The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§291.3, 291.5, 291.7, 291.101, 291.102, 291.104 - 291.106, 291.109, 291.113, 291.115, 291.117, and 291.119. The commission also adopts new §291.120. Sections 291.102, 291.104, 291.105, 291.109, 291.113, 291.119, and 291.120 are adopted *with changes* to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6211). Sections 291.3, 291.5, 291.7, 291.101, 291.106, 291.115, and 291.117 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 79th Legislature, 2005, passed House Bill (HB) 2876, which amended Texas Water Code (TWC), §§13.002, 13.241, 13.242, 13.244, 13.246, 13.247, 13.254, 13.255, and 13.257. This bill also added to the TWC, §§13.245, 13.2451, and 13.2551 and repealed TWC, §13.254(h) and §13.2541. These changes relate to revising the criteria for obtaining, amending, transferring, and decertifying certificates of convenience and necessity (CCNs) for water and sewer service. These changes also amended the mapping requirements, which now require CCN holders to file a copy of their service area maps in the respective county deed records. The commission adopts the changes to the requirements in this chapter to correspond with the newly amended sections of the TWC.

The 79th Legislature also passed Senate Bill (SB) 425, relating to subdivision platting requirements and assistance for certain counties near an international border, which amended the definition of affected county. The commission will revise the definition of affected county in this rulemaking to correspond with the TWC.

In addition to the changes based on HB 2876 and SB 425, the commission also modifies the definition of service; amends the contents of the CCN application; amends the notice requirements for CCN transfers by contract under TWC, §13.248; amends the requirements for utilities that want to change names; amends the requirements to include an agreement to consent from the affected utility for dual certification if consent exists; more specifically explains some of the criteria for granting or amending a CCN; more specifically explains CCN decertification and cancellation procedures; and amends the requirements for applicants who owe delinquent fees or penalties. These are requirements that have been identified by stakeholders and staff as causing confusion because of differing interpretations. The changes to these requirements will help to clarify these rules and eliminate the differences in interpretation. This will provide more certainty for the entities that are regulated by these rules.

HB 2876 requires the commission to promulgate rules to implement the changes to the TWC by January 1, 2006.

SECTION BY SECTION DISCUSSION

The commission will update the names of the agency, the division, and the section used in Subchapters A and G. The commission also adopts updates to references to the TWC. Finally, the commission adopts formatting changes throughout Subchapters A and G to be consistent with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register and agency guidelines.

Subchapter A, General Provisions

The commission adopts the amendment to §291.3, Definitions of Terms, which revises the definition of "Affected county" from "a county any part of which is within 50 miles of an international border" to "a county to which Local Government Code, Chapter 232, Subchapter B, applies." The commission adopts this change to §291.3 to be consistent with TWC, Chapter 13. The adopted definition refers to Local Government Code, Chapter 232, which states that an affected county is defined by TWC, §16.341, that has adopted the model rules developed under TWC, §16.343. SB 425 modified the definition of affected county under TWC, §16.341. The commission also amends the definition of "Affected person" to include any landowner within an area for which an application for a new or amended CCN is filed. This definition is from TWC, §13.002, however, the commission adds "an application for a new or amended" to the definition to clarify that this definition encompasses applications for both new and amended CCNs. The commission also adds a definition for the word "Landowner." The adopted definition is an owner or owners of a tract of land including multiple owners of a single deeded tract of land. The commission adopts these changes to §291.3 to implement TWC, §13.002, as amended by the 79th Legislature. The commission also will renumber the definitions to accommodate the addition of the definition of "Landowner." The commission amends the definition of "Service" to ensure that it is consistent with the definition of service in TWC, §13.002(21).

The commission adopts the amendment to §291.5, Submission of Documents, to update the name of the Utilities and Districts Section and the name of the agency.

The commission adopts the amendment to §291.7, Filing Fees, to update the citation to the TWC.

Subchapter G, Certificates of Convenience and Necessity

The commission adopts the amendment to §291.101, Certificate Required, which specifies when a CCN is required. The commission will add subsection (d) that specifies that a supplier of wholesale water or sewer service may not require a purchaser to obtain a CCN if the purchaser is not otherwise required by this chapter to obtain the certificate. The commission adopts this amendment to implement TWC, §13.242, as amended by the 79th Legislature.

The commission adopts the amendment to §291.102, Criteria for Considering and Granting Certificates or Amendments, which lists the criteria the commission is required to consider to grant a new CCN. The commission amends this section by specifying that the criteria the commission considers is for requests for both new and amended CCNs. The commission adopts this amendment to implement TWC, §13.246(b), as amended by the 79th Legislature.

In §291.102(c), the commission adds "or amendment" to clarify that it is the certificate or the amendment that the commission must determine is necessary.

In §291.102(d)(2), the commission adds as a consideration whether any landowners, prospective landowners, tenants, or residents have requested service. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. Also in subsection (d)(2), the commission will define added subparagraphs (A) - (E) the factors the commission will review when

considering the need for additional service in the area. Staff discussed with stakeholders the factors that the commission considers and stakeholders requested that the commission clarify this information; therefore, the commission adopts this amendment to provide clarity for applicants and the regulated community regarding the commission's considerations. In subsection (d)(3), the commission adds as a consideration the effect that granting or amending a certificate will have on the recipient of the certificate and on landowners in the area. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. Also in subsection (d)(3), the commission specifies that when considering the effect of granting a CCN the commissioners will look at the effect of regionalization on the area, the utility's compliance, and the economic effect on the area. This is information that the commission's staff discussed with stakeholders and stakeholders requested that the commission clarify; therefore, the commission adopts this amendment to provide additional information for applicants and the regulated community regarding the commission's considerations. In subsection (d)(4), the commission will add as a consideration whether the applicant can meet the standards of the commission, taking into consideration the current and projected density and land use of the area. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. In subsection (d)(6), the commission will add as a consideration the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. Subsection (d)(8) specifies that the commission shall consider the probable improvement in service or lowering in cost of consumers in the area. The commission will amend subsection (d)(8) by adding as a consideration the probable improvement in service or lowering in cost of consumers in the area resulting from granting the certificate or the amendment. The commission adopts this amendment

to implement TWC, §13.246(c), as amended by the 79th Legislature. The commission will add subsection (d)(9) that specifies that the commission shall consider the effect on the land to be included in the certificated area. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature.

Section 291.102(e) requires that an applicant utility provide financial assurance to ensure that continuous and adequate service is provided. The commission will add language that will allow an applicant for a certificate or for an amendment to provide a bond or other financial assurance to ensure continuous and adequate service is provided. The commission adopts this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature.

The commission will add subsections (h) and (i) to §291.102. Subsection (h) will allow a landowner who owns at least 25 acres of land wholly or partially within the proposed service area to exclude some or all of the property from the service area by providing written notice to the commission before the 30th day after the date the landowner receives notice of a new application for a CCN or for an amendment to an existing certificate. The commission adopts this amendment to implement TWC, §13.246(h), as amended by the 79th Legislature. Subsection (i) will specify that a landowner is not entitled to make an election under subsection (h), but is entitled to contest the inclusion of the landowner's property in the proposed service area at a hearing held by the commission regarding the application if the proposed service area is located within the boundaries or extraterritorial jurisdiction (ETJ) of a municipality with a population of more than 500,000 and the municipality or a utility owned

by the municipality is the applicant. The commission adopts this amendment to implement TWC, §13.246(i), as amended by the 79th Legislature.

The commission adopts the amendment to §291.104, Applicant, to add language that will require an applicant to submit information regarding any material change in the applicant's financial, managerial, or technical status that arises during the application review process. The commission adopts this amendment to address an applicant's changing circumstances after the application has been submitted to the executive director. If an applicant fails to notify the executive director that information on the application has changed, the commission would not have accurate information on which to base a decision.

The commission adopts the amendment to §291.105, Contents of Certificate of Convenience and Necessity Applications, which lists the contents required in a CCN. The commission will reformat this section into subsections (a) and (b). Subsection (a) will specify that to obtain a CCN, an applicant must submit to the commission an application for a certificate or for an amendment along with the items specified in subsection (a)(1) - (16). The commission adopts this amendment to implement TWC, §13.244, as amended by the 79th Legislature. The commission will delete existing paragraphs (2), (3), (6), (7), and (10). The commission will add paragraphs (2), (3), (6), (7), and (10) - (16). The adopted new requirements include: a map and description of only the proposed service area by a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor; a map and description of the proposed service area by the Texas State Plane Coordinate System or any standard map projection and corresponding metadata; a map and description of the proposed service

area by verifiable landmarks, including a road, creek, or railroad line; or a map and description of the proposed service area by a copy of the recorded plat of the area, if it exists, with lot and block number; maps as described in §291.119; and a general location map and other maps as requested by the executive director or required by 30 TAC §281.16. In §291.105(a)(2)(A), the commission will add the requirement for a map, because the written description required by TWC, §13.244, alone is not enough information to accurately locate the proposed service area on the ground. In §291.105(a)(2)(B), the commission will add the alternative standard map projection and corresponding metadata to the Texas State Plane Coordinate System required by TWC, §13.244, to allow flexibility for those who work with digital data and not limit them to a coordinate system. The commission's CCN digital data is currently available to the public in Lambert Conformal Conic projection as defined by the Texas State Mapping System (TSMS), which is the state standard and agency standard. Adding the new language to §291.105(a)(2)(B) allows those entities that wish to use the commission's digital data and projection that flexibility. Metadata is also needed because it provides information about the digital data being submitted, including projection or coordinate system, who created the data, and other pertinent information needed to incorporate into a Geographic Information System (GIS). In §291.105(a)(2)(D), the commission will request a copy of the recorded plat of the area because the lot and block number alone is not enough information to locate the area on the ground. The commission's staff cannot easily obtain county property records, therefore, a copy of the actual plat is needed, as well. If the applicant does not provide a copy of the plat, staff would be required to travel to the counties to research the real property records, resulting in delays in the processing time for CCN applications as well as additional costs to travel and copy those records. The commission also adds subsection (a)(2)(E) to require maps as described in §291.119. The commission adds this requirement to provide additional details to the

commission and affected parties regarding the CCN location. The commission will be able to more quickly process applications by having this additional detail. The commission also will add subsection (a)(2)(F) to identify the general service area being requested. This is especially important when the proposed service areas are prepared by metes and bounds or survey data. Also, the applicant is required to provide a map with the notice and the general location map works best for that purpose and is less costly to reproduce. Finally, the commission adds subsection (a)(2)(G) to allow staff to request additional maps. This becomes necessary when maps provided by the applicant may not be scaled or may be reduced to the point that they are unreadable or unusable.

The proposed new requirements in subsection (a) would also include a description of any requests for service in the proposed service area; a capital improvements plan, including a budget and estimated time line for construction of all facilities necessary to provide full service to the entire proposed service area; a description of the sources of funding for all facilities; to the extent known, a description of current and projected land uses, including densities; a current financial statement of the applicant; and according to the tax roll of the central appraisal district for each county in which the proposed service area is located, a list of the owners of each tract of land that is at least 25 acres and wholly or partially located within the proposed service area. The commission adopts the revisions to subsection (a) to implement TWC, §13.244, as amended by the 79th Legislature with revisions to make it consistent with notice requirements in §291.106(b)(3).

The commission adds §291.105(a)(13) to require if dual certification is being requested, and an agreement between the affected utilities exists, that an applicant must submit an original and three

copies of the agreement. The commission adopts this amendment as a method to ensure that all the parties involved in the transaction are made aware of the actions being taken. The commission adds subsection (a)(14) and (15) to specify what is required for an entity seeking a water CCN or a sewer CCN. The commission adopts these revisions to ensure that the applicant is not making a speculative request and has obtained the necessary approvals to be able to provide utility service. The commission adds subsection (a)(16) to request any other item required by the commission or executive director.

The commission adds subsection (b) to §291.105. Adopted subsection (b) specifies that the commission may not grant to a retail public utility a CCN for a service area within the boundaries or ETJ of a municipality with a population of 500,000 or more without the consent of the municipality. Subsection (b) also outlines the circumstances under which the commission may grant a CCN. The commission adopts this amendment to implement TWC, §13.245, as amended by the 79th Legislature.

The commission adds subsection (c) to §291.105. Adopted subsection (c) specifies that, except as provided elsewhere in the rule, if a municipality extends its ETJ to include an area certificated to a retail public utility, the retail public utility may continue and extend service in its area of public convenience and necessity under the rights granted by its certificate and this chapter. The commission adopts this amendment to implement TWC, §13.2451, as amended by the 79th Legislature. Subsection (c) will specify that the commission may not extend a municipality's CCN beyond its ETJ without the written consent of the landowner who owns the property in which the certificate is to be extended. The commission has decided to remove that part of subsection (c), which provides that the portion of any CCN that extends beyond the ETJ of the municipality without the consent of the landowner is void on

September 1, 2005. The commission decided to remove the provision that states that within 30 days of receipt of a written request by a landowner in an area of a voided certificate, the executive director shall affirm that the certificate is modified to reflect the voided portion of the CCN and direct the municipality to prepare and record revised maps of its service area within 30 days of receipt of the affirmation. The commission has decided to remove the provision that a municipality that holds a CCN, a portion of which is void under proposed subsection (c), may submit an application to the commission to reinstate all or a portion of such voided area if the municipality has obtained the written consents of all affected landowners. 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.

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 of they provide landowner consent for those areas.

The commission also adds subsection (d)(3)(A) and (B) to specify that a municipality shall notify the commission prior to filing an eminent domain lawsuit to acquire a substandard water or sewer system and that the municipality, in its sole discretion, shall request that the commission either cancel the CCN of the acquired system or transfer the certificate to the municipality and that the commission shall take such requested action. The commission adopts this amendment to clarify that the CCN is still in operation even though the system has been acquired by eminent domain and that the city must cancel or transfer the CCN so that the portion of the utility being acquired is no longer obligated to provide service.

The commission adds subsection (d) to §291.105. Subsection (d) will specify that if an area is within the boundaries of a municipality, a retail public utility that is certified or entitled to certification can continue and extend service in its area of public convenience and necessity unless a municipality with a population of more than 500,000 exercises its power of eminent domain under §291.105(d)(3). Subsection (d) would also specify that a municipally owned or operated utility may not provide retail water and sewer utility service within the area certificated to another retail public utility without first having obtained from the commission a CCN that includes the areas to be served. Additionally, subsection (d) specifies that this section may not be construed as limiting the power of municipalities to incorporate or extend their boundaries by annexation. Finally, subsection (d) would provide that a municipality with a population of more than 500,000 may exercise the power of eminent domain in the manner provided by Texas Property Code, Chapter 21, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries and that the

municipality shall pay just and adequate compensation for the property. The commission adopts this amendment to implement TWC, §13.247, as amended by the 79th Legislature.

The commission adopts the amendment to §291.106, Notice for Applications for Certificates of Convenience and Necessity, which outlines the requirements for notice related to applications for CCNs, and is retitled "Notice for Applications for Certificates of Convenience and Necessity and Requirements for Recording Maps and Descriptions of Areas Covered by Certificates of Convenience and Necessity," because it will also outline requirements for recording CCN maps and descriptions in the county real property records.

Subsection (b)(2) specifies who must receive notice for applications for an amendment to a CCN. The commission amends subsection (b)(2) to require that if decertification or dual certification is being requested, the applicant shall provide notice by certified mail to the current CCN holder. The commission adopts this amendment to ensure that if an agreement does not exist between the parties as indicated in §291.105(a)(10), the current CCN holder has been provided notice of the request.

The commission adopts §291.106(b)(3), which will require the applicant to mail notice to each owner of a tract of land that is at least 25 acres and is wholly or partially included in the area proposed to be certified. The commission adopts this amendment to implement TWC, §13.246(a)(1), as amended by the 79th Legislature with revisions to require notice to landowners with over 25 acres since TWC, §13.246(h) allows landowners with more than 25 acres to opt out of a CCN area.. The commission also will renumber the paragraphs in subsection (b) to accommodate proposed paragraph (3). The

commission adds subsection (e) to §291.106, which will define utility service provider as a retail public utility other than a district subject to TWC, §49.452. The commission adopts this amendment to implement TWC, §13.257(a), as amended by the 79th Legislature.

The commission adds subsection (f) to §291.106, which will require a utility service provider to record in the real property records of each county in which the service area or a portion of the service area is located, a certified copy of the map of the CCN and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area. Subsection (f) also requires the utility service provider to send evidence to the executive director that it has been recorded. Subsection (f) also lists what is required in the boundary description of the service area and would require the utility service provider to submit to the executive director evidence of the recording. The commission adopts this amendment to implement TWC, §13.257(r), as amended by the 79th Legislature.

The commission adds subsection (g) to §291.106, which will require that the recording required under this section be completed not later than the 31st day after the date a utility service provider receives a final order from the commission granting an application for a new certificate or for an amendment to a certificate that results in a change in the utility service provider's service area. The commission adopts this amendment to implement TWC, §13.257.

The commission adds subsection (h) to §291.106, which will require the recording required by this section for holders of CCN already in existence as of September 1, 2005, to be completed not later than January 1, 2007. This requirement is from HB 2876.

The commission adopts the amendment to §291.109, Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction, which requires that on or before the 120th day before the effective date of any sale, acquisition, lease, rental, merger, or consolidation of any water or sewer system required by law to possess a CCN, the utility or water supply or sewer service corporation shall file a written application with the commission and give public notice of the action. The commission adds language to subsection (a) that will specify when the 120-day period begins if the applicant does not provide an effective date or the effective date is changed for the proposed date of any sale, acquisition, lease, rental, merger, or consolidation. Staff received questions regarding when the 120-day period begins, therefore, to eliminate confusion regarding this date, the commission adopts this change.

The commission adopts the amendment to §291.113, Revocation or Amendment of Certificate, which specifies the criteria for decertification. Subsection (a) allows the commission at any time after notice and hearing to revoke or amend any CCN if certain requirements are met. The commission adopts the amendment to subsection (a) to explicitly state that on its own motion or the receipt of a petition, the commission at any time after notice and hearing may revoke or amend any CCN with the written consent of the holder or if certain requirements are met. The commission adopts this amendment to implement TWC, §13.254(a), as amended by the 79th Legislature. In subsection (a)(1), the commission adds the language “is incapable of providing service,” as a condition that may lead to

revocation or amendment of a CCN. The commission adopts this amendment to implement TWC, §13.254(a)(1), as amended by the 79th Legislature.

The commission also adopts the addition of subsection (b) to §291.113, which will provide an alternative to decertification for the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service, to petition the commission for expedited release of the area from a CCN so that the area may receive service from another retail public utility. Subsection (b) also lists the items that the petitioner must demonstrate to the commission. The commission adopts this amendment to implement TWC, §13.254(a-1), as amended by the 79th Legislature.

In §291.113(b)(1)(A), the commission adds to the requirement that the area for which service is sought be shown on a map with descriptions according to §290.105(a)(2)(A) - (G). The commission adopts this amendment to ensure that exclusions from CCNs are held to the same mapping requirements as a new CCN or CCN amendment. Additionally, in §290.105(b)(4) the commission added language regarding an alternative service supplier. The commission amended this provision in response to comments received.

The commission adopts §291.113(c) to specify the circumstances under which a landowner may not petition for expedited release from a CCN, but instead may contest the involuntary certification of its property. The commission adopts subsection (d) to specify the time frame and manner in which the commission or executive director must take action on the petition filed under proposed subsection (b);

and subsection (e) to specify that Texas Government Code, Chapter 2001 does not apply to any petition filed under subsection (b). The commission adopts these revisions to implement TWC, §13.254(a-2) - (a-4), as amended by the 79th Legislature. The commission also adds after the word "rules" in subsection (e), the words, "under §50.139 of this title" to specify the rules that relate to motions to overturn. Finally, the commission will reletter the existing subsections to accommodate the new subsections.

Section 291.113(e), which specifies when the determination of the amount of monetary compensation will be made, is redesignated as §291.113(i). The commission adds a requirement to §291.113(i) that the monetary amount of compensation will be determined not later than the 90th day after the date on which a retail public utility notifies the commission of its intent to provide service to the decertified area. The commission adopts this amendment to implement TWC, §13.254(a-3), as amended by the 79th Legislature.

Section 291.113(f), which specifies that the monetary amount will be determined by a qualified individual or firm serving as an independent appraiser agreed upon by the decertified retail public utility and the retail public utility seeking to serve the areas, is redesignated as §291.113(j). The commission will add paragraphs (1) and (2) to subsection (j) to outline the criteria for using an independent appraiser if the retail public utilities cannot agree on an independent appraiser. These provisions implement TWC, §13.254.

Section 291.113(g), which specifies that the value of real property will be determined according to the standards in Texas Property Code, Chapter 21, and that the value of personal property will be determined using factors listed in this subsection, is redesignated as §291.113(k). The commission will amend subsection (k) by specifying that the value of the real property will be based on real property that is owned and used by the retail public utility for its facilities. The commission also will delete the language that specifies that compensation will be for the taking, damaging, or loss of personal property, including the retail public utility's business. The commission also will delete the words "at a minimum." Additionally, the commission will delete the following factors used to ensure that the compensation to a retail public utility is just and adequate: the impact on the existing indebtedness of the retail public utility and its ability to repay that debt; the expenses of the retail public utility; and factors relevant to maintaining the current financial integrity of the retail public utility. The commission also adds the following new factor to ensure that the compensation to a retail public utility is just and adequate: the amount of the retail public utility's debt allocable for service to the area in question. Additionally, the commission will modify the factor "the impact on future revenues" by adding "lost from existing customers." The commission adopts this amendment to implement TWC, §13.254(g), as amended by the 79th Legislature.

The commission also will delete existing subsections (h) - (m) and add subsections (l) - (p) in §291.113. Adopted subsection (l) will allow the commission to order a retail public utility seeking to provide service to a decertified area to serve the entire service area of the retail public utility that is being decertified and will also allow the commission to transfer the entire CCN of a partially decertified retail public utility to the retail public utility seeking to provide service to the decertified area. The

commission adopts this amendment to implement TWC, §13.2551(a), as amended by the 79th Legislature.

Adopted subsection (m) will require the commission to order service to the entire area under subsection (l) if the commission finds that the decertified retail public utility will be unable to provide continuous and adequate service at an affordable cost to the remaining customers. The commission adopts this amendment to implement TWC, §13.2551(b), as amended by the 79th Legislature.

Adopted subsection (n) will specify that the commission require the retail public utility seeking to provide service to the decertified area to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to its other customers and would establish the terms under which the service must be provided. This adopted subsection also lists what the terms may include. The commission adopts this amendment to implement TWC, §13.2551(c), as amended by the 79th Legislature.

Adopted subsection (o) will require that the retail public utility seeking decertification not charge the affected customers any transfer fee or other fee to obtain service other than the retail public utility's usual and customary rates for monthly service or the interim rates set by the commission, if applicable. The commission adopts this amendment to implement TWC, §13.2551(d), as amended by the 79th Legislature.

Adopted subsection (p) states that the commission may not order compensation to the decertificated retail public utility if service to the entire service area is ordered under this section. The commission adopts this amendment to implement TWC, §13.2551(e), as amended by the 79th Legislature. The commission added the word "public" between "retail" and "utility" to clarify the type of utility.

The commission added subsection (q) to require retail public utilities to provide notice to the commission and lienholders of any outstanding debt allocable to the CCN areas to be decertified in response to comments.

The commission adopts the amendment to §291.115, Cessation of Operations by a Retail Public Utility, which specifies what a utility that holds or is required to hold a CCN must do to discontinue, reduce, or impair utility service. Subsection (i) lists the factors that the commission must consider when determining whether to authorize a utility to discontinue, reduce, or impair service. In subsection (i)(1), the commission will add as a factor the effect on landowners. In subsection (i)(8), the commission will add as a factor the feasibility of landowners obtaining services from alternate sources. The commission adopts these changes to ensure that landowners, as defined in §291.3, are considered when the commission is making its decision.

The commission adopts the amendment to §291.117, Contracts Valid and Enforceable, which specifies that contracts between retail public utilities designating areas to be served and customers to be served are valid and enforceable when approved by the commission after notice and hearing and are incorporated into the CCNs. The commission will add language to subsection (a) providing that this

provision does not negate the requirements of TWC, §13.301. The commission also will add subsection (b) to specify how retail public utilities may request approval of contracts. The commission has received contracts without justification, notice, and filing fees, which can slow down processing. The commission adopts these revisions to avoid delays in processing by clarifying what is needed for processing.

The commission adopts the amendment to §291.119, Filing of Maps, to require each public utility and water supply or sewer service corporation to file the maps described in this section with applications to obtain or amend a CCN without being requested to do so by the commission. The commission adopts this amendment to implement TWC, §13.244(b), as amended by the 79th Legislature. To try and eliminate confusion about what maps are due to the commission with the CCN application, the commission adds a cross-reference to this section in adopted §291.105(a)(3). In a future rulemaking, the commission will repeal §291.119 and move its requirement to §291.105, which contains the mapping requirements. This will eliminate any confusion about what type of maps must be submitted to the commission with a CCN application. The commission cannot repeal §291.119 in this rulemaking because the commission did not propose to repeal this section.

The commission adopts §291.120, Single Certification in Incorporated or Annexed Areas, which will specify that in the event an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer service to all or part of the area under a CCN may agree, in writing, that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility. This

section contains the time frames and manner in which a single certification must be carried out. This new section is adopted to implement TWC, §13.255. Additionally, the commission added language to §291.120(b) regarding notice to lienholders.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A major environmental rule means "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Here, the primary specific intent of the adopted rulemaking is to implement HB 2876 of the 79th Legislature, which makes changes to rules governing CCNs for water and sewer service. A secondary intent of the adopted rulemaking is to implement portions of SB 425 of the 79th Legislature, which changes the definition of affected county. Generally, these changes are intended to impact only the economic regulation of water and sewer utilities and the prevention of substandard housing in the border areas. The adopted rules are not intended to have any impact on environmental regulation. Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules: 1) are specifically required by state law, namely TWC, Chapter 13; 2) do not exceed the express requirements of the TWC; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to

implement a state and federal program where there is no federal delegation regarding CCNs or border-area connection of water and sewer service and there is no agreement or contract between the federal government and the State of Texas or commission regarding CCNs or border-area connection of water and sewer service; and 4) will not be adopted solely under the general powers of the commission.

Therefore, the adopted rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to make changes to rules governing CCNs for water and sewer service. A secondary intent of the adopted rulemaking is to change the definition of affected county to be consistent with the TWC. The adopted rules will substantially advance these stated purposes by revising the criteria for obtaining, amending, transferring, and decertifying CCNs for water and sewer service and amending the CCN mapping requirements. The adopted rules will also expand the definition of affected county to include a county within 100 miles of an international border, which also contains a municipality with a population greater than 250,000.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted CCN regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because

this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. More specifically, these rules implement the changes to the TWC mandated by HB 2876 and SB 425, enacted by the 79th Legislature. There are no burdens imposed on private real property by the enactment of these rules. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The commission held a public hearing for this rulemaking on October 25, 2005, in Austin, Texas. The public comment period for this rulemaking closed at 5:00 p.m. on October 31, 2005. The commission received comments from Allen Boone Humphries Robinson LLP (ABHR); City of Austin, Austin Water Utility (COA); Aqua Water Supply Corporation (Aqua Water); Barney Knight & Associates on behalf of the Cities of Bertram, Buckholts, Burnet, Cottonwood Shores, Dublin, Evant, Gun Barrel City, Hays, Highland Haven, Holland, Jonestown, Kempner, Kyle, Leander, Lago Vista, Manor, Meadowlakes, Ranger, Rogers, Santa Anna, Somerville, Spearman, Sunrise Beach Village, Trinidad, and Woodcreek (BKA); Andrew N. Barrett, Attorney, on behalf of Aqua Texas (Barrett); Bickerstaff,

Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Cities of McKinney, College Station, Mabank, Kaufman, Castroville, Presidio, and Crandall (Bickerstaff - Cities); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Guadalupe-Blanco River Authority (Bickerstaff - GBRA); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Town of Hebron (Bickerstaff - Hebron); Jim Box - Consultant, Inc. (Box); the City of Ovilla (Ovilla); Clark, Thomas & Winters on behalf of Becker Utility Corporation; Talley Road Utility Corporation; Westlakes Utility Corporation; Country Ridge Water Co., LLC; Deer Creek Ranch Water Co., LLC; LCR Water Development, L.P.; 3009 Water Co., LLC. (CTW); Law Offices of Clay E. Crawford, P.C. (Crawford); the Honorable Shirley Erickson, Mayor, City of Covington (Mayor Erickson); the Honorable Roy Floyd, Mayor, City of Bonham (Mayor Floyd); the Forsythe Company (Forsythe); the Honorable Doug Garber, Mayor, City of Parker (Mayor Garber); Greater Houston Builders Association (GHBA); the Honorable Russell N. Green, Jr., Mayor, City of Rio Vista (Mayor Green); Independent Water and Sewer Companies of Texas, Inc. (IWSCOT); Kelly, Hart & Hallman on behalf of the City of Fort Worth (KHH); the Honorable Brad Kerr, Mayor, City of Collinsville (Mayor Kerr); Landowners of Texas (LOT); the City of Leander (Leander); the Lower Colorado River Authority (LCRA); Lloyd Gosselink Blevins Rochelle & Townsend PC (LGBRT); Lloyd Gosselink Blevins Rochelle & Townsend PC on behalf of Aqua Water Supply Corporation (LGBRT - Aqua WSC); McPherson & Associates, P.C. (McPherson); North Texas Developers Council (NTDC); the Honorable James Robinson, Mayor, City of Chico (Mayor Robinson); Russell, Moorman & Rodriguez, L.L.P. on behalf of the Cities of Aledo, Alice, Alvord, Anna, Bonham, Celina, Chico, Dodd City, Gunter, Honey Grove, Ladonia, Lampasas, Leonard, Liberty Hill, Lindsay, Royse City, Valley View, Whitney, and the Town of Prosper collectively known as the Cities' Coalition on CCNs (RM&R); Sahs & Associates,

P.C. on behalf of one individual and the Forsythe Company (Sahs); Schwartz, Page & Harding, L.L.P. (SPH); the Honorable Dewayne Sherwood, Mayor Pro Tem, City of Alvord (Mayor Sherwood); the Honorable Sarah A. Stevick, Mayor, City of Bulverde (Mayor Stevick); Texas Association of Builders (TAB); Texas Rural Water Association (TRWA); United States Department of Agriculture Rural Development (USDA RD); Winstead Sechrest & Minick on behalf of the City of Granite Shoals (Winstead - Granite Shoals); Winstead Consulting Group (Winstead); Yancey Water Supply Corporation (YWSC); and two individuals.

One individual generally supported the rulemaking. ABHR, COA, Aqua Water, BKA, Barrett, Bickerstaff - Cities, Bickerstaff - GBRA, Bickerstaff - Hebron, Box, Ovilla, CTW, Crawford, Mayor Erickson, Mayor Floyd, Forsythe, Mayor Garber, GHBA, Mayor Green, IWSCOT, KHH, Mayor Kerr, LOT, Leander, LCRA, LGBRT, LGBRT - Aqua WSC, McPherson, NTDC, Mayor Robinson, RM&R, Sahs, SPH, Mayor Sherwood, Mayor Stevick, TAB, TRWA, USDA RD, Winstead - Granite Shoals, Winstead, and YWSC suggested modifications to the proposed rules to clarify their applicability as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General

CTW commented that HB 2876, §15, limits the changes in law made by the bill to those applications submitted to the commission for new CCNs or amendments to existing CCNs. CTW commented that the language in HB 2876, §15, is almost identical to that used by the 76th Legislature in HB 801 and to ensure this current rulemaking is consistent with the clear language of HB 2876, the commission should

use a similar framework to adopt the proposed revisions to Chapter 291 so that new subchapters for Chapter 291 apply only to those applications submitted on or after January 1, 2006. Additionally, CTW commented that the commission should revise its rules applicable to both existing and new CCN holders to require compliance with the requirements of TWC, §13.257, by January 1, 2007.

RESPONSE

The commission disagrees with this comment. HB 801 fundamentally changed all of the procedural requirements for water quality, waste, and air applications. HB 2876's changes were significant, however, the bill did not completely change all of the procedural requirements applicable to CCN applications. Therefore, it is not necessary for the commission to have two separate sets of procedural requirements set out by rule for CCN applications. The applications that were submitted prior to January 1, 2006, will be governed by the procedural requirements in effect as of December 31, 2005. Those requirements are readily accessible to the regulated community and the public and will continue to be accessible after January 1, 2006.

One individual submitted comments generally requesting that changes be made to several statutes to require that better information be provided to, and consideration and protection afforded to, ratepayers in unincorporated areas who are served by regional utilities. Specifically, the individual requested that the commission make changes to the following sections of the TWC: §§13.002(1), 13.011(b)(6), 13.137, 13.145, 13.182, 13.184, 13.187, 13.243, 13.246, and 13.250.

RESPONSE

The commission responds that it cannot make changes to a statute. Statutory changes can only be made by the legislature. The primary purpose of this rulemaking is to implement HB 2876. TWC, §§13.011(b)(6), 13.137, 13.145, 13.182, 13.184, 13.187, 13.243, and 13.250 were not amended by HB 2876. While TWC, §13.002 and §13.246 were amended by HB 2876, the amendments to these sections do not include the changes suggested by the commenter. No changes were made to the rules.

One individual encouraged the commission to adopt the rules as they were proposed.

RESPONSE

The commission acknowledges the commenter's support of the rules.

Mayor Kerr stated that the City of Collinsville is a small city and depends greatly on the water system revenue and that the rules will have an effect on the customers that have used the water service for many years.

RESPONSE

The commission acknowledges that this rulemaking will have an effect on people in the State of Texas. However, HB 2876, §16, requires that the commission promulgate rules implementing the changes in law effected by HB 2876 by January 1, 2006, or report to the governor, lieutenant governor, and speaker of the house any failure to comply with this deadline. The commission has undertaken this rulemaking to comply with HB 2876, §16. No change was made to the rules.

Throughout Chapter 291, Winstead suggested adding the words, "retail" or "retail public" before the word "utility" and in some instances suggested deleting "water supply or sewer service corporation" or "water supply corporation."

RESPONSE

The commission did not make the changes requested by the commenter because "retail public utility" is specifically defined in the commission's rules and the TWC. Changing "utility" to "retail public utility" would bring all cities, districts, counties, water supply corporations, and investor-owned utilities under the commission's original jurisdiction. The commission does not have original jurisdiction over anything except "utilities" as defined in TWC, Chapter 13. No change was made to the rules.

Winstead suggested adding a new section to the rulemaking to incorporate the requirements of TWC, §13.245. Additionally, Winstead suggested some modifications to the statutory language.

RESPONSE

The commission did not create a new section to add the requirements of TWC, §13.245. Instead, the commission incorporated the requirements of TWC, §13.245 into §291.105(b). The commission did not modify the language of the statute except for formatting and style changes to make this rule consistent with the remainder of Chapter 291. No change was made to the rule.

Winstead suggested adding a new §291.114 to incorporate the requirements for single certifications in incorporated or annexed areas.

RESPONSE

The commission did not create a new §291.114, but instead incorporated the requirements for single certification in incorporated or annexed areas into new §291.120. No change was made to the rule.

Winstead suggested adding a new §291.115 to incorporate the requirements for completion of decertification from TWC, §13.2551.

RESPONSE

The commission incorporated the requirements from TWC, §13.2551 into various subsections of §291.113.

Winstead suggested adding a new §291.122 to incorporate the requirements for deed recording certificates of convenience and necessity from TWC, §13.257(r) and also suggested some modifications to the statutory language.

RESPONSE

The commission incorporated the requirements from TWC, §13.257(r) into §291.106(f). The commission did not modify the language of the statute except for formatting and style changes to make this rule consistent with the remainder of Chapter 291.

Subchapter A, General Provisions

§291.3, Definitions of Terms.

The COA suggested that §291.3 be amended to include these two terms: "Annexed – annexed for limited purposes" and "Incorporated - incorporated as part of a municipality's original boundaries or annexed for full purpose."

RESPONSE

The commission responds that in HB 2876 the legislature uses the term "annexed" not "full-purpose annexed." The commission cannot infer meaning outside the legislative enactment. Additionally, these terms do not need to be included in the commission's rules because the meanings and the legal effect of the terms are set out in the Local Government Code. No change was made to the rule.

Winstead proposed adding ". . . landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed . . ." after the first word in the definition of "Affected person" in §291.103(3).

RESPONSE

The commission incorporated this language into the rule.

RM&R commented that the language in the definition of "Affected person" in §291.3(3) is appropriate if the definition of "Landowner" in §291.3(19) is modified to read, "the person identified by the county tax appraisal district as owner of a tract of land." Similarly, the COA and Winstead commented that the definition of "Landowner" in §291.3(19) should be amended by adding language at the end of the definition about "the most current tax appraisal rolls of the area where the tract of land is located."

RESPONSE

The commission responds that the definition of "Landowner" is consistent with the language used in TWC, §13.002(1-a), as amended by HB 2876. The language that the commenters requested is used where necessary in the rules. Additionally, the requested change would limit some affected parties from their ability to request a State Office of Administrative Hearings (SOAH) hearing. No change was made to the rule.

Subchapter G: Certificates of Convenience and Necessity

§291.101, Certificate Required.

Winstead suggested adding subsection (d) to §291.101 that would read: "A supplier of wholesale water or sewer service may not require a purchaser to obtain a certificate of public convenience and necessity if the purchaser is not otherwise required by law to obtain the certificate."

RESPONSE

The change the commenter suggests is an amendment to TWC, §13.242, made by HB 2876. The commission added subsection (d) to §291.101 to incorporate the amendment to TWC, §13.242.

Crawford commented that §291.101(d) should be revised by adding "the Texas Water Code or" between the words " required by" and "this chapter" toward the end of the sentence to more accurately reflect the intent of the statute.

RESPONSE

The commission's authority to incorporate this change into its rules comes from the TWC. Additionally, the commission is using the language as it appears in TWC, §13.242. Therefore, the addition of the words "the Texas Water Code or" are redundant and are not necessary to reflect the intent of the statute. No change was made to the rule.

§291.102, Criteria for Considering and Granting Certificates or Amendments.

Bickerstaff - Cities and Bickerstaff - GBRA commented that it supports the changes to §291.102(d).

RESPONSE

The commission acknowledges the commenters' support of the rule.

Winstead suggested changes to §291.102(d) that are similar to the changes made by HB 2876 to TWC, §13.246.

RESPONSE

The commission incorporated the changes made to TWC, §13.246 into §291.102(d). The commission did not modify the language of the statute except for formatting and style changes to make this rule consistent with the remainder of Chapter 291.

RM&R requested that the commission add the "location of the property in the ETJ of the applicant" and "the provision of fire protection services to the requested service area" as factors to be considered in §291.102(d)(2). KHH commented that since §291.102(d)(2) included certain nonstatutory factors when considering requests for service such as economic and environmental needs and reports or market studies, KHH expressed that fire fighting water capacity needs should also be included.

RESPONSE

The "location of the property in the ETJ of the applicant" factor will be clarified by the mapping requirements in §291.105(a) and is not necessary in §291.102(d)(2). The factors included in §291.102(d)(2) are either required by statute or closely tied to the requirement to demonstrate that there is a need for additional service. The commission does not have statutory authority on which to base a requirement to require CCN holders to have the ability to provide fireflows. No change was made to the rule.

IWSCOT commented that the language in §291.102(d)(2) may be confusing but could be clarified by adding "but not limited to."

RESPONSE

The commission agrees with the IWSCOT that adding "but not limited to" would clarify this provision. The commission has added this language to §291.102(d)(2).

Bickerstaff - Cities stated that it supports the list of factors in §291.102(d), but expressed that the list should not be all inclusive. Additionally, Bickerstaff - Cities and Bickerstaff - GBRA requested that the commission clarify in the preamble that the factors demonstrating need should be considered in their entirety and the lack of one factor is not "fatal" in considering whether need exists.

RESPONSE

The commission acknowledges the commenters' support of the rule. Additionally, the commenters requested that one factor in §291.102(d) not be a fatal flaw. The executive director considers all factors and failure to meet one would not necessarily mean that the CCN application would be denied.

Crawford suggested deleting the words "economic needs" in §291.102(d)(2)(A) and the words "environmental needs" in subparagraph (B) as factors that will be considered in determining whether there is a need for additional service in a proposed CCN area. The terms are not defined and there is no guidance in the preamble. Additionally, these issues are already covered in other criteria in §291.102(d)(7) and (8).

RESPONSE

The commission responds that §291.102(d)(2)(A) and (B) is clarification for determining the need for service in a proposed area under §291.102(d)(2). The factors included in §291.102(d)(2) are either required by statute or closely tied to the requirement to demonstrate that there is a need for additional service. These factors may not always be the same as the criteria requested in §291.102(d)(7) and (8). No change was made to the rule.

Crawford suggested revising §291.102(d)(2)(D) by adding "existing or anticipated" between the words "demonstrating" and "growth" for clarification.

RESPONSE

The commission agrees with the commenter and has made the change.

Crawford suggested deleting "including, but not limited to, regionalization, compliance history, or economic effects" from §291.102(d)(3). Crawford stated that the terms are not defined and no guidance is provided. Regionalization issues are already covered in §291.102(b) as implemented from TWC, §13.241(d). Compliance history as outlined in TWC, §5.751, does not apply to CCN applications under TWC, Chapter 13, and the CCN applicant's ability to provide continuous and adequate service is already covered under §291.102(a) and (d)(4). Economic issues are also already addressed under other sections. RM&R commented that the factor "economic effect on the area" in §291.102(d)(3) exceeds the commission's authority and requests that this factor be deleted.

RESPONSE

The commission added this information to the rule to address concerns received during stakeholder meetings about how the commission would evaluate the effect of granting or amending a CCN. The executive director can provide additional guidance related to these terms in the application form or in guidance documents developed with stakeholder input to help both staff and the regulated community. In this instance, the commission is using "compliance" to determine if the facility has been able to provide continuous and adequate service. To avoid confusion, the commission has deleted the term "history" in §291.102(d)(3).

IWSCOT asked when the 30-day comment period begins in §291.102(h) and suggested incorporating the three-day mail receipt rule contained in 30 TAC §1.11 into §291.102(d).

RESPONSE

The commission responds that §291.102(h) is consistent with the language in HB 2876. Subsection (h) prescribes a 30-day comment period to begin when mailed notice is received by the landowner. The request to add a three-day presumptive mailing rule is not necessary because the commission's rule in §1.11, which includes a three-day presumptive mailing rule, already governs notice mailed to interested persons. No change was made to the rule.

Winstead suggested adding subsections (h) and (i) from TWC, §13.246 to §291.102.

RESPONSE

The change the commenter suggests is an amendment to TWC, §13.246, made by HB 2876. The commission added subsections (h) and (i) to §291.102 to incorporate the amendment to TWC, §13.246.

The COA commented that it is not clear whether the hearing identified in §291.102(i) is a SOAH proceeding or a hearing conducted by the commissioners and, therefore, §291.102 should either contain a provision analogous to the provision in §291.113, which specifically states that Texas Government Code, Chapter 2001 (the Administrative Procedure Act) does not apply to a petition filed under §291.113(c), or §291.102 should specify "evidentiary hearing" or otherwise clarify what type of hearing is intended in this subsection.

RESPONSE

The commission responds that the type of hearing referenced in §291.102 is a SOAH hearing and, therefore, is subject to Texas Government Code, Chapter 2001. The legislature did not include specific limiting language in TWC, §13.246(i), therefore, 30 TAC §55.101(g)(5), which provides for direct referral of contested utility cases to SOAH, applies. No change was made to the rule.

§291.104, Applicant.

RM&R commented that §291.104(b) places an unnecessary and undue burden on the applicant for a new or amended CCN. RM&R proposed inserting the word "material" before the word "change." Alternatively, Crawford suggested deleting §291.104(b) concerning the applicant's continuing duty to

submit information on changes in its financial, managerial, or technical status during the application review process. Crawford added that Chapter 281 of the commission's rules sets out a process for reviewing CCN applications that ensures that the commission has accurate and complete information on which to base a decision.

RESPONSE

The commission agrees with RM&R and added the word "material" to §291.104(b). Chapter 281 does not contain specific language to require an applicant to submit information regarding a change in applicant's status during the application review. While Chapter 281 does allow the commission to request additional information during the application process, §291.104(b) places a responsibility on the applicant to provide information that would otherwise be unknown to the commission.

§291.105, Contents of Certificate of Convenience and Necessity Applications.

Winstead suggested adding the requirements from TWC, §13.244(d) to §291.105.

RESPONSE

The commission incorporated the changes made to TWC, §13.244(d) into §291.105(a). The commission modified the language of the statute for formatting and style changes to make this rule consistent with the remainder of Chapter 291 and in response to comments.

RM&R commented that §291.105(a)(2) appears to require an applicant to provide one map in compliance with §291.105(a)(2)(A) - (D) and all of the items contained in subparagraphs (E) - (G). RM&R requested that §291.105(a)(2) be reworded to prevent confusion on which maps are required and which maps the applicant can choose to submit.

RESPONSE

The language in §291.105(a)(2)(A) - (D) tracks the language of TWC, §13.244(d)(1)(A) - (D). Section 291.105(a)(2)(F) - (G) codifies by rule additional maps that are required on the application for a CCN. Section 281.16 allows the commission or executive director to request additional information as needed to evaluate the application. The commission has modified §291.105(a)(2)(E) by deleting the proposed requirement and adding a cross-reference to the mapping requirement in §291.119. The commission also added a cross-reference to §281.16 in §291.105(a)(2)(G) to further clarify application mapping requirements.

IWSCOT commented that §291.105(a)(2) requires applicants to submit three sets of maps. The commenter stated that the first set of maps is required by statute and the second set of maps is from the current rule. Regarding the second set of maps, IWSCOT commented that requiring a map of each county where service is available is burdensome. Additionally, IWSCOT stated that the requirement for a general map is duplicative and that no definition of general map is provided in the rule or in §291.103. Finally, IWSCOT stated that the commission does not need all the maps listed in the rule. Similarly, Barrett commented that §291.105(a)(2)(E) adds a burden for companies and proposes that this provision be deleted. Bickerstaff - Cities and Bickerstaff - GBRA commented that in

§291.105(a)(2)(F) the commission should clarify what a general location map is and how it is different than the other maps required in §291.105(a)(2).

RESPONSE

The commission made a change to §291.105(a)(2) to clarify that the executive director only needs a map of the counties that are affected by the proposed change to the CCN. Section 281.16 allows the commission or executive director to request additional information as needed to evaluate the application. The commission has modified §291.105(a)(2)(E) by deleting the proposed requirement and adding a cross-reference to the mapping requirement in §291.119. The commission also added a cross-reference to §281.16 in §291.105(a)(2)(G) to further clarify application mapping requirements. A general location map assists in locating the proposed area in relation to the entire county or counties because it can be difficult to locate the proposed area on some of the other maps without a general location map and because the executive director uses the general map to review the applicant's notice information. Additionally, the commission requires the applicant to provide the maps listed in the rule to allow for multiple reviews of the CCN application.

Crawford suggested that §291.105(a)(12)(A) be revised to require CCN applicants to provide a list from the county central appraisal district of those owning 25 acres or more in the proposed CCN area and that §291.106(b)(3) be revised to require CCN application notice to those owning 25 acres or more in the proposed CCN area. The changes to TWC, Chapter 13, by HB 2876, contain a potential inconsistency in that they require notice to landowners who own at least 50 acres in the proposed area

and also give landowners who own more than 25 acres an option to get out of a proposed CCN during the application process. However, the bill does not require notice to the landowners that own less than 50 acres within the proposed area. The commission can exercise its authority concerning notice requirements under TWC, §13.246(a), to require notice to the owners of 25 or more acres in the proposed area.

RESPONSE

The commission concurs that it does have the authority to require the mailed notice as suggested by the commenter under TWC, §13.246(a), and has made the change suggested by the commenter.

RM&R commented that §291.105(a)(12)(B) contains the word "and" at the end of subparagraph (B) but that there are no additional subparagraphs included. RM&R requested that this "and" be deleted to prevent confusion.

RESPONSE

The commission agrees with the commenter and has made the change.

TRWA stated that the requirement in §291.105(a)(13) for written agreement between two utilities should be a requirement for dual certification, and not as the proposed rule indicates "if an agreement exists," because TWC, Chapter 13, provides for utility service by monopolies.

RESPONSE

The legislation has not required consent between two certificate holders for dual certification. The legislature has required consent in some instances but has not done so in this instance. No change was made to the rule.

IWSCOT stated that the requirement in §291.105(a)(13) for written agreement between the two utilities for dual certifications is not authorized by the statute.

RESPONSE

In §291.105(a)(13), the commission is not requiring that an agreement exist; rather, the proposed rule requires that if an agreement *already* exists the applicant should provide a copy of the agreement to the commission. (emphasis added.) Under TWC, §5.103, the commission has the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. In order to make a decision on whether to dually certify an area, it would be beneficial for the commission to know whether an agreement exists between the two retail public utilities and if so, what the terms of the agreement are. No change is made to this rule.

IWSCOT commented that the requirement in §291.105(a)(14) for copies of plans and specifications approvals or discharge permits are not authorized by the statute. Additionally, IWSCOT commented that there is not a requirement in TWC, Chapter 13, or Texas Health and Safety Code, Chapter 341, for a CCN applicant to have a set of approved public water system plans or preliminary engineering report

before a certification application is filed. IWSCOT stated that TWC, §13.241(b) requires that a water CCN applicant show the capability of constructing a public drinking water system satisfying Texas Health and Safety Code, Chapter 341, and that the applicant has an "access" to a sufficient water supply. Additionally, IWSCOT commented that in §291.105(a)(15) the commission is imposing by rule requirements on CCN applicants that do not exist in statute. IWSCOT commented that this defeats the purpose of regionalization found in TWC, Chapters 13 and 26. RM&R stated that §291.105(a)(14) requires a copy of commission-approved plans and specifications or preliminary engineering reports for a water CCN. RM&R commented that this is unnecessary and impractical and that there are already adequate safeguards to prevent speculative CCN applications. RM&R commented that this would cause applicants to unnecessarily expend money on having drawings engineered and submitted to the commission with no assurance that the applicant will be allowed to provide service to the proposed service area. Bickerstaff - Cities and Bickerstaff - GBRA commented that §291.105(a)(14) appears to require plans and specifications to be prepared and approved before a retail public utility may obtain a CCN. Bickerstaff - Cities and Bickerstaff - GBRA stated that it is unclear what is meant by this requirement; that this provision would require the applicant to spend money with no assurance that the applicant will be allowed to provide service to the proposed area; and that the section appears to create a conflict with §290.39(j). KHH commented that §291.105(a)(14) requires a water CCN applicant to submit a copy of the plans and specification approval letter except where not required by §291.39(j)(1)(D), however, this section only applies where a public water system is undergoing a significant change and in many cases the applicant may not have had to make significant changes to serve additional areas. This section should be revised to apply only in cases where a TCEQ letter is necessary. Barrett commented that §291.105(a)(14) and (15) should be deleted because HB 2876 does

not mandate these "pre-application" steps. Crawford suggested revising §291.105(a)(14) and (15) by adding "or else identify the wholesale provider" because the sections cover information to be submitted with a CCN application and do not take into account the possibility that the CCN applicant may purchase wholesale water or wastewater treatment capacity to meet its needs. Bickerstaff - Cities and Bickerstaff - GBRA commented that §291.105(a)(15) should be changed to allow an applicant who does not treat its own wastewater to submit a certified copy of a wastewater treatment services contract with a permitted entity. RM&R stated that §291.105(a)(15) requires applicants to provide a copy of a wastewater permit or proof that a wastewater permit application is on file with the commission. RM&R stated that this is unnecessary, impractical, and contrary to the commission's policy on regionalization. RM&R proposed that §291.105(a)(15) be rewritten to include language to allow a certified copy of a wastewater treatment services contract with a permitted entity to be submitted to the commission. KHH commented that §291.105(a)(15) requires a sewer CCN applicant to submit a copy of the TCEQ wastewater permit or proof that a permit application has been submitted, however, a CCN applicant may propose to serve the area with purchased wastewater treatment capacity and not have to have a discharge permit. This section should be revised to apply only to cases where the applicant will serve with its own permitted wastewater treatment plant.

RESPONSE

TWC, §13.241(a), requires the commission to ensure that the CCN applicant has the technical capability to provide continuous and adequate service before the applicant can obtain a CCN. Under TWC, §13.241(b), for a water CCN applicant, the commission must ensure that the applicant is capable of providing drinking water that meets the requirements of Texas Health and

Safety Code, Chapter 341 and the TWC and has access to an adequate supply of water. Additionally, TWC, §13.244(d)(8), specifies that the commission may require that a CCN applicant submit any other item with its application. The information required by §291.105(a)(14) is necessary for the commission to determine whether the applicant meets this requirement. The information requested in §291.105(a)(14) codifies by rule what is currently required to be submitted to the commission in the current CCN application. Under TWC, §13.241(c), for a sewer CCN applicant the commission shall ensure that the applicant is capable of meeting the commission design criteria for sewer treatment plants and the requirements of the TWC. The information required by §291.105(a)(15) is necessary for the commission to determine whether the applicant meets this requirement. The commission has revised §291.105(a)(14) and (15) to allow applicants to submit information that demonstrates that they have complied with these requirements through a wholesale provider.

The COA stated that §291.105(b) provides that as a condition of municipal consent to the granting of a CCN to a retail public utility within the municipality's boundaries or ETJ, the municipality may require that all facilities be designed and constructed to meet the municipality's standards. The COA requested that the commission add a requirement that allows a municipality to require inspection (in addition to design and construction) of the facilities to ensure that the facilities are constructed to municipal standards, with the cost of the inspection paid by the applicant.

RESPONSE

The commission responds that municipalities do not need permission from the agency to require inspections of the facilities to ensure that the facilities are constructed to municipal standards and to require the cost of the inspections to be paid by the applicant. Local Government Code, §51.001, allows municipalities to draft ordinances that are necessary or proper for carrying out a power granted by law to the municipality. The power to protect the health and safety of its citizens in its municipal boundaries and its ETJ is expressly granted in Local Government Code, §42.001. Therefore, no change was made to the rule.

The COA requested that §291.105(b)(3) be amended to provide the criteria as to how the commission would determine if a municipality does not have the ability to provide service or whether the municipality has failed to make a good faith effort to provide service on reasonable terms and conditions. The COA suggested that the criteria would clarify, for example, whether "ability to provide service" refers to current or future ability or both, and what constitutes "reasonable terms and conditions." The COA commented that without such criteria to guide decision-making, inconsistent decisions may result.

RESPONSE

The commission declines to make the suggested change because the commission will make decisions on a case-by-case basis considering all relevant factors as the applications are submitted. In order to ensure consistent decision-making, the commission will work with stakeholders to develop and make available guidance documents on evaluating these matters. No change was made to the rule.

The COA commented that it is unclear whether the term "service facilities" in §291.105(b)(4) refers to the facilities required to be constructed by the developer, the facilities required to be constructed by the municipality, or both. The COA further commented that if the term refers to those facilities the municipality is required to construct, it is unclear what kinds of facilities are required. The COA recommends that the commission include language in the rule to state that the municipality would "provide service and the related facilities necessary to provide service in accordance with its tariff and ordinances."

RESPONSE

Neither the statute nor this rulemaking changes the ability of developers and municipalities to enter into agreements to construct these facilities. The commission responds that "service facilities" can be constructed by either the municipality or the developer. Whether the municipality or the developer is required to construct the facilities, the facilities must be sufficient to provide adequate water and sewer service as provided by §291.93, Adequacy of Water Utility Service, and §291.94, Adequacy of Sewer Service. No change was made to this rule.

ABHR, Ovilla, TAB, Forsythe, Sahs, and one individual commented that they supported §291.105(c)(2) as proposed and TAB encouraged the commission to adopt the rules as written. TRWA expressed the belief that the legislative intent was to void CCNs as of September 1, 2005. Sahs stated that §291.105(c)(2) is supported by the well-established rules of statutory construction and that the legislative history, debates, committee reports, and legislative proceedings also support the commission interpretation and implementation of TWC, §13.2451(b). Sahs stated that HB 2876, §15, specifically

mentions an application for a CCN, an application for a CCN amendment, and a proceeding to amend or revoke a CCN. Sahs commented that under the doctrine of *unius est exclusion alterus*, "the express mention or enumeration of one person, thing, consequence, or class is tantamount to an express exclusion of all others . . .." HB 2876, §15 amounts to an express exclusion of applying the January 1, 2006, effective date to actions taken under TWC, §13.2451(b). Forsythe commented that if CCNs outside a cities' ETJ were voided, cities could be certificated outside their ETJ with landowner consent. Additionally, Forsythe requested that the rules be adopted as proposed. NTDC commented that it supports the proposed rule that would require a municipality to obtain written consent from landowners when seeking to extend its CCN beyond its ETJ. NTDC also commented that it supports the legislative intent of HB 2876 establishing that this written consent is retroactive to September 1, 2005.

RESPONSE

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.

Regarding §291.105(c), CTW commented that TWC, §13.2451(b), clearly truncates any CCN beyond the municipality's ETJ, unless the municipality receives the landowners' consent. The commission should state that any municipality's CCN that extends beyond the municipality's ETJ is void and not require a landowner to file some written request to determine whether the municipality's CCN is valid.

Sahs commented that proposed §291.105(c)(2) seems to interpret the term "void" in TWC, §13.2451(b) as meaning "voidable" since the commission requires a landowner to request that the agency affirm that the CCN is modified to reflect the voided portion of the CCN.

RESPONSE

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.

Sahs commented that under the rules of statutory construction "effect and meaning" should be given to every sentence of the statute. Sahs commented that if the commission interprets the second sentence of TWC, §13.2451(b), as other commenters suggest then the second sentence would be superfluous. Sahs concludes that with the second sentence of TWC, §13.2451(b), the legislature must have meant that existing CCNs are void. BKA commented that reading and construing HB 2876 in its entirety as required by the statutory construction authority, the plain language HB 2876, §15, contradicts an interpretation that CCNs outside of a city's ETJ are immediately void as of September 1, 2005. BKA proposed that the correct interpretation of HB 2876 is one that recognizes that TWC, §13.2451(b), as added by HB 2876 does not apply to existing CCNs. IWSCOT stated that the first sentence of TWC, §13.2541(b) clearly states that the limitation on the city's certification rights applies to the "property in which the certificate is to be extended." IWSCOT commented that this language is in the future tense

and applies only to future CCN grants or amendments. RM&R commented that §291.105(c)(2) is a misapplication of the clear and unambiguous language contained in TWC, §13.2451(b) and HB 2876, §15 and proposed that subsection (c)(2) be rewritten.

RESPONSE

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.

McPherson commented that HB 2876, §15, clearly exempts specific CCNs from TWC, §13.2451 and §291.105(c)(2). McPherson stated that the attempted voiding of CCNs on September 1, 2005, removes landowners from the protections of the decertification process in TWC, §13.250. McPherson offered language for revising §291.105(c)(2). McPherson also commented that §291.105(c)(2) is a material misstatement of TWC, §13.2451, because it conclusively presumes a lack of landowner consent to the extension of the CCN beyond the ETJ of a municipality. McPherson commented that this section must include a mechanism by which a landowner who owns land within a CCN certificated area which extends beyond the ETJ of the municipality may consent to being included in the CCN's certificated area to avoid the "void" status of the applicable CCN. Bickerstaff - Hebron commented that the proposed rules should state that existing customers have, in fact, consented to service and the CCNs for existing customers are not void. LGBRT requested that the commission revise §291.105(c)(2).

RESPONSE

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.

Winstead - Granite Shoals does not support resolving specific instances of cities abusing the use of a CCN through statewide policy; however, should the commission feel compelled to act on these alleged "abuses," Winstead - Granite Shoals expressed the belief that the commission could implement a process for landowners seeking to have a city's CCN voided. A landowner currently in this situation could petition the commission within a specified number of days after the rules take effect. Winstead - Granite Shoals contends that, if the commission takes any action to terminate a city's CCN outside its ETJ without landowner consent, a provision should be added stating that existing customers have presumptively given such consent to city services by virtue of the fact that they have asked for and received service and have most likely contracted with the city to receive service according to standard city policies and application/service contract arrangements. IWSCOT also asked which landowners must give consent; what happens when the city's ETJ is expanded by future annexations or voluntary ETJ additions; and how the commission will deal with CCNs that were statutorily created under the Public Utility Regulatory Act.

RESPONSE

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. However, the commission concurs that existing customers who regularly receive and pay for service have presumptively given consent to the CCN unless the customer expressly objects to service. Therefore, the commission added language to §291.105(c)(2) to clarify this.

RM&R, Mayor Sherwood, Mayor Floyd, Mayor Robinson, Bickerstaff - Cities, Bickerstaff - GBRA, and Bickerstaff - Hebron commented that §291.105(c)(2) should provide for grandfathering and not retroactively voiding existing CCNs and CCN applications filed before January 1, 2006. The commenters expressed the belief that HB 2876 should be read in its entirety and interpret HB 2876, §15 as applying to HB 2876, §5, which voids cities' CCNs outside their ETJ. Bickerstaff - Cities and Bickerstaff - Hebron stated that grandfathering of cities' CCNs outside of their ETJs is supported by the fact that HB 2876 provides alternative mechanisms for landowners opting out of a CCN area. Bickerstaff - Cities, Bickerstaff - GBRA, and Bickerstaff - Hebron commented that the provision in HB 2876 that voids CCNs granted outside a city's ETJ without landowner consent applies only to applications and amendments filed on or after January 1, 2006. Bickerstaff - Cities, Bickerstaff - GBRA, and Bickerstaff - Hebron requested that the commission revise the second sentence of §291.105(c)(2). Bickerstaff - Cities, Bickerstaff - GBRA, and Bickerstaff - Hebron also requested that the third and fourth sentences of §291.105(c)(2) be deleted. Mayor Sherwood, Mayor Floyd, and

Mayor Robinson requested that the commission revise language in §291.105(c)(2). Leander commented that the proposed rules misinterpret and conflict with the plain language of HB 2876, §15 and that the draft rules fail to state that the proposed changes are only effective for applications or proceedings initiated on or after January 1, 2006. Leander recommended that the proposed rules include a provision clarifying that the changes made by the rules are only effective with regard to applications or proceedings initiated on or after January 1, 2006, and also suggested revising §291.105(c)(2). Mayor Erickson, Mayor Garber, and Mayor Green submitted resolutions regarding the CCN rulemaking and asked that the commission adopt rules that comply with the law. Mayor Stevick and YWSC commented that HB 2876 clearly states that the changes to law apply only to applications to receive or amend a CCN after January 1, 2006, that the commission's proposed rule is contrary to the law and legislative intent, and that if the rules are adopted as written, they will result in a confiscation of property. The commenters also stated that the required fiscal note is critically flawed. Mayor Stevick and YWSC requested that the proposed rules be amended to clarify that the changes to implement HB 2876 only apply to applications for a CCN or to amend a CCN filed after January 1, 2006.

RESPONSE

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.

Mayor Sherwood, Mayor Floyd, Mayor Robinson, and Bickerstaff - Hebron commented that if §291.105(c)(2) is implemented as proposed, the cities should be compensated for costs stranded by the voided certificate. The commenters further stated that the proper entity to compensate the cities for its stranded costs is the entity or entities that provide service in the voided CCN service areas because it would be unfair for the cities, their rate payers, and the taxpayers to solely bear the brunt of the commission's application of HB 2876. BKA commented that cities obtain CCNs outside their ETJs for legitimate reasons and that cities invest significant amounts of public funds in all stages of obtaining a CCN. BKA commented that under the proposed rules cities will be forced to expend additional public funds to "reobtain" their CCNs to protect invested public funds. Bickerstaff - Cities commented that if HB 2876 is read retroactively it destroys the investment and customer protection afforded by the CCNs and leaves cities with stranded costs. RM&R commented that the commission should not make a municipality prepare and record revised maps when a property owner requests to be released from a city's CCN. RM&R commented that this requirement is an illegal, unfunded mandate. RM&R suggested that the commission rewrite §291.105(c)(2) to provide that the cost of the revised maps for the municipality's CNN shall be borne by the petitioning landowner.

RESPONSE

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.

RM&R requested that if the commission seeks to void CCN service areas outside a municipality, the rule should provide a formula for compensation to the city for lost service territory and stranded costs incurred by the municipality as a result of the commission voiding a certain portion of the city's ETJ without a hearing and due process of law. IWSCOT commented that HB 2876 is not exempt from the procedural due process requirements afforded all parties in contested case hearings under the Administrative Procedure Act. IWSCOT added that even though a CCN is not a vested property right, the legislature has always made it clear that a CCN may not be revoked or abridged without notice and hearing.

RESPONSE

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.

IWSCOT commented that the commission proposes to adopt a rule that on its face violates the prohibitions of ex post facto laws in the United States and Texas Constitutions and that the commission has no statutory support for this proposal. Bickerstaff - Cities, Bickerstaff - GBRA, and Bickerstaff - Hebron commented that §291.105(c)(2) is an illegal ex post facto law. Winstead - Granite Shoals commented that §291.105(c) should not retroactively void existing CCNs and should interpret TWC, §13.2451, to act prospectively only. Winstead - Granite Shoals stated that Texas Constitution, Article

1, §16 prohibits the enforcement of any law that acts retroactively; therefore, Winstead does not believe that either newly promulgated TWC, §13.2451, and §291.105(c) can revoke a city's permit retroactively without some element of due process. Alternatively, Winstead - Granite Shoals requested that §291.105(c) not take effect until the effective date of the rules.

RESPONSE

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 COA stated that §291.105(d)(1) provides, in part, that except as provided by TWC, §13.255, a municipally owned or operated utility may not provide retail service within another retail public utility's certificated area without obtaining a CCN, including the area to be served. The COA requested that §291.105(d)(1) be revised to include TWC, §13.242 and §13.248, as additional exceptions.

RESPONSE

The commission responds that it would not be appropriate to include TWC, §13.242 in §291.105(d)(1) because TWC, §13.242, does not provide any additional exceptions to the municipality. It is unnecessary to reference TWC, §13.242, in §291.105(d)(1) because to the extent the exception applies it is already incorporated in TWC, §13.255. The remaining exception

in TWC, §13.242, relating to retail water service to 15 or fewer potential connections applies only to "a utility or a water supply corporation" and does not apply to municipalities. TWC, §13.248, does not give a city the right to serve until the agreement is approved by the commission and the commission either transfers or cancels the other entity's CCN. Therefore, the commission declines to make the requested change.

The COA requested further clarification and criteria for decision-making for the term "just and adequate compensation" in §291.105(d)(3). The COA commented that a municipality should only be required to pay as compensation that amount of debt that is associated with the assets of the substandard water or sewer system located within the municipality's boundaries.

RESPONSE

The commission responds that Texas Property Code, Chapter 21 establishes the process to assess damages and set costs. Special commissioners, as defined by Texas Property Code, §21.014, assess damages in a condemnation proceeding. Texas Property Code, §21.041 requires the special commissioners to admit evidence of the value of the property being condemned; the injury to the property owner; the benefit to the property owner's remaining property; and the use of the property for the purpose of condemnation when determining the basis for assessing actual damages to a property owner. Furthermore, Texas Property Code, §21.042, specifies how a tract of land or portion of a tract of land that has been condemned will be valued. The commission declines to include criteria in this rule to establish "just and adequate compensation" since the process for establishing "just and adequate compensation" is set forth in Texas Property Code,

Chapter 21. The commission acknowledges COA's comment that municipalities should only be required to pay as compensation that amount of debt that is associated with the assets of the substandard water or sewer system located within the municipality's boundaries; however, the commission cannot alter the criteria established in Texas Property Code, Chapter 21 for assessing compensation. No change was made to the rule.

The COA and KHH commented that §291.105(d)(3) contains a typo. The COA stated that "Property Code, Chapter 2" should be "Property Code, Chapter 21."

RESPONSE

The commission agrees with these commenters and has made the change in the rule language.

KHH commented that §291.105(d)(3)(A) and (B), which requires a city to notice TCEQ prior to filing an eminent domain lawsuit to acquire a substandard water or sewer system should either be deleted or the rule should specify a time period for the notice to clarify the process. It is also unclear whether the request described in §291.105(d)(3)(B) should be filed as part of the notice in §291.105(d)(3)(A).

RESPONSE

The commission modified §291.105(d)(3)(A) to allow the city up to seven days after it files an eminent domain lawsuit and up to seven days after it acquires the system to notify the commission. The commission modified §291.105(d)(3)(B) to specify that the notification of filing

the lawsuit contain information about whether to cancel or transfer the CCN upon acquisition of the system.

§291.106, Notice for Applications for Certificates of Convenience and Necessity and Requirements for Recording Maps and Descriptions of Areas Covered by Certificates of Convenience and Necessity.

RM&R requested that the commission rewrite §291.106(b)(6) and insert the words "of receipt" after the first instance of the word "date."

RESPONSE

Making the change the commenter suggests would change the time line in this provision. The rules regarding notice are in §1.11. No change was made to the rule.

RM&R commented that the commission should rewrite §291.106(c) and insert the words "next available" after the phrase "once each week for two consecutive weeks beginning with the."

RESPONSE

The executive director has not had a problem with applicants abiding with this requirements. It is agency practice to work with applicants if an applicant has difficulty placing the notice in a newspaper for any reason. No change was made to the rule.

The COA stated that §291.106(f) requires deed recordation of a certified copy of the CCN map and any CCN amendment. The COA commented that the executive director should be allowed an opportunity

to review and approve documents to be recorded before recordation. The COA commented that if the executive director is not allowed to review the documents it is not clear how the executive director will ensure consistency of recorded maps with the TCEQ master maps.

RESPONSE

The commission responds that utility service providers will receive the certified maps referenced in §291.106(f)(1) from the agency. The executive director will review the CCN maps at the time the map is requested by the utility. Since the executive director will review the maps and provide the maps to the utility service provider, the maps that the utility service provider records in the real property records of each county will match the maps on file at the agency. No change has been made to the rule.

IWSCOT stated that HB 2876 does not mandate the filing of existing CCNs and existing TWC, §13.257, is voluntary. IWSCOT asked under what authority the commission requires county clerks to accept and file old CCNs. IWSCOT also suggested that the commission bear the burden of preparing and filing existing CCN maps and suggested a process similar to water rights recordation.

RESPONSE

HB 2876, §14, states that a holder of a CCN on the effective date of HB 2876 must comply with TWC, §13.257, as amended by HB 2876, not later than January 1, 2007. TWC, §13.257(r), requires that certified copies of the maps be filed with each county. Because the maps are

required to be certified, the maps will need to be obtained from the commission. No change was made to the rule.

§291.109, Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction.

KHH commented that proposed §291.109 that purports to define the beginning date for the 120-day period under TWC, §13.301, is beyond the statutory authority of the TCEQ and the TWC itself defines the beginning date.

RESPONSE

The commission agrees that TWC, §13.301, defines when the 120-day period begins. The commission disagrees that the adopted rule is beyond the commission's authority. The rule simply states, consistent with the statute, that the 120-day period begins after the application is filed and any required notice, mailed and/or published, has been provided.

The COA commented that in §291.109(a) the word "latter" should be replaced with "later."

RESPONSE

For clarity, the commission has rewritten the sentence to read: "The 120-day period begins on the last date of whichever of the following events occur:."

IWSCOT stated that in §291.109(a)(3) the tolling of the 120-day review period on sale, transfer, or merger (STM) applications does not start until after notice of the application is published in the

newspaper. IWSCOT further stated that STM applications have never been subject to newspaper notices and that nothing cited in the legislation underlying this rule package justifies the change. IWSCOT commented that there is no justification for delaying an STM review until completion of the newspaper notice and provided language for how to revise §291.109(a)(3).

RESPONSE

The commission agrees that the commission's practice has not been to require newspaper notice of STM applications. However, the requirement under TWC, §13.301(a)(2), that public notice of an STM application be given unless waived by the executive director is broad enough to potentially include newspaper notice. Furthermore, §291.112(c)(2) states that the commission may require an STM applicant to publish notice in a newspaper. However, the commission has modified the rule to clarify that the 120-day period is tolled pending publication of notice in a newspaper only if newspaper notice is required.

§291.113, Revocation or Amendment of Certificate.

Sahs supported the proposed changes to §291.113(a) regarding petitions to revoke or amend certificates.

RESPONSE

The commission acknowledges the commenter's support of the rule.

Winstead suggested adding subsections (d) - (l) to §291.113 to incorporate the requirements of TWC, §13.254. Additionally, Winstead suggested some modifications to the rule language.

RESPONSE

The commission incorporated the changes made to TWC, §13.254 into §291.113. The commission modified the language of the statute for formatting and style changes to make this rule consistent with the remainder of Chapter 291 and in response to comments.

The COA commented that in §291.113(b) the phrase "prior to the petition being filed with the commission" should be added toward the end of the sentence to clarify the timing sequence.

RESPONSE

The commission agrees that the sentence would be more clear with the additional language but has added the language the COA suggested at the beginning of the second sentence in subsection (b).

Crawford commented that for further clarification on maps to be included with requests for service as outlined in §291.113(b)(1)(A), the requirement should be revised to include a map with descriptions according to §291.105(a)(2)(A) - (D) with the written request for service.

RESPONSE

The commission agrees and has made the change.

SPH commented that a CCN holder may indefinitely delay the commission's consideration of the landowner's petition by making repeated and baseless information requests under proposed §291.113(b)(1)(D). SPH suggested that the commission revise §291.113(b)(3) so that a landowner may

file its petition, notwithstanding the fact that the CCN holder has either not responded or requested additional information under §291.113(b)(1)(D). SPH suggested the following language: "(D) has not responded to the landowner's written request for service; or (E) has responded with a request for, or conditioned its response upon receipt and review of additional information pursuant to paragraph (b)(1)(D) of this subsection." Winstead stated that §291.113(b)(1)(D) is ripe for abuse and submitted proposed language for the commission to add a subsection (r) to §291.113.

RESPONSE

The CCN holder must be able to communicate with the petitioner to be able to determine what the petitioner's needs are regarding the level of water or sewer service to the proposed development. The petitioner only needs to submit the information that it can obtain from the CCN holder. If the CCN holder refuses to provide information, the petitioner may still submit the petition and note that it was unable to obtain the information that it needed from the CCN holder regarding the availability and level of service being requested. No change was made to the rule.

Barrett proposed adding two clauses to §291.113(b)(3)(B): "(i) a reasonable time frame if the requested service requires the current CCN holder to construct; new production, treatment, or storage facilities must be at least one year to begin construction and two years for substantial operation; or for transmission or distribution only must be at least nine months to being construction and 15 months for substantial operation; (ii) continuous and adequate means meeting the minimum requirements in the commission's Chapter 290 Rules; or."

RESPONSE

The rule language in §291.113(b)(3)(B) tracks the language in TWC, §13.254. The commission declines to add the language proposed by the commenter to the rule. However, the executive director will consider providing a guidance document developed with stakeholder input in the future to further explain time frames associated with §291.113(b)(3)(B), if necessary. No change was made to the rule.

Barrett also proposes adding ". . . has provided verifiable documentation which is included in the petition that it . . ." to §291.113(b)(4).

RESPONSE

The language in §291.113(b)(4) tracks the language of TWC, §13.254(a-1)(4). No change was made to the rule.

The COA commented that in §291.113(b)(3)(C) the term "properly allocable" should be further defined using the words "roughly proportional" consistent with amendments made by the 79th Legislature to Local Government Code, §212.904, and provide criteria to make consistent decisions regarding these matters.

RESPONSE

The commission notes that Local Government Code, §212.904, as added by HB 1835, uses the word "proportionate" not "proportional." The legislature selected the language for both HB 2876 and HB 1835 during the same legislative session and chose to use the words "properly allocable" in HB 2876 and "roughly proportionate" in HB 1835. Therefore, the commission declines to make the suggested change. The commission will make decisions regarding "properly allocable" on a case-by-case basis. No change was made to the rule.

The COA requested that the information requested by the certificate holder relating to cost and capacity, as stated in §291.113(b)(3)(C), be included in the listing in §291.113(b)(4) as well.

RESPONSE

The commission responds that the language in §291.113(b)(3)(C) and (b)(4) is taken directly from TWC, §13.254(a-1)(3) and (a-1)(4), as amended by the 79th Legislature. The legislature did not include the information requested by the certificate holder relating to cost and capacity in TWC, §13.254(a-1)(4); therefore, the commission will not include this information in §291.113(b)(4). No change was made to the rule.

The COA commented that it is unclear in §291.113(c) whether the hearing identified in this subsection is a SOAH proceeding or a hearing conducted by the commissioners. The COA further commented that §291.113(e) states that Texas Government Code, Chapter 2001 does not apply to any petition filed under subsection (b) but does not make the same reference to subsection (c) hearings.

RESPONSE

The commission responds that the type of hearing referenced in §291.113(c) is a SOAH hearing and, therefore, is subject to Texas Government Code, Chapter 2001. The legislature did not include specific limiting language in TWC, §13.254(a-2), therefore, §55.101(g)(5), which provides for direct referral of contested utility cases to SOAH applies. No change was made to the rule.

SPH commented that the commission should add to §291.113 procedures for determining when a petition is administratively complete to ensure timely processing of the petitions. SPH proposed new language that outlined its suggested procedures.

RESPONSE

The rule language in §291.113(b) tracks the language in TWC, §13.254. The commission declines to add the language proposed by the commenter to the rule. However, the executive director will consider providing a guidance document in the future with stakeholder input to further explain time frames associated with §291.113(b), if necessary. No change was made to the rule.

Crawford suggested revising proposed §291.113(d) by deleting "executive director" as an authorized decision maker. TWC, §13.254(a-4) specifies that these petitions may not be subject to a contested case hearing. Given their nature, they are disputed matters and do not meet the criteria that generally must be met for the executive director to act on an application. This section should be revised to state

that the commission's decision is final after disposition of any motion for rehearing authorized under 30 TAC §50.119. Similarly, RM&R requested that the commission delete references to the executive director in §291.113(d) and (e) because these are related to contested matters. RM&R commented that as a contested matter the commission cannot delegate its function to the executive director.

RESPONSE

The commission disagrees with the commenters because TWC, §5.122, authorizes the commission by rule or order to delegate to the executive director the commission's authority to act on uncontested applications if: 1) required notice of the application has been given; 2) the applicant for the approval agrees in writing to the action agreed to be taken by the executive director; and 3) the application is uncontested and does not require an evidentiary hearing. Element 1 is satisfied if the petitioner delivers notice via certified mail to the certificate holder as required by HB 2876. Element 2 is satisfied if the petitioner for expedited release agrees in writing to the action taken by the executive director. Element 3 is satisfied because under HB 2876, Texas Government Code, Chapter 2001, does not apply to a petition for expedited release and, therefore, the matter is by definition an uncontested matter and does not require an evidentiary hearing. Therefore, the commission may by rule delegate to the executive director its authority to act on a petition for expedited release from a CCN.

The COA requested that in §291.113(d) the rule identify or describe what information will be required to determine the administrative completeness of a petition for expedited release of an area from a CCN. The COA commented that there seems to be no identified opportunity or timeline for a certificate

holder to submit information contrary to the petitioner's claims, nor any express statement that the executive director or the commission may request additional information or clarification from either party and that such provisions should be added.

RESPONSE

The commission responds that it plans to develop a guidance document with stakeholder input and a petition or application form to request the information that will be required to determine the administrative completeness of a petition for expedited release from a CCN. The CCN holder will have notice of the application when the requestor gives written notice to the CCN holder at least 90 days prior to filing the application under §291.113(b). The commission or the executive director must make a decision based on the information provided by the petitioner and the certificate holder; therefore, the certificate holder will have an opportunity to provide that information. An express statement that the executive director or commission may request additional information is not needed because the commission has the general authority under TWC, §13.132, to require water and sewer utilities to report any information that it considers necessary and useful in the administration of TWC, Chapter 13. No change was made to the rule.

IWSCOT commented that §291.113(e) contains a constitutional flaw that denies affected parties the right to appeal the commission's or executive director's decision.

RESPONSE

The language the commenter is concerned about in §291.113(c) tracks the language in TWC, §13.254(a-4). The commission included this language in its rule to implement the changes to the TWC made by HB 2876. No change was made to the rule.

IWSCOT commented that the 90-day deadline is directive and not jurisdictional and the parties may waive it if they all agree to do so. IWSCOT recommended adopting §291.113(f) to read as follows: "The 90-day calendar period in subsection (d) hereof may be waived or extended by written agreement of all affected parties filed with the commission. The executive director may not initiate any waiver or extension of this deadline."

RESPONSE

The parties to an alternative decertification action as provided in TWC, §13.254, may shorten or extend the 90-day deadline if they so choose. However, the TWC, §13.254, does not allow the commission the flexibility to extend or shorten this time line in its rules. No change was made to the rules.

Crawford commented that §291.113(k) concerning compensation for a decertified CCN area under this section follows the statutory language but does not provide any additional guidance. It should specify that any portion of debt that is allocable should be based on information from the lender, the value of service facilities should be based on the depreciated value of those facilities, and finally that expenses should only be allowed when the decertified utility can show those expenses were incurred for identified facilities to serve that particular area and not the system as a whole.

RESPONSE

The language in §291.113 tracks the language in TWC, §13.255(g). The commission declines to make the changes suggested by the commenter because it would make the rule too prescriptive. These issues should be left to the appraisers as required in §291.113(j). No change was made to the rule.

The COA commented that the factors set out in §291.113(k) need clarification and also provided a number of different scenarios asking how some specific factors in §291.113(k) would be applied.

RESPONSE

The commission recognizes that there will be a wide variety of issues involved in these types of cases and, therefore, cannot address all issues without knowing the specific facts of each case. The commission wants to retain flexibility to address each application on its own merits. If necessary, the commission will develop a guidance document with stakeholder input to the extent that specific criteria can be identified. No change was made to the rule.

The COA commented that in §291.113(k) for the factor "necessary and reasonable legal expenses and professional fees" the phrase "of the retail public utility relating to the decertification" should be added to the end of the sentence. The COA also requested that a time period related to legal expenses and professional fees also be defined.

RESPONSE

The commission declines to make the change because the language "necessary and reasonable" appropriately addresses the concerns raised by the COA relating to the types of expenses and the time period. If the expenses are not associated with the decertification then the expenses would not be necessary and reasonable. No change was made to the rule.

The COA requested that an additional factor be added at the end of §291.113(k) concerning the determination of the value of real property of the retail public utility facilities in a case under this section.

RESPONSE

The commission declines to add the additional factor to the list of factors considered when determining the value of personal property. TWC, §13.254(g), as amended by the 79th Legislature in HB 2876, includes the exclusive list of factors that the legislature decided should be considered in determining the value of personal property. The 79th Legislature amended TWC, §13.254(g), and did not add a factor like what the commenter requested be added; therefore, adding a new factor would be going beyond the scope of the legislation. No change was made to the rule.

§291.117, Contracts Valid and Enforceable.

IWSCOT stated that the proposed rule changes in §291.117(a) and (b)(3) seek to tie TWC, §13.248, customer service area agreements, to TWC, §13.301, sale-transfer-merger applications. IWSCOT

commented that this is incorrect because TWC, §13.301, applications are not applicable to all water and sewer utility service purveyors while TWC, §13.248, are; because in TWC, §13.301, a hearing is only required under statutorily limited conditions and in TWC, §13.248, notice and hearing are always required; because TWC, §13.248, agreements are often agreements for dual certification between opposing utilities and some other customer/service sharing arrangement; and, because there is no statutory link. IWSCOT requested that the last line in subsection (a) and subsection (b)(3) be deleted. Similarly, KHH commented that §291.117(b) concerning approval of contracts by TCEQ for transfer of CCN areas contains a list of items to be submitted when a request is submitted to the TCEQ, however, the rule is unclear about whether such a request is to be filed when transferring a CCN area. The proposed rule states that nothing in the rule negates the need to comply with the STM application requirements. It is not clear if the contract approval request is required separate and apart from the regular STM application approval process. Typically, a contract setting forth the terms of the CCN area transfer will be filed as part of the STM application so there is not need for a separate contract approval process. Additionally, RM&R commented that in §291.117(a) the reference to TWC, §13.301, is superfluous and should be removed and that §291.117(b)(3) should be deleted because it marries two separate and incompatible sections of the TWC together.

RESPONSE

The commission is receiving more contract approval requests to transfer CCN areas that lack the appropriate STM application and notice requirements. The amendment to §291.117 clarifies that in some cases a separate STM application is appropriate and TWC, §13.248 does not negate that fact. The commission added the last sentence to subsection (a) to ensure that a retail public utility

is aware that in some cases TWC, §13.301 also applies and the retail public utility is still responsible for completing an STM application. The commission added new subsection (b) to provide information about what retail public utilities are required to submit when requesting approval of contracts under this section.

§291.119, Filing of Maps.

TRWA commented that §291.119 is unclear because it implies that facility maps for public utilities and water supply or sewer service corporations are required to be filed with TCEQ; however, HB 2876 requires these maps to be filed only at the time the CCN application is filed. Additionally, TRWA disagreed with the provision in §291.119 to require all public utilities and water supply corporations to submit maps delineating facilities and suggested that the language should be changed in context of application requirements in §291.105(a). Barrett commented that §291.119 puts an unmanageable burden on larger companies and that HB 2876 does not require this burden.

RESPONSE

The words, "on request by the commission. . . " had been included in §291.119 to allow the commission to request a facilities map from a public utility or water supply or sewer service corporation. However, HB 2876 amended TWC, §13.244, to require that each public utility and water supply or sewer service corporation file maps with the commission showing all its facilities and illustrating separately facilities for production, transmission, and distribution of its services, and to require that each certificated retail public utility file maps with the commission showing any facilities, customers, or area currently being served outside its certificated areas. The

commission amended §291.119 to reflect the change in the statute. The commission agrees that having mapping requirements in different sections makes it unclear when the maps are to be filed. To try and eliminate the uncertainty about what types of maps are due to the commission with a CCN application, the commission has added a cross-reference in §291.105(a) to §291.119. The commission also relettered the remaining paragraphs in §291.105(a) to accommodate the addition of the cross-reference. In a future rulemaking, the commission will repeal §291.119 and move the requirement in §291.119 to §291.105 to consolidate the maps due the commission with a CCN application. The commission cannot repeal §291.119 during the adoption phase of this rulemaking because the commission did not propose to repeal this section.

§291.120, Single Certification in Incorporated or Annexed Areas.

The COA commented that §291.120 is taken verbatim from TWC, §13.255 and that the commission should take this opportunity to provide clarification and consistency where possible within the statutory language. The COA also requested that §291.120(c) be amended to allow the commission to require a municipality to take all of the service area if the remaining portion cannot be provided continuous and adequate service at a reasonable cost after the single certification. The COA further commented that the commission should require the municipality to submit a detailed plan, for the commission's approval, relating to the transition of existing customers to the municipality. Finally, COA recommended that the retail public utility then be required to follow the plan in order to ensure that existing customers are provided continuous and adequate service.

RESPONSE

The commenter's requests go beyond what is provided by the statute. No change was made to the rule.

The COA suggested that §291.3 be amended to include these two terms: "Annexed - annexed for limited purposes" and "Incorporated - incorporated as part of a municipality's original boundaries or annexed for full purpose." The COA commented that §291.120(m) uses the words "incorporated" and "annexed" as if they do not overlap, although they do. The COA stated that an area that is "incorporated" by definition becomes within a municipality's corporate limits and that an area that is full-purpose annexed also becomes within the municipality's corporate limits.

RESPONSE

The commission responds that in HB 2876 the legislature uses the term "annexed" not "full-purpose annexed." The commission cannot infer meaning outside the legislative enactment. Additionally, these terms do not need to be included in the commission's rules because the meanings and the legal effect of the terms are set out in the Local Government Code. No change was made to the rule.

Comments on whether the executive director, upon written request of a landowner within the void portion of a municipality's CCN, should simply affirm that the portion of the CCN is void as proposed in the rules, or should the executive director issue an order modifying the city's CCN to reflect the portion of the CCN that is void.

RM&R commented that the voiding of a city's existing CCN is unnecessary and contrary to law. RM&R commented that when TWC, §13.2451(b), is read with HB 2876, §15, it is clear that the legislature intended TWC, §13.2451(b), to be applied prospectively to municipal CCN applications filed on or after January 1, 2006. RM&R commented that the legislature provided corrections to a municipality's misuse of a CCN. Alternatively, RM&R commented that if the statute is read to void CCNs that extend beyond a municipality's ETC without due process of law then the executive director should be required to issue an order modifying the city's CCN. RM&R commented that this is the only way an updated map will be created. Forsythe expressed the belief that the executive director should issue an order. IWSCOT commented that this issue is one where the executive director is required to make legal findings of fact; therefore, the executive director may only act through an order. LGBRT requested that the commission adopt rules regarding this issue that create a more formalized and orderly process for the redrawing of CCN boundaries that give both landowners and cities the opportunity to provide information on the necessary revisions to CCN boundaries. LGBRT commented that the commission does not have jurisdiction to adjudicate the validity of a city's ETJ boundaries and that neither the commission or the executive director should find that a city's ETJ is invalid, valid, or improperly extended as part of this process. LGBRT stated that municipal ETJs are governed generally by Texas Local Government Code, Chapter 42. GHBA commented that the current rule proposal is consistent with the plain meaning and legislative intent of HB 2876 and that the commission should not deviate from the express terms of HB 2876 or its current rule proposal. ABHR commented that it concurs with the rule proposal and does not propose any changes. LOT endorses the current rule. Winstead expressed the belief that the simple affirmation proposed in the rules is appropriate and is clearly consistent with the statute, provided the executive director's affirmation is required to order the

accordant redrawing of the CCN's map(s) to reflect the change in the CCN boundaries. Winstead also commented that the legislature's clear intent to impose an expedited, definitive process must be heeded, and nothing more than the executive director's affirmation should be required. McPherson commented that the executive director must provide any affected landowner the opportunity to provide consent to that landowner's land being included in the CCN's certificated area so that the CCN is not void for any period of time. McPherson also commented that landowners who want to remove their land from a certificated area should provide notice to the commission in writing and that the writing should be notarized. McPherson commented that it does not seem necessary for the TCEQ to issue a formal order "voiding" the CCN.

RESPONSE

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.

Comments on whether, and in what manner, a proposed district should qualify as an alternate retail public utility for the purpose of a landowner filing a petition for expedited release from a CCN.

LGBRT - Aqua WSC submitted revised text for §291.113(b)(4) that allows the commission to consider a conditional decertification for a proposed district being considered an alternate service provider. LGBRT - Aqua WSC proposed a new §291.113(q) to require the petitioner seeking decertification to pay the required compensation within 90 days of the commission's order or the order is void. LGBRT - Aqua WSC also proposed that the proposed conditional decertification shall be for a period of up to 24 months and the petitioner can seek an extension and the area shall remain in the CCN until the district is created. Box agreed that a proposed district should be considered an alternative service provider when a landowner is seeking decertification from a CCN area. Crawford commented that for the alternate service provider issue, a proposed water district should qualify. Crawford also commented that the landowner is in a "Catch 22" situation if the district cannot be created because of the existence of the CCN but the area cannot be decertified because the district has not yet been created. Crawford suggested that §291.113(b) define alternate service provider to include a district that is proposed to be created pursuant to authority granted by either Texas Constitution, Article 3, §52 or Article 16, §59. Winstead stated that it was the clear and unequivocal expectation of those involved with HB 2876 that a proposed district would qualify as an alternate retail public utility for purposes of expedited decertification. Winstead commented that the commission's rules should expressly recognize that this is the case. Winstead suggested adding a subsection (q) to §291.113 for the purposes of subsection (b)(4) to define an alternate retail public utility as a district proposed to be created under Texas Constitution, Article 16, §59 or Article 3, §52. TRWA commented that it agrees and that it believes that it was the intent of the legislature that a proposed district should be considered, in appropriate circumstances, as an alternative service provider. TRWA stressed that there should be criteria added to the proposed rule to balance the competing interests of the proposed district and the CCN holder. TRWA also contended

that given that a period of time will necessarily lapse between the TCEQ's decision on an expedited decertification in favor of a proposed district and the final decision on the creation of the district by the TCEQ, legislature, or county commissioners court, there should be a time frame included in the rules within which the petitioner must have created a district. ABHR commented that a proposed district should qualify as an alternate retail public utility for the purpose of a landowner filing a petition for expedited release from a CCN. ABHR commented that the use of proposed districts is crucial for most landowners to be able to utilize the expedited decertification process. ABHR proposed that the commission could condition final decertification of a tract upon the final and unappealable creation of the district. LOT expressed the belief that proposed districts should qualify as alternative retail public utilities for purposes of decertification. Aqua Water commented that proposed districts should be considered alternate service providers in the proposed rules. TAB commented that proposed municipal utility districts should be considered alternate service providers for these purposes. NTDC commented that a proposed municipal utility district should qualify as an alternate retail public utility. GHBA commented that a proposed district must qualify as an alternate retail public utility. GHBA commented that a requirement to complete the creation of a new district prior to contesting a CCN would be a significant impediment to orderly growth and development.

RESPONSE

The commission agrees that proposed districts can be an alternate retail public utility. In §291.113(b)(4), the commission has added language to allow a proposed district to be considered an alternate service provider for the purpose of a landowner filing a petition for expedited release from a CCN. The commission may include time lines or schedules to condition an order

decertificating a CCN area, if necessary. A CCN holder's protest of a proposed district on grounds other than the decertification by the proposed district would be a jurisdictional matter if the CCN holder can demonstrate that it is an affected party.

The COA does not support considering a proposed district as an alternate public utility. The COA stated that HB 2876 did not specifically include this type of language in the bill and that this language is outside of the legislative intent of the bill because it raises issues relating to the creation of districts and legal liabilities, responsibilities, and powers of proposed districts. Additionally, the COA commented that by allowing a proposed district to qualify, and because a legal mechanism has not been developed to void the qualification if the proposed district is not created in a timely manner, land within municipalities' jurisdictions could be placed in a legal limbo. Finally, the COA commented that allowing a proposed district to qualify would create an unfair incentive to give additional weight to the decision in favor of approving the district before the district had even gone through the creation process. IWSCOT commented that a proposed district is never an alternative service purveyor because it is not a "retail public utility" as defined by the TWC and Chapter 291 rules. RM&R commented that a proposed district is not an alternate retail public utility and should not be considered by the commission when processing an expedited request for release by a landowner from a CCN. RM&R commented that state law and the commission's rules clearly contemplate that to be a retail public utility the utility must have the present ability to provide service and stated that a proposed district, by definition, cannot provide service. Bickerstaff - Cities and Bickerstaff - GBRA also agreed that proposed districts should not be considered as alternative service providers under §291.113(b).

RESPONSE

The statutory language does not preclude the commission's interpretation. The commission has interpreted the bill to mean that proposed districts can be an alternate retail service provider. Interpreting the provision in the manner proposed by the commenters would severely curtail the applicability of this provision and effectively negate the intent of the legislation. In response to COA's comment that the commission may not adopt rules related to the creation of districts and legal liabilities, responsibilities, and powers of proposed districts, this rule does not curtail or limit the powers of districts; rather, this rule would simply carry out the legislature's intent when it enacted HB 2876. The commission responds to the COA's comment about areas remaining in legal limbo that the proposed districts are conditional. A proposed district status will not unfairly disadvantage the existing CCN holder because the proposed district is still required to comply with all of the requirements for the creation of a district. The definition for retail public utility in TWC, §13.002(19), does not preclude a proposed district from being an alternative service provider. While the definition uses the present tense in describing a retail public utility, interpreting this to mean that it applies only to existing retail public utilities would lead to the result that no retail public utility could be newly certificated unless it is unlawfully providing service.

Comments on whether, and if so, when, a retail public utility that may be compensated pursuant to decertification should be required to notify its lenders that the commission will be determining whether to award compensation for loss of service territory.

USDA RD commented that it supports lender notification in decertification, compensation cases. RM&R commented that notification is necessary when an application for decertification is filed, especially when the lender is the USDA. ABHR makes a distinction between lenders and lienholders and commented that it has no objection to notice to all lenders but expressed the belief that secured lenders, i.e., lienholders, must be notified. ABHR commented that lienholders of a retail public utility must receive notice of a decertification proceeding at the earliest possible point in the process. LOT commented that lenders should have a right to be notified of any proceeding affecting their financial interest as soon as possible in the decertification proceeding. Aqua Water supported adding notice to lenders to the rules. TAB commented that a retail public utility should be required to notify its lenders of such an event, and that the retail public utility should be required to provide this notification as soon as possible. GHBA commented that lienholders of a retail public utility ought to receive notice of a decertification proceeding as soon as possible in the decertification process. Bickerstaff - Cities and Bickerstaff - GBRA commented that it agreed with requiring notification to lenders early in the decertification process. Bickerstaff - Cities and Bickerstaff - GBRA commented that lender notification of amounts necessary to avoid debt impairment can overcome the obstacle of decertification in TWC, §13.255 applications poised by 7 United States Code, §1926(b). LCRA commented that notification of "lenders" is not appropriate for many public utilities that are political subdivisions and have tax-exempt bonds outstanding. LCRA requested that the rule, if adopted, require a retail public utility to notify any holders of liens on the assets for which the retail public utility will receive compensation pursuant to a decertification rather than require the retail public utility to notify its lenders. TRWA supported lender notice to lending institutions including, but not limited to, entities such as state and federal agencies and local banks, but not for lending institutions not recognized by Texas law or not made enforceable by

TCEQ in Texas law. TRWA commented that the lenders that receive notice in these cases should be limited to those entities that hold security interests in the facilities or service areas, and that notice to bond holders should be left to the retail public utility's fiduciary obligations to notify them of "material events."

RESPONSE

The commission agrees with the commenters that lienholders should be provided notice in the event of decertification to allow the lienholders the opportunity to protect their security interests. The commission added language in §291.113(q) and §291.120(b) to require retail public utilities whose CCN area is being decertified to provide notice to the commission and lienholders of any outstanding debt allocable to the CCN areas affected.

Comments on whether a lender of a retail public utility that may be compensated pursuant to decertification should be required to provide the commission information on the amount of money necessary, if any, to avoid impairment of the debt allocable to the area in question.

TRWA stated that lenders should not be compelled to participate in the CCN process. IWSCOT commented that the commission does not have jurisdiction to interfere in the private contractual relationship of a retail public utility and its lender; nor should the commission intrude in this private relationship as a matter of policy. USDA RD does not support requiring lenders to participate in decertification, compensation cases. USDA RD expressed the belief that the TCEQ should ensure that whether or not a lender participates in any CCN compensation process, the lender does not forego any other course of action otherwise authorized under state or federal law to enforce any liens, debt

instruments, and the like. RM&R commented that the lender should provide the requested information. ABHR commented that the commission should recognize a justiciable interest of a lienholder in a decertification proceeding and permit, not require, a lienholder to petition the commission for party status or to simply inform the commission of the amount necessary, if any, to avoid impairment of the debt allocable to the area in question. Additionally, ABHR commented that if a lienholder exercises its right to participate then the commission should ensure that the monetary amount of compensation is sufficient to pay the amount necessary to avoid impairment of the debt. LOT commented that lienholders should be given the option to participate or otherwise provide information to allow the commission to properly consider their interests. GHBA commented that all interested parties ought to have rights to participate in the CCN process and that GHBA supports the proposal, which gives lien holders the option to participate in such proceedings.

RESPONSE

The commission agrees that a lienholder should not be compelled to participate as a party in a CCN decertification case; however, if a lender wants to participate in a case, it may. HB 2876 lists the debt allocable to release the liens as a factor for the commission to consider, however, it does not mandate that the commission ensure that the monetary amount of compensation is sufficient to pay the amount necessary to avoid impairment of the debt. No change was made to the rule.

Comments on whether the rules should provide more specific time lines for the decertification process initiated by landowners or retail public utilities to ensure that compensation is determined within 90 days.

RM&R supported the development of time lines that adopt the elements outlined in TWC, §13.255 for all instances when an appraisal might be required. ABHR and TRWA commented that they would like specific time lines in the proposed rule to provide more certainty, to assist everyone in the process and to make it easier for staff to administer. TRWA recommended that the rules include specific time lines for the three decertification/compensation scenarios in TWC, §13.254(a) and (a-1) and §13.255. ABHR stated that there are three different decertification procedures: standard decertification, provided by the rules; expedited decertification, upon petition of a landowner; and decertification as a result of municipal annexation. To avoid confusion and acknowledge differences in the decertification processes, ABHR suggested that the rules provide for three different compensation procedures. GHBA commented that it strongly supports the "expedited decertification" process provided in HB 2876. LOT expressed the belief that the rules governing the decertification process should be as specific as possible to avoid lengthy procedural debates. GHBA commented that the process of determining compensation ought to be tailored to fit the nuances of this new process and that greater specificity in the process and time lines will serve all parties, including TCEQ staff, by eliminating arguments over procedural issues. IWSCOT commented that a directory time line would be helpful to all affected parties but that the time line should not be absolute because it might limit the parties' ability to resolve matters more efficiently and less expensively through a mutually agreed time line. Bickerstaff - Cities and Bickerstaff - GBRA commented that more specific time lines would allow more certainty in the process and ensure that no one side is able to unnecessarily stall the process. Additionally, Bickerstaff - Cities commented that the

commission should consider developing an appraisal time line that adopts the elements outlined in TWC, §13.255 for all of the instances when an appraisal might be required.

RESPONSE

The commission responds that the executive director will create guidance documents with stakeholder input, including specific time lines, when evaluating the revocation or amendment of a CCN. This information will also be available to the regulated community to use when seeking an amendment or revocation. The executive director will also provide guidance regarding specific time lines in the applications for a revocation or for an amendment. By including the time lines in a guidance document the executive director will retain the flexibility to modify the time lines within the framework of the legislation. No change was made to the rule.

SUBCHAPTER A: GENERAL PROVISIONS

§§291.3, 291.5, 291.7

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendments implement TWC, §§13.002, 13.241, 13.242, 13.244, 13.245, 13.2451, 13.246, 13.247, 13.254, 13.255, 13.2551, 13.257, and 16.341.

§291.3. Definitions of Terms.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Acquisition adjustment**--

(A) The difference between:

(i) the lesser of the purchase price paid by an acquiring utility or the current depreciated replacement cost of the plant, property, and equipment comparable in size, quantity, and quality to that being acquired, excluding customer contributed property; and

(ii) the original cost of the plant, property, and equipment being acquired, excluding customer contributed property, less accumulated depreciation.

(B) A positive acquisition adjustment results when subparagraph (A)(i) of this paragraph is greater than subparagraph (A)(ii) of this paragraph.

(C) A negative acquisition adjustment results when subparagraph (A)(ii) of this paragraph is greater than subparagraph (A)(i) of this paragraph.

(2) **Affected county**--A county to which Local Government Code, Chapter 232, Subchapter B, applies.

(3) **Affected person**--Any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed; any retail public utility affected by

any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

(4) **Affiliated interest or affiliate**--

(A) any person or corporation owning or holding directly or indirectly 5.0% or more of the voting securities of a utility;

(B) any person or corporation in any chain of successive ownership of 5.0% or more of the voting securities of a utility;

(C) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by a utility;

(D) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by any person or corporation that owns or controls directly or indirectly 5.0% or more of the voting securities of any utility or by any person or corporation in any chain of successive ownership of 5.0% of those utility securities;

(E) any person who is an officer or director of a utility or of any corporation in any chain of successive ownership of 5.0% or more of voting securities of a public utility;

(F) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a utility or over which a utility exercises such control or that is under common control with a utility, such control being the possession directly or indirectly of the power to direct or cause the direction of the management and policies of another, whether that power is established through ownership or voting of securities or by any other direct or indirect means; or

(G) any person or corporation that the commission, after notice and hearing, determines is exercising substantial influence over the policies and action of the utility in conjunction with one or more persons or corporations with which they are related by ownership or blood relationship, or by action in concert, that together they are affiliated within the meaning of this section, even though no one of them alone is so affiliated.

(5) **Agency**--Any state board, commission, department, or officer having statewide jurisdiction (other than an agency wholly financed by federal funds, the legislature, the courts, the Workers' Compensation Commission, and institutions for higher education) which makes rules or determines contested cases.

(6) **Allocations**--For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a municipality or for a municipality and unincorporated areas.

(7) **Base rate**--The portion of a consumer's utility bill which is paid for the opportunity of receiving utility service, excluding stand-by fees, which does not vary due to changes in utility service consumption patterns.

(8) **Billing period**--The usage period between meter reading dates for which a bill is issued or in nonmetered situations, the period between bill issuance dates.

(9) **Certificate**--The definition of certificate is that definition given to certificate of convenience and necessity in this subchapter.

(10) **Certificate of Convenience and Necessity**--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 water or sewer utility service to a specified geographic area.

(11) **Certificate of Public Convenience and Necessity**--The definition of certificate of public convenience and necessity is that definition given to certificate of convenience and necessity in this subchapter.

(12) **Class of service or customer class**--A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate.

(13) **Code**--The Texas Water Code.

(14) **Corporation**--Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers and privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in the Texas Water Code.

(15) **Customer**--Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.

(16) **Customer service line or pipe**--The pipe connecting the water meter to the customer's point of consumption or the pipe which conveys sewage from the customer's premises to the service provider's service line.

(17) **Facilities**--All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

(18) **Incident of tenancy**--Water or sewer service, provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

(19) **Landowner**--An owner or owners of a tract of land including multiple owners of a single deeded tract of land.

(20) **License**--The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.

(21) **Licensing**--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission in accordance with its authority under the Texas Water Code.

(22) **Main**--A pipe operated by a utility service provider that is used for transmission or distribution of water or to collect or transport sewage.

(23) **Mandatory water use reduction**--The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures that seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.

(24) **Member**--A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation, or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

(25) **Membership fee**--A fee assessed each water supply or sewer service corporation service applicant that entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed under said bylaws. For purposes of Texas Water Code, §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.

(26) **Municipality**--A city, existing, created, or organized under the general, home rule, or special laws of this state.

(27) **Municipally owned utility**--Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(28) **Person**--Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(29) **Physician**--Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.

(30) **Point of use or point of ultimate use**--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(31) **Potable water**--Water that is used for or intended to be used for human consumption or household use.

(32) **Premises**--A tract of land or real estate including buildings and other appurtenances thereon.

(33) **Public utility**--The definition of public utility is that definition given to water and sewer utility in this subchapter.

(34) **Purchased sewage treatment**--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(35) **Purchased water**--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(36) **Rate**--Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in Texas Water Code, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(37) **Ratepayer**--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(38) **Reconnect fee**--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §291.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(39) **Retail public utility**--Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(40) **Retail water or sewer utility service**--Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(41) **Safe drinking water revolving fund**--The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal program established under the provisions of the Safe Drinking Water Act and as defined in Texas Water Code, §15.602.

(42) **Service**--Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(43) **Service line or pipe**--A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(44) **Sewage**--Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(45) **Standby fee**--A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.

(46) **Tap fee**--A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(47) **Tariff**--The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(48) **Temporary water rate provision**--A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(49) **Test year**--The most recent 12-month period for which representative operating data for a retail public utility are available. A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.

(50) **Utility**--The definition of utility is that definition given to water and sewer utility in this subchapter.

(51) **Water and sewer utility**--Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(52) **Water use restrictions**--Restrictions implemented to reduce the amount of water that may be consumed by customers of the system due to emergency conditions or drought.

(53) **Water supply or sewer service corporation**--Any nonprofit corporation organized and operating under Texas Water Code, Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's by-laws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect.

(54) **Wholesale water or sewer service**--Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

§291.5. Submission of Documents.

All documents to be considered by the executive director under this chapter shall be submitted to the Utilities and Districts Section, Water Supply Division, Mail Code 153, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087. Unless otherwise provided in this chapter, an original and four copies shall be submitted.

§291.7. Filing Fees.

Each application, petition, or complaint that is intended to institute a proceeding before the commission shall be accompanied by the appropriate filing fee as required by Texas Water Code, §5.701 and §13.4521, and costs of mailing notice, if any.

(1) A rate change application filed with the commission under Texas Water Code, §13.187, must be accompanied by the appropriate filing fee as follows:

(A) fewer than 100 connections - $50;

(B) 100 - 200 connections - $100;

(C) 201 - 500 connections - $200; or

(D) more than 500 connections - $500.

(2) An application for a certificate of public convenience and necessity under Texas Water Code, §13.244, must be accompanied by an application fee of $100.

(3) An application for sale, assignment, or lease of a certificate of convenience and necessity under Texas Water Code, §13.251, or notice of intent to sell, assign, lease, or rent a water or sewer system under Texas Water Code, §13.301, must be accompanied by the appropriate fee as follows (one fee will suffice for both applications):

(A) fewer than 100 connections - $50;

(B) 100 - 200 connections - $100;

(C) 201 - 500 connections - $200; or

(D) more than 500 connections - $500.

(4) The fees required in paragraphs (1) - (3) of this section are in lieu of the $100 filing fee required by Texas Water Code, §5.701, which should accompany all other applications and petitions. A filing fee is not required for appeals or complaints filed under Texas Water Code, §13.043(b) or §13.187(e).

SUBCHAPTER G: CERTIFICATES OF CONVENIENCE AND NECESSITY

§§291.101, 291.102, 291.104 - 291.106, 291.109, 291.113, 291.115, 291.117, 291.119, 291.120

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The adopted amendments and new section implement TWC, §§13.002, 13.241, 13.242, 13.244, 13.245, 13.2451, 13.246, 13.247, 13.254, 13.255, 13.2551, 13.257, and 16.341.

§291.101. Certificate Required.

(a) Unless otherwise specified, a utility, a utility operated by an affected county, or a water supply or sewer service corporation may not in any way render retail water or sewer utility service directly or indirectly to the public without first having obtained from the commission a certificate that

the present or future public convenience and necessity requires or will require that installation, operation, or extension. Except as otherwise provided by this subchapter, a retail public utility may not furnish, make available, render, or extend retail water or sewer utility service to any area to which retail water or sewer service is being lawfully furnished by another retail public utility without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

(b) A person that is not a retail public utility or a utility or water supply corporation that is operating under provisions pursuant to the Texas Water Code, §13.242(c) may not construct facilities to provide water or sewer service to more than one service connection not on the property owned by the person and that are within the certificated service area of a retail public utility without first obtaining written consent from the retail public utility.

(c) A district may not provide services within an area for which a retail public utility holds a certificate of convenience and necessity or within the boundaries of another district without the district's consent, unless the district has a valid certificate of convenience and necessity to provide services to that area.

(d) A supplier of wholesale water or sewer service may not require a purchaser to obtain a certificate of public convenience and necessity if the purchaser is not otherwise required by this chapter to obtain the certificate.

§291.102. Criteria for Considering and Granting Certificates or Amendments.

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

(1) For water utility service, the commission shall ensure that the applicant is capable of providing drinking water that meets the requirements of Texas Health and Safety Code, Chapter 341 and commission rules and has access to an adequate supply of water.

(2) For sewer utility service, the commission shall ensure that the applicant is capable of meeting the commission's design criteria for sewer treatment plants, commission rules, and the Texas Water Code.

(b) Where a new certificate of convenience and necessity is being issued for an area which would require construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible. To demonstrate this, the applicant must at a minimum provide:

(1) a list of all public drinking water supply systems or sewer systems within a two-mile radius of the proposed system;

(2) copies of written requests seeking to obtain service from each of the public drinking water supply systems or sewer systems or demonstrate that it is not economically feasible to obtain service from a neighboring public drinking water supply system or sewer system;

(3) copies of written responses from each of the systems from which written requests for service were made or evidence that they failed to respond;

(4) a description of the type of service that a neighboring public drinking water supply system or sewer system is willing to provide and comparison with service the applicant is proposing;

(5) an analysis of all necessary costs for constructing, operating, and maintaining the new system for at least the first five years, including such items as taxes and insurance;

(6) an analysis of all necessary costs for acquiring and continuing to receive service from the neighboring public drinking water supply system or sewer system for at least the first five years.

(c) The commission may approve applications and grant or amend a certificate only after finding that the certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue or amend the certificate as applied for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or

extension thereof, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(d) In considering whether to grant or amend a certificate, the commission shall also consider:

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

(2) the need for additional service in the requested area, including, but not limited to:

(A) whether any landowners, prospective landowners, tenants, or residents have requested service;

(B) economic needs;

(C) environmental needs;

(D) written application or requests for service; or

(E) reports or market studies demonstrating existing or anticipated growth in the area;

(3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area, including, but not limited to, regionalization, compliance, and economic effects;

(4) the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;

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

(6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;

(7) environmental integrity;

(8) the probable improvement in service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and

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

(e) The commission may require an applicant for a certificate or for an amendment to provide a bond or other financial assurance to ensure that continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance will be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(f) Where applicable, in addition to the other factors in this section the commission shall consider the efforts of the applicant to extend service to any economically distressed areas located within the service areas certificated to the applicant. For purposes of this subsection, "economically distressed area" has the meaning assigned in Texas Water Code, §15.001.

(g) For two or more retail public utilities that apply for a certificate of convenience and necessity to provide water or sewer utility service to an uncertificated area located in an economically distressed area as defined in Texas Water Code, §15.001, the executive director shall conduct an assessment of the applicants to determine which applicant is more capable financially, managerially and technically of providing continuous and adequate service. The assessment shall be conducted after the preliminary hearing and only if the parties are unable to resolve the service area dispute. The assessment shall be conducted using a standard form designed by the executive director and will include:

(1) all criteria from subsections (a) - (f) of this section;

(2) source water adequacy;

(3) infrastructure adequacy;

(4) technical knowledge of the applicant;

(5) ownership accountability;

(6) staffing and organization;

(7) revenue sufficiency;

(8) credit worthiness;

(9) fiscal management and controls;

(10) compliance history; and

(11) planning reports or studies by the applicant to serve the proposed area.

(h) Except as provided by subsection (i) of this section, a landowner who owns a tract of land that is at least 25 acres and that is wholly or partially located within the proposed service area may elect

to exclude some or all of the landowner's property from the proposed service area by providing written notice to the commission before the 30th day after the date the landowner receives notice of a new application for a certificate of public convenience and necessity or for an amendment to an existing certificate of public convenience and necessity. The landowner's election is effective without a further hearing or other process by the commission. If a landowner makes an election under this subsection, the application shall be modified so that the electing landowner's property is not included in the proposed service area.

(i) A landowner is not entitled to make an election under subsection (h) of this section but is entitled to contest the inclusion of the landowner's property in the proposed service area at a hearing held by the commission regarding the application if the proposed service area is located within the boundaries or extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or a utility owned by the municipality is the applicant.

§291.104. Applicant.

(a) It is the responsibility of the owner of the utility or the president of the board of directors or designated representative of the water supply or sewer service corporation, affected county, district, or municipality to submit an application for a certificate of convenience and necessity.

(b) The applicant shall have the continuing duty to submit information regarding any material change in the applicant's financial, managerial, or technical status that arises during the application review process.

§291.105. Contents of Certificate of Convenience and Necessity Applications.

(a) Application. To obtain a certificate of public convenience and necessity (CCN) or an amendment to a certificate, a public utility or water supply or sewer service corporation shall submit to the commission an application for a certificate or for an amendment as provided by this section. Applications for CCNs or for an amendment to a certificate must contain an original and three copies of the following materials, unless otherwise specified in the application:

(1) the appropriate application form prescribed by the commission, completed as instructed and properly executed;

(2) a map and description of only the proposed service area by:

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

(B) the Texas State Plane Coordinate System or any standard map projection and corresponding metadata;

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

(D) a copy of the recorded plat of the area, if it exists, with lot and block number; and

(E) maps as described in §291.119 of this title (relating to Filing of Maps) ;

(F) a general location map; and

(G) other maps as requested by the executive director or required by §281.16 of this title (relating to Applications for Certificates of Convenience and Necessity);

(3) a description of any requests for service in the proposed service area;

(4) any evidence as required by the commission to show that the applicant has received the necessary consent, franchise, permit, or license from the proper municipality or other public authority;

(5) an explanation of the applicant's reasons for contending that issuance of a certificate as requested is necessary for the service, accommodation, convenience, or safety of the public;

(6) a capital improvements plan, including a budget and estimated time line for construction of all facilities necessary to provide full service to the entire proposed service area, keyed to maps showing where such facilities will be located to provide service;

(7) a description of the sources of funding for all facilities;

(8) for utilities or water supply or sewer service corporation previously exempted for operations or extensions in progress as of September 1, 1975, a list of all current customer locations which were being served on September 1, 1975, and an accurate location of them on the maps submitted. Current customer locations which were not being served on that date should also be located on the same map in a way which clearly distinguishes the two groups;

(9) disclosure of all affiliated interests as defined by §291.3 of this title (relating to Definitions of Terms);

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

(11) a current financial statement of the applicant;

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

(A) at least 25 acres; and

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

(13) if dual certification is being requested, and an agreement between the affected utilities exists, a copy of the agreement;

(14) for a water CCN for a new or existing system, a copy of:

(A) the approval letter for the commission-approved plans and specifications for the system or proof that the applicant has submitted either a preliminary engineering report or plans and specification for the first phase of the system unless §290.39(j)(1)(D) of this title (relating to General Provisions) applies;

(B) other information that indicates the applicant is in compliance with §291.93 of this title (relating to Adequacy of Water Utility Service) for the system; or

(C) a contract with a wholesale provider that meets the requirements in §291.93 of this title;

(15) for a sewer CCN for a new or existing facility, a copy of:

(A) a wastewater permit or proof that a wastewater permit application for that facility has been filed with the commission;

(B) other information that indicates that the applicant is in compliance with §291.94 of this title (relating to Adequacy of Sewer Service) for the facility; or

(C) a contract with a wholesale provider that meets the requirements in §291.94 of this title; and

(16) any other item required by the commission or executive director.

(b) Application within the municipal boundaries or extraterritorial jurisdiction of certain municipalities.

(1) This subsection applies only to a municipality with a population of 500,000 or more.

(2) Except as provided by paragraph (3) of this subsection, the commission may not grant to a retail public utility a CCN for a service area within the boundaries or extraterritorial jurisdiction of a municipality without the consent of the municipality. The municipality may not unreasonably withhold the consent. As a condition of the consent, a municipality may require that all

water and sewer facilities be designed and constructed in accordance with the municipality's standards for facilities.

(3) If a municipality has not consented under paragraph (2) of this subsection before the 180th day after the date the municipality receives the retail public utility's application, the commission shall grant the CCN without the consent of the municipality if the commission finds that the municipality:

(A) does not have the ability to provide service; or

(B) has failed to make a good faith effort to provide service on reasonable terms and conditions.

(4) A commitment by a city to provide service must, at a minimum, provide that the construction of service facilities will begin within one year and will be substantially completed within two years after the date the retail public utility's application was filed with the municipality.

(5) If the commission makes a decision under paragraph (3) of this subsection regarding the granting of a CCN without the consent of the municipality, the municipality or the retail public utility may appeal the decision to the appropriate state district court.

(c) Extension beyond extraterritorial jurisdiction.

(1) Except as provided by paragraph (2) of this subsection, if a municipality extends its extraterritorial jurisdiction to include an area certificated to a retail public utility, the retail public utility may continue and extend service in its area of public convenience and necessity under the rights granted by its certificate and this chapter.

(2) The commission may not extend a municipality's CCN beyond its extraterritorial jurisdiction without the written consent of the landowner who owns the property in which the certificate is to be extended. For those areas served by a municipality out its extraterritorial jurisdiction before September 1, 2005, pursuant to a CCN, a landowner in such an area who regularly receives and pays for service from the municipality is deemed to have consented to the CCN, unless the landowner specifically objects in writing to such service.

(d) Area within municipality.

(1) If an area is within the boundaries of a municipality, all retail public utilities certified or entitled to certification under this chapter to provide service or operate facilities in that area may continue and extend service in its area of public convenience and necessity within the area under the rights granted by its certificate and this chapter, unless the municipality exercises its power of eminent domain to acquire the property of the retail public utility under this subsection. Except as provided by Texas Water Code, §13.255, a municipally owned or operated utility may not provide retail water and sewer utility service within the area certificated to another retail public utility without first having obtained from the commission a CCN that includes the areas to be served.

(2) This subsection may not be construed as limiting the power of municipalities to incorporate or extend their boundaries by annexation, or as prohibiting any municipality from levying taxes and other special charges for the use of the streets as are authorized by Texas Tax Code, §182.025.

(3) In addition to any other rights provided by law, a municipality with a population of more than 500,000 may exercise the power of eminent domain in the manner provided by Texas Property Code, Chapter 21, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries. The municipality shall pay just and adequate compensation for the property. In this subsection, substandard water or sewer system means a system that is not in compliance with the municipality's standards for water and wastewater service.

(A) A municipality shall notify the commission no later than seven days after filing an eminent domain lawsuit to acquire a substandard water or sewer system and also notify the commission no later than seven days after acquiring the system.

(B) With the notification of filing its eminent domain lawsuit, the municipality, in its sole discretion, shall either request that the commission cancel the CCN of the acquired system or transfer the certificate to the municipality and the commission shall take such requested action upon notification of acquisition of the system.

§291.106. Notice for Applications for Certificates of Convenience and Necessity and Requirements for Recording Maps and Descriptions of Areas Covered by Certificates of Convenience and Necessity.

(a) If an application for issuance or amendment of a certificate of public convenience and necessity (CCN) is filed, the applicant will prepare a notice or notices, as prescribed in the commission's application form, which will include the following:

(1) all information outlined in the Administrative Procedure Act, Texas Government Code, Chapter 2001;

(2) all information stipulated in the commission's instructions for completing an application for a CCN; and

(3) a statement that persons who wish to intervene or comment upon the action sought should contact the Utilities and Districts Section, Water Supply Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, within 30 days of mailing or publication of notice, whichever occurs later.

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will send the notice to the applicant for publication and/or mailing.

(1) For applications for issuance of a new CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within five miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries.

(2) For applications for an amendment of a CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries. If decertification or dual certification is being requested, the applicant shall provide notice by certified mail to the current CCN holder.

(3) Except as otherwise provided by this subsection, in addition to the notice required by subsection (a) of this section, the applicant shall mail notice to each owner of a tract of land that is at least 25 acres and is wholly or partially included in the area proposed to be certified. Notice required under this subsection must be mailed by first class mail to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time the commission received the application for the certificate or amendment. Good faith efforts to comply with the requirements of this subsection shall be considered adequate mailed notice to landowners. Notice under this subsection is not required for a matter filed with the commission under:

(A) Texas Water Code, §13.248 or §13.255; or

(B) Texas Water Code, Chapter 65.

(4) Applicants previously exempted for operations or extensions in progress as of September 1, 1975, must provide individual mailed notice to all current customers. The notice must contain the information required in the application.

(5) Utilities that are required to possess a certificate but that are currently providing service without a certificate must provide individual mailed notice to all current customers. The notice must contain the current rates, the effective date those rates were instituted, and any other information required in the application.

(6) Within 30 days of the date of the notice, the applicant shall submit to the commission an affidavit specifying the persons to whom notice was provided and the date of that notice.

(c) The applicant shall publish the notice in a newspaper having general circulation in the county or counties where a CCN is being requested, once each week for two consecutive weeks beginning with the week after the notice is received from the commission. Proof of publication in the form of a publisher's affidavit shall be submitted to the commission within 30 days of the last publication date. The affidavit shall state with specificity each county in which the newspaper is of general circulation.

(d) The commission may require the applicant to deliver notice to other affected persons or agencies.

(e) In this section, utility service provider means a retail public utility other than a district subject to Texas Water Code, §49.452.

(f) A utility service provider shall:

(1) record in the real property records of each county in which the service area, or a portion of the service area is located, a certified copy of the map of the CCN and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area by:

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

(B) the Texas State Plane Coordinate System;

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

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

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

(g) The recording required by this section must be completed not later than the 31st day after the date a utility service provider receives a final order from the commission granting an application for a new certificate or for an amendment to a certificate that results in a change in the utility service provider's service area.

(h) The recording required by this section for holders of certificates of public convenience and necessity already in existence as of September 1, 2005 must be completed not later than January 1, 2007.

§291.109. Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction.

(a) On or before the 120th day before the effective date of any sale, acquisition, lease, rental, merger, or consolidation of any water or sewer system required by law to possess a certificate of public convenience and necessity, the utility or water supply or sewer service corporation shall file a written application with the commission and give public notice of the action. The notification shall be on the form required by the commission and the comment period will not be less than 30 days. Public notice may be waived by the executive director for good cause shown. The 120-day period begins on the last date of whichever of the following events occur:

(1) the date the applicant files an application under this section;

(2) if mailed notice is required, the last date the applicant mailed the required notices as stated in the applicant's affidavit of notice; or

(3) if newspaper notice is required, the last date of the publication of the notice in the newspaper as stated in the affidavit of publication.

(b) A person purchasing or acquiring the water or sewer system must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

(c) If the person purchasing or acquiring the water or sewer system cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(d) The commission shall, with or without a public hearing, investigate the sale, acquisition, lease, rental, merger or consolidation to determine whether the transaction will serve the public interest.

(e) Prior to the expiration of the 120-day notification period, the executive director shall notify all known parties to the transaction of the decision to either approve the sale administratively or to

request that the commission hold a public hearing to determine if the transaction will serve the public interest. The executive director may request a hearing if:

(1) the application filed with the commission or the public notice was improper;

(2) the person purchasing or acquiring the water or sewer system has not demonstrated adequate financial, managerial, and technical capability for providing continuous and adequate service to the service area being acquired and to any areas currently certificated to that person;

(3) the person or an affiliated interest of the person purchasing or acquiring the water or sewer system has a history of:

(A) noncompliance with the requirements of the commission or the Department of State Health Services; or

(B) continuing mismanagement or misuse of revenues as a utility service provider;

(4) the person purchasing or acquiring the water or sewer system cannot demonstrate the financial ability to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system;

(5) it is in the public interest to investigate the following factors:

(A) whether the seller has failed to comply with a commission order;

(B) the adequacy of service currently provided to the area;

(C) the need for additional service in the requested area;

(D) the effect of approving the transaction on the utility or water supply or sewer service corporation, the person purchasing or acquiring the water or sewer system, and on any retail public utility of the same kind already serving the proximate area;

(E) the ability of the person purchasing or acquiring the water or sewer system to provide adequate service;

(F) the feasibility of obtaining service from an adjacent retail public utility;

(G) the financial stability of the person purchasing or acquiring the water or sewer system, including, if applicable, the adequacy of the debt-equity ratio of the person purchasing or acquiring the water or sewer system if the transaction is approved;

(H) the environmental integrity; and

(I) the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction.

(f) Unless the executive director requests that a public hearing be held, the sale, acquisition, lease, or rental or merger or consolidation may be completed as proposed:

(1) at the end of the 120-day period;

(2) or may be completed at any time after the utility or water supply or sewer service corporation receives notice that a hearing will not be requested.

(g) Within 30 days after the actual effective date of the transaction, the utility or water supply or sewer service corporation must file a signed contract, bill of sale, or other appropriate documents as evidence that the transaction has been made final and documentation that customer deposits have been transferred or refunded to the customer with interest as required by these rules.

(h) If a hearing is requested or if the utility or water supply or sewer service corporation fails to make the application as required or to provide public notice, the sale, acquisition, lease, merger, consolidation, or rental may not be completed unless the commission determines that the proposed transaction serves the public interest.

(i) A sale, acquisition, lease, or rental of any water or sewer system, required by law to possess a certificate of public convenience and necessity that is not completed in accordance with the provisions of the Texas Water Code, §13.301 is void.

(j) The requirements of the Texas Water Code, §13.301 do not apply to:

(1) the purchase of replacement property;

(2) a transaction under the Texas Water Code, §13.255; or

(3) foreclosure on the physical assets of a utility.

(k) If a utility facility or system is sold and the facility or system was partially or wholly constructed with customer contributions in aid of construction derived from specific surcharges approved by the regulatory authority over and above revenues required for normal operating expenses and return, the utility may not sell or transfer any of its assets, its certificate of convenience and necessity or controlling interest in an incorporated utility, unless the utility provides to the purchaser or transferee before the date of the sale or transfer a written disclosure relating to the contributions. The disclosure must contain, at a minimum, the total dollar amount of the contributions and a statement that the contributed property or capital may not be included in invested capital or allowed depreciation expense by the regulatory authority in rate-making proceedings.

(l) A utility or a water supply or sewer service corporation that proposes to sell, assign, lease, or rent its facilities shall notify the other party to the transaction of the requirements of this section before signing an agreement to sell, assign, lease, or rent its facilities.

§291.113. Revocation or Amendment of Certificate.

(a) A certificate or other order of the commission does not become a vested right and the commission at any time after notice and hearing may on its own motion or on receipt of a petition revoke or amend any certificate of public convenience and necessity with the written consent of the certificate holder or if it finds that:

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

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

(3) the certificate 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 certificate; or

(4) the certificate holder has failed to file a cease and desist action under Texas Water Code, §13.252 within 180 days of the date that it became aware that another retail public utility was providing service within its service area, unless the certificate holder demonstrates good cause for its failure to file such action within the 180 days.

(b) As an alternative to decertification under subsection (a) of this section, the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service may petition the commission under this subsection for expedited release of the area from a certificate of public convenience and necessity so that the area may receive service from another retail public utility. Prior to the petition being filed with the commission, the petitioner shall deliver, via certified mail, a copy of the petition to the certificate holder, who may submit information to the commission to controvert information submitted by the petitioner. The petitioner must demonstrate that:

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

(A) the area for which service is sought shown on a map with descriptions according to §291.105(a)(2)(A) - (G) of this title (relating to Contents of Certificate of Convenience and Necessity Applications);

(B) the time frame within which service is needed for current and projected service demands in the area;

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

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

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

(3) the certificate holder:

(A) has refused to provide the service;

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

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

(4) the alternate retail public utility from which the petitioner will be requesting service is capable of providing continuous and adequate service within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area. An alternate retail public utility is limited to:

(A) an existing retail public utility; or

(B) a district proposed to be created under Texas Constitution, Article 16, §59 or Article 3, §52. If an area is decertificated under a petition filed in accordance with subsection (d) of this section in favor of such a proposed district, the commission may order that final decertification is conditioned upon the final and unappealable creation of the district and that prior to final decertification the duty of the certificate holder to provide continuous and adequate service is held in abeyance.

(c) A landowner is not entitled to make the election described in subsection (b) of this section but is entitled to contest the involuntary certification of its property in a hearing held by the commission if the landowner's property is located:

(1) within the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the holder of the certificate; or

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

(d) Within 90 calendar days from the date the commission determines the petition filed under subsection (b) of this section to be administratively complete, the commission or executive director shall grant the petition unless the commission or executive director makes an express finding that the petitioner failed to satisfy the elements required in subsection (b) of this section and supports its finding with separate findings and conclusions for each element based solely on the information provided by the petitioner and the certificate holder. The commission or executive director may grant or deny a petition subject to terms and conditions specifically related to the service request of the petitioner and all relevant information submitted by the petitioner and the certificate holder. In addition, the commission may require an award of compensation as otherwise provided by this section.

(e) Texas Government Code, Chapter 2001, does not apply to any petition filed under subsection (b) of this section. The decision of the commission or executive director on the petition is

final after any reconsideration authorized under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) and may not be appealed.

(f) Upon written request from the certificate holder, the executive director may cancel the certificate of a utility or water supply corporation authorized by rule to operate without a certificate of public convenience and necessity under Texas Water Code, §13.242(c).

(g) If the certificate of any retail public utility is revoked or amended, the commission may require one or more retail public utilities to provide service in the area in question. The order of the commission shall not be effective to transfer property.

(h) A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section without providing compensation for any property that the commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

(i) The determination of the monetary amount of compensation, if any, shall be determined at the time another retail public utility seeks to provide service in the previously decertified area and before service is actually provided but no later than the 90th calendar day after the date on which a retail public utility notifies the commission of its intent to provide service to the decertified area.

(j) The monetary amount shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified retail public utility and the retail public utility seeking to serve the area. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the retail public utility seeking to serve the area.

(1) If the retail public utilities cannot agree on an independent appraiser within ten calendar days after the date on which the retail public utility notifies the commission of its intent to provide service to the decertified area, each retail public utility shall engage its own appraiser at its own expense, and each appraisal shall be submitted to the commission within 60 calendar days after the date on which the retail public utility notified the commission of its intent to provide service to the decertified area.

(2) After receiving the appraisals, the commission or executive director shall appoint a third appraiser who shall make a determination of the compensation within 30 days after the commission receives the appraisals. The determination may not be less than the lower appraisal or more than the higher appraisal. Each retail public utility shall pay one-half of the cost of the third appraisal.

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

property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers ; necessary and reasonable legal expenses and professional fees; and other relevant factors.

(l) As a condition to decertification or single certification under Texas Water Code, §13.254 or §13.255, and on request by a retail public utility that has lost certificated service rights to another retail public utility, the commission may order:

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

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

(m) The commission shall order service to the entire area under subsection (l) of this section if the commission finds that the decertified retail public utility will be unable to provide continuous and adequate service at an affordable cost to the remaining customers.

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

(1) transferring debt and other contract obligations;

(2) transferring real and personal property;

(3) establishing interim service rates for affected customers during specified times; and

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

(o) The retail public utility seeking decertification shall not charge the affected customers any transfer fee or other fee to obtain service other than the retail public utility's usual and customary rates for monthly service or the interim rates set by the commission, if applicable.

(p) The commission shall not order compensation to the decertificated retail public utility if service to the entire service area is ordered under this section.

(q) Within ten calendar days after receipt of notice that a decertification process has been initiated, a retail public utility with outstanding debt secured by one or more liens shall:

(1) submit to the executive director a written list with the names and addresses of the lienholders and the amount of debt; and

(2) notify the lienholders of the decertification process and request that the lienholder provide information to the executive director sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question.

§291.115. Cessation of Operations by a Retail Public Utility.

(a) Any retail public utility which possesses or is required to possess a certificate of convenience and necessity desiring to discontinue, reduce or impair utility service, except under the conditions listed in the Texas Water Code, §13.250(b), must file a petition with the commission which sets out:

(1) the action proposed by the retail public utility;

(2) the proposed effective date of the actions which must be at least 120 days after the petition is filed with the commission;

(3) a concise statement of the reasons for proposing the action; and

(4) the area affected by the action, including maps as described by §291.106(2) and (3) of this title (relating to Notice for Applications for Certificates of Convenience and Necessity).

(b) The retail public utility shall submit a proposed notice to be provided to customers of the utility and other affected parties which will include the following:

(1) the name and business address of the retail public utility which seeks to cease operations;

(2) a description of the service area of the retail public utility involved;

(3) the anticipated effect of the cessation of operations on the rates and services provided to the customers; and

(4) a statement that persons who wish to intervene or comment upon the action sought should contact the designated representative of the executive director at the commission's mailing address within 30 days of mailing or publication of notice, whichever occurs later.

(c) After review by the commission, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within two miles of the petitioner's service area and any city whose extraterritorial jurisdiction overlaps the applicant's service area, and to the customers of the applicant proposing to cease operations.

(d) The applicant may be required by the executive director or the commission to publish notice once each week for two consecutive weeks in a newspaper of general circulation in the county of operation which shall include, in addition to the information specified in subsection (b) of this section:

(1) the sale price of the facilities;

(2) the name and mailing address of the owner of the retail public utility; and

(3) the business telephone of the retail public utility.

(e) The commission may require the applicant to deliver notice to other affected persons or agencies.

(f) If, 30 days after the required mailed or published notice has been issued, whichever occurs later, no hearing is requested, the commission may consider the application for final decision without further hearing.

(g) If a hearing is requested, the application will be processed in accordance with §55.101(g) of this title (relating to Applicability).

(h) In no circumstance may a retail public utility which possesses or is required to possess a certificate of convenience and necessity, a person who possesses facilities used to provide utility

service, or a water utility or water supply corporation with less than 15 connections that is operating without a certificate of convenience and necessity pursuant to §291.103(d) of this title (relating to Certificates Not Required) cease operations without commission authorization.

(i) In determining whether to grant authorization to the retail public utility for discontinuation, reduction, or impairment of utility service, the commission shall consider, but is not limited to, the following factors:

(1) the effect on the customers and landowners;

(2) the costs associated with bringing the system into compliance;

(3) the applicant's diligence in locating alternative sources of service;

(4) the applicant's efforts to sell the system, such as running advertisements, contacting similar adjacent retail public utilities, or discussing cooperative organization with the customers;

(5) the asking price for purchase of the system as it relates to the undepreciated original cost of the system for ratemaking purposes;

(6) the relationship between the applicant and the original developer of the area served;

(7) the availability of alternative sources of service, such as adjacent retail public utilities or groundwater; and

(8) the feasibility of customers and landowners obtaining service from alternative sources, considering the costs to the customer, quality of service available from the alternative source, and length of time before full service can be provided.

(j) If a utility does abandon operation of its facilities without commission authorization, the commission may appoint a temporary manager to take over operations of the facilities to ensure continuous and adequate service.

§291.117. Contracts Valid and Enforceable.

(a) Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the commission after notice and hearing, are valid and enforceable and are incorporated into the certificates of public convenience and necessity. Nothing in this provision negates the requirements of Texas Water Code, §13.301.

(b) Retail public utilities may request approval of contracts by filing a written request with the commission including:

(1) maps of the area to be transferred;

(2) a copy of the executed contract or agreement;

(3) if applicable, an affidavit that notice has been provided under Texas Water Code, §13.301;

(4) the filing fee as prescribed by Texas Water Code, §5.701; and

(5) any other information requested by the executive director.

§291.119. Filing of Maps.

With applications to obtain or amend a certificate of convenience and necessity, each public utility and water supply or sewer service corporation shall file with the commission a map or maps of the area or areas being requested in the application showing all its facilities and illustrating separately facilities for production, transmission, and distribution of its services, and each certificated retail public utility shall file with the commission a map or maps showing any facilities, customers, or area currently being served outside its certificated areas.

§291.120. Single Certification in Incorporated or Annexed Areas.

(a) In the event that an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer

service to all or part of the area under a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility. In this section, the phrase franchised utility means a retail public utility that has been granted a franchise by a municipality to provide water or sewer service inside municipal boundaries. The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on. If a franchised utility is to serve the area, the franchised utility shall also be a party to the agreement. The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.

(b) If an agreement is not executed within 180 days after the municipality, in writing, notifies the retail public utility of its intent to provide service to the incorporated or annexed area, and if the municipality desires and intends to provide retail utility service to the area, the municipality, prior to providing service to the area, shall file an application with the commission to grant single certification to the municipally owned water or sewer utility or to a franchised utility. If an application for single certification is filed, the commission shall fix a time and place for a hearing and give notice of the hearing to the municipality and franchised utility, if any, and notice of the application and hearing to the retail public utility. Within ten calendar days after receipt of notice that a decertification process has been initiated, a retail public utility with outstanding debt secured by one or more liens shall:

(1) submit to the executive director a written list with the names and addresses of the lienholders and the amount of debt; and

(2) notify the lienholders of the decertification process and request that the lienholder provide information to the executive director sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question.

(c) The commission shall grant single certification to the municipality. The commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. If the municipality in its application has requested the transfer of specified property of the retail public utility to the municipality or to a franchised utility, the commission shall also determine in its order the adequate and just compensation to be paid for such property under the provisions of this section, including an award for damages to property remaining in the ownership of the retail public utility after single certification. The order of the commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered under Texas Water Code, §13.255(d) or (e). The grant of single certification by the commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation in accordance with court order, or pays an amount into the registry of the court or to the retail public utility under Texas Water Code, §13.255(f). If the court judgment provides that the retail public utility is not entitled to any compensation, the grant of single certification shall go into effect

when the court judgment becomes final. The municipality or franchised utility must provide to each customer of the retail public utility being acquired an individual written notice within 60 days after the effective date for the transfer specified in the court judgment. The notice must clearly advise the customer of the identity of the new service provider, the reason for the transfer, the rates to be charged by the new service provider, and the effective date of those rates.

(d) In the event the final order of the commission is not appealed within 30 days, the municipality may request the district court of Travis County to enter a judgment consistent with the order of the commission.

(e) Any party that is aggrieved by a final order of the commission under this section may file an appeal with the district court of Travis County within 30 days after the order becomes final.

(f) Transfer of property shall be effective on the date the judgment becomes final. However, after the judgment of the court is entered, the municipality or franchised utility may take possession of condemned property pending appeal if the municipality or franchised utility pays the retail public utility or pays into the registry of the court, subject to withdrawal by the retail public utility, the amount, if any, established in the court's judgment as just and adequate compensation. To provide security in the event an appellate court, or the trial court in a new trial or on remand, awards compensation in excess of the original award, the municipality or franchised utility, as the case may be, shall deposit in the registry of the court an additional sum in the amount of the award, or a surety bond in the same amount issued by a surety company qualified to do business in this state, conditioned to secure the payment of

an award of damages in excess of the original award of the trial court. In the event the municipally owned utility or franchised utility takes possession of property or provides utility service in the singly certificated area pending appeal, and a court in a final judgment in an appeal under this section holds that the grant of single certification was in error, the retail public utility is entitled to seek compensation for any damages sustained by it in accordance with subsection (g) of this section.

(g) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards in Texas Property Code, Chapter 21, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; factors relevant to maintaining the current financial integrity of the retail public utility; and other relevant factors.

(h) The total compensation to be paid to a retail public utility under subsections (g) and (m) of this section must be determined not later than the 90th calendar day after the date on which the commission determines that the municipality's application is administratively complete.

(i) A municipality or a franchised utility may dismiss an application for single certification without prejudice at any time before a judgment becomes final provided the municipality or the franchised public utility has not taken physical possession of property of the retail public utility or made payment for such right under Texas Water Code, §13.255(f).

(j) In the event that a municipality files an application for single certification on behalf of a franchised utility, the municipality shall be joined in such application by such franchised utility, and the franchised utility shall make all payments required in the court's judgment to adequately and justly compensate the retail public utility for any taking or damaging of property and for the transfer of property to such franchised utility.

(k) This section shall apply only in a case where:

(1) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply or sewer service corporation, a special utility district under Texas Water Code, Chapter 65, or a fresh water supply district under Texas Water Code, Chapter 53; or

(2) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a retail public utility, other than a nonprofit water supply or sewer service corporation, and whose service area is located entirely within the boundaries of a municipality with a population of 1.7 million or more according to the most recent federal census.

(l) The following conditions apply when a municipality or franchised utility makes an application to acquire the service area or facilities of a retail public utility described in subsection (k)(2) of this section:

(1) the commission or court must determine that the service provided by the retail public utility is substandard or its rates are unreasonable in view of the reasonable expenses of the utility;

(2) if the municipality abandons its application, the court or the commission is authorized to award to the retail public utility its reasonable expenses related to the proceeding, including attorney fees; and

(3) unless otherwise agreed by the retail public utility, the municipality must take the entire utility property of the retail public utility in a proceeding under this section.

(m) For an area incorporated by a municipality, the compensation provided under subsection (g) of this section shall be determined by a qualified individual or firm to serve as independent

appraiser, which shall be selected by the affected retail public utility, and the costs of the appraiser shall be paid by the municipality. For an area annexed by a municipality, the compensation provided under subsection (g) of this section shall be determined by a qualified individual or firm to which the municipality and the retail public utility agree to serve as independent appraiser. If the retail public utility and the municipality are unable to agree on a single individual or firm to serve as the independent appraiser before the 11th day after the date the retail public utility or municipality notifies the other party of the impasse, the retail public utility and municipality each shall appoint a qualified individual or firm to serve as independent appraiser. On or before the tenth business day after the date of their appointment, the independent appraisers shall meet to reach an agreed determination of the amount of compensation. If the appraisers are unable to agree on a determination before the 16th business day after the date of their first meeting under this subsection, the retail public utility or municipality may petition the commission or a person the commission designates for the purpose to appoint a third qualified independent appraiser to reconcile the appraisals of the two originally appointed appraisers. The determination of the third appraiser may not be less than the lesser or more than the greater of the two original appraisals. The costs of the independent appraisers for an annexed area shall be shared equally by the retail public utility and the municipality. The determination of compensation under this subsection is binding on the commission.

(n) The commission shall deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's minimum requirements for public drinking water systems.