OPEN RANGE: THE SQUARE-OFF BETWEEN UTILITIES AND LANDOWNERS IN THE TURF BATTLE OVER CERTIFICATED SERVICE AREA ("CCN")

REP. BILL CALLEGARI, *Houston*
State Representative, District 132

BRUCE WASINGER, *Austin*
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel

State Bar of Texas
7TH ANNUAL THE CHANGING FACE OF WATER RIGHTS IN TEXAS
May 18-19, 2006
San Antonio

CHAPTER 8

William A. Callegari

Representative William A. Callegari holds a B.S. degree in Agricultural Engineering from Louisiana State Univeristy, and a masters degree in Civil Engineering from the University of Houston. His first position was with Caterpillar Tractor Company in Peoria, Illinois. There he received several patents for electro/hydraulic mechanical control systems used in tractor transmissions. He later accepted an engineering position with Shell Pipeline Corporation in Houston, Texas. He served in several different capacities for five years before being assigned to a special research group devoted to oil spill containment and clean-up. At that time, this project was one of the most comprehensive ever conducted. When this project was completed, he was assigned to the Shell Pipeline Engineering Department with primary responsibility for design and construction management of pipeline projects from Illinois to Louisiana (the Capline System) as well as construction of expansion projects in Illinois, Mississippi, and Louisiana.

Representative Callegari completed his Master of Science Degree in Civil Engineering at the University of Houston in 1972. His thesis related to oil spill containment and control. During this time, he also served as a consultant on several oil spill events in Texas, made several presentations to industry groups relating to oil spill containment and control, and was recognized as one of the experts in the field. He became more involved in the environmental field when he accepted a Project Manager position with the consultant engineering firm S&B Engineers, Inc. to develop an advanced water treatment plant. He led the design team for one of the most advanced wastewater treatment plants in Texas at that time. It included elements such as the use of phosphorus for nutrient removal and ozonization for disinfection, which was not done on a regular basis in the U.S.

Next, Representative Callegari was given the responsibility to start up and head a Municipal and Environmental Division to provide engineering design and consulting services to municipal and industrial clients, with particular emphasis on wastewater treatment, water treatment, and water related environmental issues, Under his direction this Division was strongly established in Houston and other cities in Texas. Subsequently, he was promoted to Vice President of the company. He established a reputation as a strong and knowledgeable engineer and manager. He was regularly invited to speak to industry groups on water treatment.

In 1974, Representative Callegari formed the AM-TEX Corporation, a technical firm to provide management, operations, maintenance, and technical support to water and wastewater facilities, primarily focusing on municipal entities. He was very successful and AM-TEX Corporation was recognized as the premier environmental/municipal privatization firm in Texas. The business, starting as a one-man operation in his home, grew to a strong regional company employing 275 people in seven branch offices and approximately $20,000,000 per year of engineering projects. The firm served clients in the Houston, Austin, and Dallas-Fort Worth area.

In 1993, Representative Callegari sold AM-TEX to the fourth largest utility in the world. He stayed on with the new firm and served as Southern U.S. Division president and Vice Chairman of the Board until his retirement in 1995.

Representative Callegari serves as a member of the Texas Society of Professional Engineers, National Society of Professional Engineers, Professional Engineers in Private Practice, Houston Engineering and Scientific Society, Sam Houston Engineering Society, TWC Advisory Committee for Wastewater Operator Certification, Greater Houston Builders Association, City of Houston WW Regionalization Task Force, Texas Sewer System Design Criteria Committee, GHBA Government Affairs Committee, and the Association of Water Board Directors.

Throughout his career Representative Callegari has been involved in many professional and community organizations. He is a Licensed Professional Engineer, and holds Class A certifications in water and wastewater operations. He served as a KISD Trustee from 1984-1988. He has been a member of the American Water Works Association, Water Environment Federation, the Texas Section of the American Water Works Association, Federal Water Pollution Control Association, Texas Water Environment Federation, Texas Water Utilities Association, and other associated industry organizations.

Representative Callegari was a contributing author for the Texas Water Utilities Association Water Utility Manual for wastewater treatment and wastewater collection systems. He has served on numerous local and state committees relating to environmental control and wastewater treatment. He was appointed as the first Chairman of the Texas Water Commission Wastewater Certification Advisory Committee. Representative Callegari served as Chairman of the Houston Community College - Northwest College Business Advisory Committee and served on the Environmental Advisory Committee of San Jacinto College. He has served on several other boards. He is listed in the *Who's Who in the South and Southwest, Worldwide, and Environmental Registry.*

Mr. Callegari was inducted into the LSU College of Engineering Hall of Distinction in 1997 and the LSU Alumni Hall of Distinction in 1999 and is included on the Alumni Center Wall of Honor. Additionally in 2000 the William A. Callegari Environmental Center was named in his honor.

With his 30 years of experience, Representative Callegari is eminently qualified with regard to issues relating to the Natural Resources Committee. His experience includes expertise in engineering and design, hands on operations, and policy issues. His background also includes experience in the petrochemical and pipeline industries. Representative Callegari has worked with the EPA and TNRCC (now TCEQ) for more than 25 years on a variety of water and environmental issues. In addition, he has served as a consultant for over 150 water districts and municipalities during his career. He has been a leader in providing innovative solutions to water and environmental issues in Texas.

He currently owns and is CEO of WC Engineers, which provides engineering consulting services for water/wastewater and environmental industries, with particular emphasis on cities and water districts.

BRUCE WASINGER
Bickerstaff, Heath, Pollan & Caroom, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701
512-472-8021; FAX: 512-320-5638

BIOGRAPHICAL INFORMATION

EDUCATION

J.D., Washburn University School of Law (Kansas) (1977).
B.A. in Political Science, Fort Hays State University (Kansas) (1974).

PROFESSIONAL ACTIVITIES

Partner, Bickerstaff, Heath, Pollan & Caroom, L.L.P.
Former Associate General Counsel at Lower Colorado River Authority
Member, Kansas Bar (1977)
Member, United States District Court for District of Kansas (1977)
Member, United States Court of Appeals, 10th Circuit (1978)
Member, State Bar of Texas (1981)
Member, United States District Court for Western District of Texas (1984)
Member, Texas Bar Foundation

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

Co-Author of "Governmental Immunity: Despotic Mantle or Creature of Necessity," 16 Washburn Law Journal 12 (1976).
Author of "Evolution of a Water Rights Adjudication Settlement," State Bar of Texas, Environmental Law Journal, Vol. 19, No. 3, Winter 1989 (Part 1); Vol. 20, No. 1, Summer 1989 (Part 2).
Author of "The Trans-Texas Water Program; Coordinating Competing Demands and Limited Supplies," Fourth Annual Conference on Texas Water Law, November 4-5, 1994.
Author of "Managing Water Rights During Drought Conditions: The Water User's Perspective," Sixth Annual Conference on Texas Water Law, December 12-13,1996.
Co-Author of "Interbasin Transfers-A Problem Resolved? Basin of Origin Protection," Texas Water Law Institute, October 23-24, 1997.
Author of "Groundwater (Background and Recent Cases)," Texas Water Law Institute, September 30, 1999-October 1, 1999.
Author of "Current Issues in Texas Water Law: Interbasin Transfers of Surface Water After Senate Bill 1," CLE International - Texas Water Law, May 4-5, 2000.
Author of "Groundwater Districts - A New Day in Texas, The Changing Face of Water Rights in Texas," State Bar of Texas, February 1-2, 2001.
Author of "Water Rights Glossary," *ibid.*
Co-Author of "Texas Water Law Glossary," The Changing Face of Water Rights in Texas 2004, February 26-27-2004.
Author of "Surface Water Conveyancing (Sale and Lease) Municipality/Developer Perspective," 6th Annual Changing Face of Water Rights in Texas, State Bar of Texas, February 10-11, 2005.
Co-Author of "Texas Water Law Glossary," *ibid.* February 10-11, 2005.

TABLE OF CONTENTS

OPEN RANGE: THE SQUARE-OFF BETWEEN UTILITIES AND LANDOWNERS IN THE TURF BATTLE OVER CERTIFICATED SERVICE AREA ("CCN")

I. BACKGROUND

What is a "CCN" and why the battle between water and wastewater utilities and landowners? The answer to the first part of this question is found in Chapter 291 of the Texas Commission on Environmental Quality's ("TCEQ") rules. TCEQ Rule 291.3(10) defines a certificate of convenience and necessity (CCN) as a permit issued by the Commission which authorizes and obligates a retail public utility to furnish, make available, render or extend continuous and adequate retail or sewer utility service to a specified geographic area. The answer to the second part of the question asking why the battle is much harder to address. There is no one answer, but whatever the answer, it is likely to have some relation to the desire to control, desire for power and the desire to make money. All of these by themselves can be or are the root of many battles. Combine all three and it is not hard to imagine the fervor and intense feelings both sides of the battle tend to generate.

II. PETITION FOR RULE-MAKING FILED BY GREATER HOUSTON BUILDERS ASSOCIATION

In August 2004, the Greater Houston Builders Association ("Houston Builders") filed its petition with the TCEQ requesting amendments to eight (8) existing CCN rules and the adoption of three (3) new CCN rules. Houston Builders requested rule changes would provide for the following:

- Landowner consent to having property included in a CCN area;
- Additional information in applications for CCNs and amendments;
- Required written notice of certain actions to landowners and purchasers;
- Requirements for the commission to consider additional factors in granting CCNs and amendments;
- Requirements for commission approval before CCN holders apply for federal grants or loans;
- Petitions from landowners to have the commission order a CCN holder to pay off federal debt;
- Recording requirements for CCNs in the county real property records;
- Requirement for a public hearing if requested by an interested party; and
- Amendment of CCNs upon request by a landowner who did not consent to inclusion in the CCN and who is not receiving continuous and adequate service from the CCN holder.

In its petition requesting these CCN rule changes, the Houston Builders alleged that the granting of CCN's under the then current law was causing irrevocable harm by depriving people of property rights without an adequate remedy at law or at equity. Among other things, Houston Builders claimed that landowners were not being given a meaningful opportunity to consent or to protest their land's inclusion in a CCN; the inclusion of land within a CCN, without the consent of the landowner damages the property of the landowner; CCN holders were misappropriating TCEQ-granted monopoly for private gain; and that CCN holders often apply for and receive federal loans, which, because of the presence of federal debt, locks in place CCN's over vast areas that cannot be served by the CCN holder, effectively denying utilities to large tracts of land and reducing land values. Houston Builders also requested that TCEQ place a moratorium on all applications for new CCN's or for enlargement of existing CCN's until their proposed rule changes have been adopted.[1]

III. TCEQ'S RESPONSE TO PETITION FOR RULEMAKING

In a little more than one (1) month after the Houston Builder's petition for rulemaking was filed, TCEQ staff in September 2004, recommended to the Commission that it direct the initiation of rulemaking to study the issues and options related to the petition. The Commission scheduled this matter for its October 13, 2004, agenda meeting. Prior to its October meeting, the Commission received "encouragement" from those in favor of the requested rule changes and those who were against. It is not surprising that most opposition came from utilities and support from landowners, developers and several political heavyweights that Houston Builders were able to successfully court.

When the Commission convened at its October 13, 2004 agenda meeting, both sides of the issue were well represented. After hearing arguments from both sides, the Commissioners agreed that a stakeholder group was needed to hash out the issues raised by Houston Builders. TCEQ staff was instructed to hold the stakeholder meetings and then report back to the Commission at its work session scheduled for December 2004. (The work session was subsequently rescheduled until January 2005). The Commission did not institute a moratorium,

[1] Petition to the Texas Commission on Environmental Quality for Adoption of Rules submitted by the Greater Houston Builders Association, August 10, 2004.

as requested by Houston Builders, but did require certain pending CCN applications to be subject to additional notice requirements, if the public comment period had not yet expired.

The first stakeholders meeting was held on November 12, 2004.[2] At this first stakeholder meeting, attendees were asked to discuss issues related to the following concerns:

- Landowners lack of awareness and a voice in the CCN expansion process.
- CCN's are granted without sufficient demonstration of ability or necessity to serve the respective area.
- Landowners can't pursue best interest of their own land because they cannot easily withdraw from an existing CCN territory.
- The State's ability to decertify CCN territory is sometimes restricted by Federal debt protection law.

As a result of the deliberations at the first stakeholder's meeting, core petition issues were identified. A second stakeholder's meeting was held on November 30, 2004 to discuss and debate the strengths and weaknesses of the following core petition issues:

- Landowner Issues
  - Proposal to Notice Individual Landowners
  - Proposal to Require Landowner Consent
  - Proposal to Allow Landowners to Petition for Decertification
- Additional Factors in Granting a CCN
  - Proposal to Require Demonstration of Actual Need for Service
  - Proposal to Require Water Utilities to Demonstrate Financial Ability to Provide Service Without Capital Recovery Fee.
- Federal Funding and CCN Issues
  - Proposal for TCEQ Approval Prior to Federal Loan Application
  - Proposal to Compel Water Utilities to Accept Federal Debt Payment from Landowners
- CCN Descriptions and Recording in County Records
  - Proposal to Compel Metes and Bounds Descriptions for CCN Boundaries
  - Proposal to Require Recording of Metes and Bounds in County Real Property Records
  - Proposal to Require CCN Service Disclosure to Purchasers of Real Property.

As promised, the Commission held a work session on January 14, 2005 to discuss the rule petition filed by Houston Builders. Based upon input from the two (2) stakeholder meetings, TCEQ staff concluded that the proposed rule revisions submitted by Houston Builders could be addressed in three (3) distinct areas through policy changes; rule changes; and statutory changes.[3]

Mr. Cowan's summary of each distinct area follows:

> "The policy changes could include changes in some notice requirements, such as individual notice to landowners and elected officials; posting application information on the TCEQ web page; criteria for demonstrating the need for service such as letters of commitment, or economic or environmental information; and better service area descriptions such as electronic metes and bounds.

Rule changes could include: rule changes to specifically identify need for service criteria; rules requiring submission of additional specific financial, managerial and technical information with a CCN application; CCN transfer notice changes; boundary description requirement changes; and corrections to the agency, division and section names.

Finally, the TCEQ does not have statutory authority to proceed with rulemaking on some of the proposed rules in the petition which include: landowner consent on a CCN application; allowing landowners to petition for removal of their property from a CCN; some of the additional proposed factors to consider in granting a CCN; and all proposed rules concerning federal funding issues."[4]

The essential question for the Commission's to decide at this juncture was how should TCEQ staff proceed on the proposed rule changes requested by Houston Builders.

One basic question was whether TCEQ should proceed with rulemaking or should TCEQ wait for legislative guidance from the 79th Texas Legislature which conveyed three (3) days earlier on January 11, 2005.

My esteemed co-speaker, the Honorable Representative Bill Callegari, addressed the

[2] The Governor's Center for Management Development was requested by TCEQ to facilitate the stakeholder meetings. In addition to facilitating the meeting, this group also prepared detailed summaries of the meeting discussions, issues and recommendations that were made available to attendees and the general public.

[3] Interoffice Memorandum from Mike Cowan, Water Supply Division, Office of Permitting, Remediation and Registration, thru Dan Eden, Deputy Director, Office of Permitting, Remediation and Registration, dated January 14, 2005.

[4] *Id.*, page 2.

Commissioner's and made it perfectly clear that the Legislature was very interested in this issue. He urged TCEQ to do as much as they could through rulemaking first, then the Legislature could provide additional fixes with new legislation, if necessary. Representative Callegari raised two issues of importance, landowner consent and landowner notice.[5]

At the conclusion of the work session, the Commissioners agreed that rulemaking should proceed, but instead of focusing only on the proposed rule changes filed by Houston Builders, such proposed rule changes should be a comprehensive look at all of TCEQ's CCN-related rules. TCEQ staff was instructed to prepare a rulemaking package that was to be presented to the Commission in June 2005 regarding possible rule changes. The rulemaking package was to include any legislative guidance, i.e., new legislation.

IV. LEGISLATIVE GUIDANCE - H.B. 2876

On March 10, 2005, Representative Callegari filed H.B. 2876 relating to certificates of public convenience and necessity for water service and sewer service. H.B. 2876 was approved by both houses and Governor Perry signed the bill on June 18, 2005. Section 17 of the Act provided that the Act took effect September 1, 2005.

H.B. 2876 amended several existing statutes found in Chapter 13, of the Texas Water Code and added several new sections to Chapter 13 as well. Significant amendments to the CCN requirements follow:

- Provides that landowners within the CCN are affected persons. (*See* Texas Water Code § 13.002(1).
- Prohibits wholesale water/sewer suppliers from requiring the purchaser to obtain CCN. (*See* Texas Water Code § 13.242(d)).
- Requires a proposed CCN to be described by a (1) metes and bounds survey; (2) Texas State Plan Coordinate System; (3) verifiable landmarks; or (4) lot & block number for recorded plats and adds additional information that must be included with a CCN application. (*See* Texas Water Code § 13.244(d)).
- Prohibits the TCEQ from extending a city's CCN beyond its ETJ without written consent of landowners and provides that any municipal CCN extended beyond ETJ without written consent is void. (*See* Texas Water Code § 13.2451).
- For applications for new or amended CCNs filed after January 1, 2006, requires notice of a CCN application to be mailed to all property owners of 50-acre tracts or more and specifically provides that landowner's request for service is a factor in determining need. (*See* Texas Water Code § 13.246).
- Requires TCEQ to consider the applicant's ability to serve an area by taking into consideration the current and projected density and land use of the area, the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service, and the effect on the land to be included in the CCN. (*See* Texas Water Code § 13.246).
- For applications for new or amended CCNs filed after January 1, 2006, allows a landowner of a tract at least 25 acres or more and wholly or partially located within the proposed service area to elect to be excluded from the CCN without requiring a hearing. (*See* Texas Water Code § 13.246).
- Allows a landowner of a tract at least 50 acres or more in an existing CCN not located within a platted subdivision actually receiving water and sewer service to petition the TCEQ to be released from a CCN so that the area may receive service from another retail public utility. There is no opportunity for hearing on these petitions although the CCN holder may submit information explaining why the petition should be denied. (*See* Texas Water Code § 13.254).
- Provides that a decertified retail public utility may request the TCEQ to order the entity obtaining the decertified area to serve the entire service area of the decertified retail public utility and transfer the entire CCN to the entity obtaining the decertified area. (*See* Texas Water Code § 13.2551).
- Requires all retail public utilities to record in the county's real property records a certified copy of the map of the CCN, any amendment thereto, and a description of the service area. All CCNs must be recorded by January 1, 2007. (*See* Texas Water Code § 13.257).

There are some differences for CCN holders that are cities with populations of 500,000 or more. For example:

- There is a TCEQ hearing requirement for landowner contests (25+ acre tracts) of inclusion of property within the CCN and landowner petitions (50+ acre tracts) for release from the CCN. (*See* Texas Water Code § 13.246).
- The TCEQ may not grant a CCN to another provider inside the city limits or ETJ without the city's consent (unless TCEQ finds that the city is not able to provide the service or has failed to make

[5] Personal notes of author taken at January 14, 2005 Commission work session.

a good faith effort to provide the service). (*See* Texas Water Code § 13.245).

- A city is expressly given the power of eminent domain (pursuant to Chapter 21, Texas Property Code) to take over substandard systems within its boundaries. (*See* Texas Water Code § 13.247).

In addition to amending and adding sections to Chapter 13, of the Texas Water Code, H.B. 2876 included as the last three (3) sections of the Act, Sections 15, 16 and 17. As will be discussed in more detail below, implementation and harmonizing these three (3) sections has proved to be troublesome for TCEQ in development of its rules to implement H.B. 2876.

Section 15 of the Act provides that the changes in law made by this Act apply only to:

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

Section 16 requires TCEQ to promulgate rules implementing the changes in law effected by this Act by January 1, 2006, or shall report to the governor, lieutenant governor, and speaker of the house any failure to comply with this deadline.

Section 17 provides that this Act takes effect September 1, 2005.

V. TCEQ'S RULEMAKING RESPONSE TO H.B. 2876

Following Governor Perry's signing of H.B. 2876 on June 18, 2005 and mindful of the Legislature's directive that TCEQ was required to adopt rules by January 1, 2006, TCEQ wasted little time in initiating additional stakeholder meetings to receive input on several issues resulting from enactment of H.B. 2876, as well as numerous non-legislative rule changes being considered by TCEQ staff. It was obvious that TCEQ fully intended to meet the Legislature's January 1, 2006 deadline for adopting rules to implement the requirements of H.B. 2876. The stakeholder meeting was held on July 18, 2005 and the proposed timeline provided to the stakeholders was to have the Commission propose rule amendments in mid-September 2005; have the proposed rule amendments published in the Texas Register by the end of September 2005; have a thirty (30) day comment period end by the end of October 2005; adopt the proposed rule amendments at its December agenda meeting; and have the rules effective to meet the Legislature's January 1, 2006 deadline.

At the July 18, 2005 stakeholder meeting, participants were asked to address numerous questions related to several key rulemaking issues that were identified by TCEQ staff.

Key rulemaking issue No. 1 related to Section 6 of H.B. 2876. That section requires mailed notice to landowners with at least 50 acres. It also allows landowners with at least 25 acres the ability to opt out of the CCN within thirty (30) days after receipt of notice. The legislation only requires mailed notice for landowners with at least 50 acres. The question asked by TCEQ staff was whether the Commission should require mailed notice to all landowners with at least 25 acres?

Key rulemaking issue No. 2 included several questions. Section 9 of H.B. 2876 allows landowners with at least 50 acres of land which is not located within a platted subdivision and receiving water or sewer service the ability to petition out of a CCN. The petition should include a written request that includes the following: timeline for projected service demands, level of service, manner of service, and current and projected demands for service.

Stakeholders were asked to discuss and provide input to the following four (4) questions:

- What is a reasonable time period for a CCN holder to provide requested service?
- What is a reasonable level of service a utility should be required to provide (i.e. meeting minimum standards for public water systems vs. a higher standard)?
- What is a reasonable manner in which a utility should provide requested service (lower cost alternative vs. a utility preferred way to provide requested service)?
- What is a reasonable demand a requestor can make for utility service (i.e. phased vs. whole development)?

A third key rulemaking issue related to Section 10 of H.B. 2876, which allows for one utility to decertify another utility and allows the Commission to set the compensation. The question that TCEQ requested stakeholder input was what should the Commission rules specify to be included in the appraisal?

In addition to these key rulemaking issues and related questions, TCEQ staff also made known to the stakeholders additional non-legislative changes to TCEQ's CCN-related rules that were being considered. Such changes included:

- The criteria for granting or amending a CCN to include the type of information that should be

submitted to meet the need for the additional service requirement;

- The contents of a CCN application, including the addition of:

  (i) An approved plan or an engineering report for a water CCN;
  (ii) A discharge permit or a pending discharge permit application for a sewer CCN; and
  (iii) The agreement to consent from the affected utility before dual certification is granted;
  (iv) The submittal requirement for requested supplemental information during the review process;
  (v) The process related to the return of applications for failure to submit supplemental information;
  (vi) The criteria for specifying when the 120 day effective date for sale, transfer, and merger (STM) applications begins;
  (vii) The notice for CCN transfers and additional information required for Texas Water Code, § 13.248;
  (viii) The revision of the definition of the term "service" to be consistent with the definition in the Texas Water Code; and
  (ix) The clarification that "effect" means "regionalization, compliance history, economic or environmental effects" when the executive director reviews "the effect of granting or amending a CCN."
  (x) Additional mapping information.

Following the stakeholder's meeting, the Commission on September 14, 2005 issued notice of a public hearing on the proposed CCN related rule changes. The public hearing was set for October 25, 2005 with written comments due October 31, 2005. The Commission's proposed rules were finally published in the Texas Register on September 30, 2005.[6] Approximately one hundred (100) persons and entities, the majority of which were municipalities, provided oral and written comments at the public hearing. Comments made during the public hearing made it clear that the battle lines between utilities and municipalities and landowners were still very much embedded. The public hearing also revealed that the TCEQ was still undecided of how to address several issues and participants were in general agreement that TCEQ should expressly request further public comment on the following issues:

- Should the Executive Director, upon written request of a landowner within the void portion of a municipality's CCN, agree that the portion of the CCN is void as proposed in the rule, or should the Executive Director issue an Order modifying the municipality's CCN to reflect the portion of the CCN voided?
- Should a proposed district (in addition to existing districts) qualify as an alternative retail public utility for the purpose of a landowner filing a petition for expedited release from a CCN?
- Whether, and if so, when should a retail public utility that may be compensated pursuant to decertification be required to notify its lenders that TCEQ will be determining whether to award compensation for loss of service territory?
- Should a lender of a retail public utility that may be compensated pursuant to decertification be required to provide TCEQ information on the amount of money necessary, if any, to avoid impairment of the debt allocable to the area in question?
- Should the rule provide more specific timelines for the decertification process initiated by landowners or retail public utilities to ensure that compensation is determined within 90 days?

Several particular proposed rules drew a lot of attention. One in particular drew the ire of municipalities. Proposed Rule 291.105(c)(2) provided that the portion of any CCN that extends beyond the extra territorial jurisdiction (ETJ) of the municipality without the consent of the landowner(s) was void on September 1, 2005.

Those opposed to this proposed rule argued that the proposed rule was inconsistent with H.B. 2876 and was harmful to municipalities with existing infrastructure outside their ETJ and to customers currently served by municipalities outside the ETJ.

They also argued that to void CCNs on September 1, 2005 was in direct conflict with Section 15 of H.B. 2876 which provides the changes in law made by H.B. 2876 apply only to applications for new or amended CCNs submitted to TCEQ on or after January 1, 2006 and actions to revoke or amend a CCN initiated on or after January 1, 2006. An example of such change in the law by H.B. 2876 was the addition of § 13.2451(b) to the Water Code, which is the provision that voids CCNs granted outside a municipality's ETJ without the consent of landowner. They argued that H.B. 2876 was clear that changes in the law, such as the newly added § 13.2451(b), affects future CCN applications only and are prospective in nature and that the proposed rule retroactively voided certain CCNs effective September 1, 2005.

It was argued that such a retroactive action through rule-making would be contrary to (i) the long-held

[6] *See* 30 Tex. Reg. 6211-6228.

presumption of statutes as prospective in application unless expressly made retrospective; (ii) that Texas law strongly militates against the restrospective application of laws; and (iii) that any doubts as to retroactivity are resolved against the retroactive application of a statute or administrative rule. H.B. 2876 did not contain any language expressly providing for the retrospective application of the changes in law made by H.B. 2876 to actions occurring before January 1, 2006.

Supporters of the proposed rule argued among other theories that the legislative intent of H.B. 2876 made it clear that the Texas Legislature intended to make void as of September 1, 2005 those service areas of existing CCNs held by municipalities outside their ETJ.

Regardless of which side is legally correct, the proposed rule if enforced as initially proposed created some unintended effects for municipalities and customers in certificated areas outside ETJs. Historically, municipalities have obtained certificated area protection outside their ETJ so that the municipalities could invest in an area with infrastructure, acquisition of water supply, and sufficient utility staff and budget without the threat of another utility taking over the municipalities' service area. The CCN provides security to bond holders who purchase bonds that finance infrastructure protected by CCN. Once a municipality obtains a CCN, it is obligated to invest in and serve the area. Municipalities argued that the proposed rule should be modified to be prospective which would protest the investment of municipalities and bond holders secured by a CCN, but places municipalities on notice that after January 1, 2006, applications for CCN areas outside their ETJ require landowner consent. Retroactive application, however, destroys the investment and customer protection afforded by the CCN and leaves municipalities with stranded cost investment. Another utility could simply move into the area once it is voided and take over the future customer base upon which the municipality relied in making its investment.

Several real worded examples of municipalities and their customers that would be harmed by the retroactive application of the rule follow:

- The municipality has served a subdivision outside its ETJ but within its CCN for over twenty-five (25) years. The subdivision contains approximately 40 to 50 customers. The area is surrounded by adjoining competing utility CCN holders. By voiding the CCN in this area, both the customers and the municipality unnecessarily lose the protection afforded by the municipality's CCN.
- This municipality also provides service to a subdivision located outside its ETJ but within its CCN. The area contains approximately 60-70 customers the municipality has served for over 30 years. The municipality recently obtained CCN coverage of this particular subdivision and other areas after a hotly contested CCN case which settled and was remanded to the Executive Director for issuance of an agreed order. The Commission's rule would retroactively repeal portions of the CCN the municipality obtained in a settlement of a contested case.
- A municipality with approximately 3400 connections, serves more customers outside its ETJ than within. The municipality's CCN is for both an area-wide and a facilities-plus-200-feet certificate. The certificated area and lines extend miles beyond the municipality's ETJ to serve over 1700 existing connections. Some of the municipality's customers are outside its ETJ but within the ETJ of another municipality. Even the municipality's water treatment plant is outside its ETJ. Both the customers served and facilities certificated outside the ETJ lose the protection afforded by a CCN if the Commission's retroactive application of proposed rule were adopted.
- A fourth example is a municipality that acquired almost 300 customers from a water supply corporation in 2002. Over 100 of these customers are located outside of the municipality's ETJ. These customers were acquired as part of an agreement that included the transfer of the territory and customers, the dual certification of territory, and the resolution of wholesale water charges owed the municipality by the water supply corporation. The agreement was approved by the TCEQ after notice and hearing in accordance with Texas Water Code § 13.248. If the CCN for the area acquired by municipality from the water supply corporation is void, the municipality will lose the protection of its investment for which it bargained in exchange for good and valuable consideration and which was approved by the TCEQ.
- A municipality and a county in the Spring of 2005 settled costly litigation in which the two entities were both seeking CCNs from the TCEQ for the right to provide water and sewer service to areas generally outside the municipality's ETJ. The disputed service area in question includes area designated by the State of Texas as Enterprise Zones,[7] locations of existing colonias, and the

[7] Enterprise Zones are designated in severely distressed areas of the state pursuant to chapter 2303 of the Texas Government Code. These zones are areas where state and local governments may provide incentives by removing unnecessary governmental regulatory barriers to economic growth and to provide tax incentives and economic development program benefits to induce private investment in those areas.

> location of the municipality's existing groundwater well field. As a result of settlement, a portion of the County's existing water and sewer CCNs were transferred to the municipality and the municipality was able to secure a water and sewer CCN for service area including areas outside of its ETJ. The municipality has since extended water service to an existing colonia, which is partly outside the municipality's ETJ. If the municipality's CCN area outside of its ETJ is void, the customers outside the ETJ of the municipality, businesses that are located or are intending to locate in the Enterprise Zones, and the municipality lose the protection afforded by a CCN. Moreover, the settlement agreement between the municipality and the County will be undermined as the municipality will lose part of the area for which it bargained in exchange for good and valuable consideration.

In response to the comments and arguments made both for and against proposed Rule 291.105(c)(2), the Commission in its preamble to adopting its proposed rules had this to say about proposed Rule 291.105(c)(2).

> "As a result of input and comments from affected parties and the public, the commission recognizes the existence of interpretive differences in regard to CCNs outside cities' ETJs. Therefore, the commission will not take any affirmative action on cities' CCNs outside their ETJ until after January 1, 2008, in order to conduct a study and to provide opportunities to cities to obtain any necessary landowner consent in those areas. This will also allow the legislature to further consider this very important issue. During this period, the commission will consider those portions of cities' pending CCN applications that are outside their ETJ only if they provide landowner consent for those areas."

In addition to the Commission's preamble statement, in commenting on particular rule changes, the Commission stated:

> "The Commission removed the language in § 291.105(c)(2) regarding the voiding of a city's CCN outside its ETJ for lack of landowner consent, subsequent executive director affirmation, and potential reinstatement of the void portion of the CCN because the second sentence in TWC § 13.2451(b), as enacted by the 79th Legislature, is self-implementing and does not require any further action by the commission."

The proposed rules were adopted by TCEQ on December 14, 2005; and published in the Teas Register on December 30, 2005.[8] The rules were effective on January 5, 2006.

VI. STATE OFFICE OF ADMINISTRATIVE HEARINGS (SOAH)

The Commission has "punted" the issue back to the Texas Legislature to consider in 2007. It is interesting to note that an Administrative Law Judge at the State Office of Administrative Hearings (SOAH) has already issued a ruling on whether H.B. 2876 should be applied retroactively to September 1, 2005.

The case involved an application of the City of Leander to amend its water CCN and sewer CCN in Williamson and Travis Counties and to obtain dual certification with a portion of the City of Cedar Park's water and sewer CCN in Travis County. The City of Liberty Hill opposed the application and had requested that the hearing be abated on the basis of an alleged conflict with TCEQ's proposed CCN rules. Liberty Hill asserted that, once implemented, the proposed rule would likely render moot that portion of the City of Leander's application of concern to Liberty Hill (area outside of City of Leander's ETJ). The City of Leander opposed abatement on the ground that no version of the proposed rule would apply to a pending case.

The SOAH ALJ agreed with the City of Leander and denied the abatement motion. The ALJ stated:

> "The effective date of the law excludes Applicant's current applications because the changes in law made by TEX. WATER CODE ANN. § 13.2451 are expressly applied to applications for a CCN submitted to TCEQ on or after January 1, 2006. Liberty Hill's argument is based on what it perceives as a strong suggestion in a draft TCEQ rule that certain provisions of the statute will be applied retroactively. Notwithstanding the language in the draft rule, the statutory language is clear as to the effective date and the ALJ cannot see a legal basis for granting an abatement.[9]

---

[8] *See* 30 Tex. Reg. 8959-8987.

[9] *See* SOAH Docket Nos. 582-05-7095 and 582-05-7096; TCEQ Docket Nos. 2005-0864-UCR and 2005-0863-UCR, Order No. 5 Denying Motion to Abate Proceeding issued November 9, 2005.

VII. ON-GOING WORK BY TCEQ

On April 13, 2006, the TCEQ held a stakeholders meeting to solicit comments from the participants regarding implementation of the new CCN rules. Matters considered included:

- The "automatic opt out" which allows owners of 25 acres or more to opt out of any proposed CCN area. TCEQ staff sought feed back on the instructions to be contained in CCN applications and notice to landowners.
- The new "expedited release" rule which allows certain landowners to decertify an existing CCN area. TCEQ is considering regulatory guidance and wanted feed back on which should be included in a landowner's petition for expedited release. The time line for the expedited release process was also considered.
- The new CCN rules require CCN holders to file certified copies of CCN maps with the County before January 1, 2007. TCEQ reads this rule in a manner that TCEQ will supply the certified copies to the CCN holder upon request and then the CCN holder files the TCEQ-certified copy with the County. The staff handed out a draft procedure to obtain the certified copies.
- TCEQ has added an addendum to the current CCN application. The addendum covers the requirements of the new rules.

TCEQ allowed additional written comments until May 3, 2006.

During the stakeholders meeting, TCEQ staff provided a graph showing the number of CCN applications filed in Fiscal Year 2000 through projected fiscal year 2006. The average number of CCN applications was 193 per fiscal year with the average number of those applications being contested being 58 or 30%. It is anyone's guess whether, as a result of the passage of H.B. 2876 and the Commission's subsequent adoption of new CCN rules, the number of CCN applications filed per fiscal year and the number of contests will increase or decrease.