

# **Water and Sewer Certificates of Convenience and Necessity: When and How They Apply to Cities**

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More and more, cities find themselves square in the middle of Texas laws relating to retail water or sewer service certification. As cities grow, so do their water and sewer service territory, which can lead to conflicts with other water and sewer utility providers who have been providing service in once-rural, now-urbanizing areas. While a city need not possess a certificate of convenience and necessity (“CCN” or “certificate”) from the Texas Commission on Environmental Quality (“Commission” or “TCEQ”) to provide retail water or sewer service in an uncertificated area, many cities elect to obtain a CCN to protect their service areas from encroaching utilities. Even a city that has never held a certificate will find itself dealing with CCN regulations if the city seeks to expand service to an area certificated to an existing retail service provider.

Chapter 13 of the Texas Water Code provides the framework for securing authorization to obtain, amend, and revoke water and sewer CCNs from the TCEQ, the state agency responsible for administering CCNs. The statutory and regulatory provisions found in the Texas Water Code and the Texas Administrative Code pertaining to CCNs overlap in their applicability and are often used in conjunction with each other. This article outlines the various mechanisms by which a city may obtain or amend CCNs, and discusses the purpose, applicability, and notice and hearing requirements of the various statutes regarding CCNs.

When working with the statutory and regulatory provisions relating to water and sewer CCNs, several definitions are important. The term “retail public utility” means, among other things, a municipality. “Water and sewer utility,” “public utility,” or “utility,” however, specifically exclude municipal corporations and political subdivisions. The exclusion of municipalities from the definition of “water and sewer utility” significantly affects the applicability and use of state statutory and regulatory water and sewer retail utility provisions as they relate to municipalities.

Before obtaining or amending a CCN, a city should consider several basic questions:

- Is the area the city is seeking to certificate already certificated to another entity?
- If so, is the area certificated to a water supply corporation, a sewer service corporation, a fresh water supply district, a special utility district, or an investor-owned utility?
- Is the area the city seeks to certificate inside the corporate limits of the city?
- Is territory being transferred as part of an agreement?
- Will the assumption of the area include the transfer of customers and/or facilities?

Answering these questions will help the city determine what type of Commission process to use, what type of application is required, and what kind of notice and hearing is required, if any.

## **Territory That is not Certificated**

To obtain or amend a CCN for territory that is not certificated to another retail public utility, a city should look to the requirements of Texas Water Code §§ 13.241 and 13.246. *See also* 30 TEX. ADMIN. CODE §§ 291.102, 291.105, and 291.106 (West 2003). All retail public utilities seeking to obtain or amend a CCN must demonstrate they possess the financial, managerial, and technical capabilities to provide continuous and adequate service and that they

are capable of operating water and sewer facilities in compliance with applicable state and federal regulatory requirements. Notice of the application and the opportunity to request a hearing is required. If, however, no affected person, such as a customer or neighboring and competing utility, requests a hearing, the Executive Director of the TCEQ is authorized to approve the application and grant the proposed CCN request without a hearing.

### **Territory Certificated to Another Entity**

For territory certificated to another service provider, the city may be able to obtain the right to service through various means. Section 13.248 of the Texas Water Code allows retail public utilities to designate by contract areas and customers to be served by each contracting entity. *See also* 30 TEX. ADMIN. CODE § 291.117. The contract, when approved by the TCEQ, is valid and enforceable and is incorporated into the appropriate areas of the CCN territory. The notice and hearing requirements are described in the statute; however, there are no specific procedures outlined in the statute or TCEQ regulations. It should be noted that if the city's agreement is with a water supply corporation to transfer CCN territory that is within the corporate limits of the city, the city should utilize Section 13.255 to transfer the CCN.

Section 13.255 of the Texas Water Code specifically applies to municipalities. It provides a mechanism to transfer to a city CCNs and facilities of water supply and sewer service corporations, special utility districts ("SUDs"), and fresh water supply districts ("FWSDs"), if the CCN and facilities are located within the corporate limits of the municipality. If an agreement is reached concerning the transfer of territory and/or facilities from the water supply or sewer service corporation, the SUD, or the FWSD, to the city, the agreement is to be filed with the TCEQ and incorporated into the respective CCNs. No notice or hearing is required.

Section 13.255 also permits cities to acquire service area in the form of a "hostile" take-over

of CCNs and facilities of water supply or sewer service corporations, SUDs, or FWSDs. If no agreement is executed within 180 days after the municipality notifies the entity, in writing, of the city's intent to provide service to the incorporated or annexed area, the city must file for single certification of the territory, and notice and hearing of that application are mandatory. A municipality may begin serving the area after it has provided notice to the entity of its intent to serve, and met the requirements of 30 TEX. ADMIN. CODE § 291.103. Section 13.255 provides for the transfer of facilities and requires payment for facilities transferred and facilities rendered valueless and useless. The procedural requirements of Section 13.255 are complicated, and to date, no Section 13.255 hearing has made its way to a decision by the TCEQ Commissioners. Most cases settle before reaching the final decision stage. Before exercising the use of this provision, a city should determine if the water supply or sewer service corporation, SUD, or FWSD involved has federal debt. *See* 7 U.S.C. § 1926(b). A federally indebted entity's service territory may be protected by federal law from acquisition absent agreement.

Another "hostile" take-over provision is Section 13.254 of the Texas Water Code, which provides for the revocation and amendment of CCNs if certain factors are shown. Notice and hearing on revocations and amendments under this section are mandatory. *See also* TEX. ADMIN. CODE § 291.113. While the TCEQ itself could use this provision to revoke an entity's CCN, it is more often used by other retail public utilities seeking to certificate territory already certificated to another retail public utility. Thus, without an agreement, a city could obtain territory from another retail public utility, regardless of its type, by seeking to decertify the territory under Section 13.254 and recertificate the area to the city under Sections 13.241 and 13.246. Section 13.254 does not provide for the transfer of facilities, but it does require payment for facilities rendered valueless and useless.

### **Purchasing a CCN or System**

When a city purchases a CCN and/or a water or sewer system from a water supply or sewer service corporation, or an investor-owned utility, unless Section 13.255 applies, the city will need to comply with the provisions of Texas Water Code §§ 13.251 and 13.301. Section 13.251 prohibits investor-owned utilities and water supply and sewer service corporations from selling, assigning, or leasing a CCN unless the TCEQ has determined that the purchaser, assignee, or lessee is capable of providing continuous and adequate service. This determination is made by considering the factors under Section 13.246(c) of the Texas Water Code. *See also* 30 TEX. ADMIN. CODE § 291.112. Section 13.251 does not apply to a municipality proposing to sell, assign, or lease its own CCN. It does apply, though, when a municipality is the purchaser of an investor-owned utility's CCN or a water supply or sewer service corporation's CCN that is located outside the city's limits. Notice of an application to sell, assign, or lease a CCN may be waived by the Executive Director for good cause. If no hearing is requested, the application for the sale, assignment, or lease of the CCN may be approved by order of the Commission issued during a regular meeting. If the sale, lease, or assignment includes transferring facilities, then the requirements of Texas Water Code § 13.301 also apply.

Section 13.301 of the Texas Water Code relates to the sale, acquisition, lease, rental, merger, or consolidation of a water or sewer system required by law to possess a CCN. Similar to Section 13.251, Section 13.301 only applies to a municipality when it is purchasing a water or sewer system from or selling a water or sewer system to an investor-owned utility or water supply or sewer service corporation, unless the municipality is obtaining the system under Section 13.255. If the sale of a system is not completed in accordance with Section 13.301, it is void. For this reason, it is important to carefully follow the requirements of Section 13.301 and not to finalize the purchase of the system until TCEQ directs the applicants to do so. Sale-Transfer-Merger applications require notice; however, this notice maybe waived by the Executive Director of the TCEQ for good

cause. Additionally, if no hearing is requested, the Executive Director may approve the transfer.

As shown, many of TCEQ's statutory and regulatory provisions governing CCNs do not always apply to municipalities and may only apply when the city is dealing with a certain type of entity. Knowing the various provisions by which a city may obtain or amend a CCN will help the city proceed through the regulatory process in an efficient and effective manner.