

The Texas Commission on Environmental Quality (commission) proposes 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 proposes new §291.120.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 This bill also added §§13.245, 13.2451, and 13.2551 to the TWC and repealed TWC, §13.254(h) and §13.2541.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 proposes to change 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 proposes to 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 proposes to modify the definition of service; to amend the contents of the CCN application; to amend the notice requirements for CCN transfers by contract under TWC, §13.248; to amend the requirements for utilities that want

to change names; to amend the requirements for an agreement to consent from the affected utility for dual certification; to more specifically explain some of the criteria for granting or amending a CCN; to more specifically explain CCN decertification and cancellation procedures; and to amend the requirements for applicants who owe delinquent fees or penalties. These are requirements that have been identified as causing confusion because of differing interpretations. The changes the commission proposes to these requirements would 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 proposes to update the names of the agency, the division, and the section used in Subchapters A and G. The commission also proposes to update references to the TWC. Finally, the commission proposes to make 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 proposes an amendment to §291.3, Definitions of Terms, which would revise 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 proposes this change to §291.3 to be consistent with TWC, Chapter 13. The proposed 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 proposes to amend 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 proposes to add “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 proposes to add a definition for the word “Landowner.” The proposed definition is an owner or owners of a tract of land including multiple owners of a single deeded tract of land. The commission proposes these changes to §291.3 to implement TWC, §13.002, as amended by the 79th Legislature. The commission proposes to renumber the definitions to accommodate the addition of the definition of “Landowner.” The commission proposes to amend the definition of “Service” to ensure that it is consistent with the definition of service in TWC, §13.002(21).

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

Subchapter G, Certificates of Convenience and Necessity

The commission proposes an amendment to §291.101, Certificate Required, which specifies when a CCN is required. The commission proposes to add a new subsection (d) that would specify 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 proposes this amendment to implement TWC, §13.242, as amended by the 79th Legislature.

The commission proposes an 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 proposes to amend this section by specifying that the criteria the commission considers is for requests for both new and amended CCNs. The commission proposes this amendment to implement TWC, §13.246(b), as amended by the 79th Legislature.

In §291.102(c) the commission proposes to add “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 proposes to add as a consideration whether any landowners, prospective landowners, tenants, or residents have requested service. The commission proposes this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. Also in subsection (d)(2), the commission proposes to define as new subparagraphs (A) - (D) the factors the commission will review when considering the need for additional service in the area. Staff has discussed with stakeholders the factors that the commission considers and has been requested to clarify this

information, therefore, the commission proposes these amendments to provide clarity for applicants and the regulated community regarding the commission's considerations. In subsection (d)(3) the commission proposes to add 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 proposes this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. Also in subsection (d)(3) the commission proposes to specify that when considering the effect of granting a CCN the commissioners will look at the effect on regionalization of the area, the utility's compliance history, and the economic effect on the area. This is information that the commission's staff has discussed with stakeholders and been requested to clarify, therefore, the commission proposes these amendments to provide additional information for applicants and the regulated community regarding the commission's considerations. In subsection (d)(4) the commission proposes to 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 proposes this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. In subsection (d)(6) the commission proposes to add as a consideration the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service. The commission proposes 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 proposes to 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 proposes this amendment to implement TWC, §13.246(c), as amended by the 79th Legislature. The commission proposes to add a new subsection

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

The commission proposes to add a new subsection (h) and a new subsection (i) to §291.102.

Subsection (h) would 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 proposes this amendment to implement TWC, §13.246(h), as amended by the 79th Legislature. Subsection (i) would 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 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 proposes this amendment to implement TWC, §13.246(i), as amended by the 79th Legislature.

The commission proposes an amendment to §291.104, Applicant, to add new language that would require an applicant to submit information regarding any change in the applicant's financial, managerial, or technical status that arises during the application review process. The commission proposes 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 proposes an amendment to §291.105, Contents of Certificate of Convenience and Necessity Applications, which lists the contents required in a CCN. The commission proposes to reformat this section into subsections and create a new subsection (a), which would 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 proposes this amendment to implement TWC, §13.244, as amended by the 79th Legislature. The commission proposes to delete existing paragraphs (2), (3), (6), (7), and (10). The commission proposes to add new paragraphs (2), (3), (6), (7), and (10) - (16). The proposed new requirements include: a map and description of 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; a map and description of the proposed service

area by separate maps showing current and proposed certificated areas for each county in which the retail public utility operates; and a general location map and other maps as requested by the executive director. In §291.105(a)(2)(A), the commission proposes to add the requirement for a map to the description required by TWC, §13.244, because a written description alone is not enough information to accurately locate the proposed service area on the ground. In §291.105(a)(2)(B), the commission proposes to 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 proposes to 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 proposes to add new subsection (a)(2)(E) to require separate maps showing current and proposed certificated areas for each county in which the retail public utility operates. The commission proposes to add 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 proposes to add new 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 proposes to add new 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 50 acres and wholly or partially located within the proposed service area. The commission proposes the revisions to subsection (a) to implement TWC, §13.244, as amended by the 79th Legislature.

The commission proposes to add new §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 proposes 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 proposes to add new subsection (a)(14) and (15) to specify what is required for an entity seeking a water CCN or a sewer CCN. The commission proposes 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 proposes to add new subsection (a)(16) to request any other item required by the commission or executive director.

The commission proposes to add a new subsection (b) to §291.105. This proposed subsection specifies that 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 with a population of 500,000 or more without the consent of the municipality. This subsection also outlines the circumstances under which the commission may grant a CCN. The commission proposes this amendment to implement TWC, §13.245, as amended by the 79th Legislature.

The commission proposes to add a new subsection (c) to §291.105. This proposed new subsection would specify that, except as provided elsewhere in the rule, 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. The commission proposes this amendment to implement TWC, §13.2451, as amended by the 79th Legislature. This subsection would specify that 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. Finally, this subsection provides that the portion of any CCN that extends beyond the extraterritorial jurisdiction of the municipality without the consent of the landowner is void on September 1, 2005. The commission proposes this amendment to implement TWC, §13.2451, as amended by the 79th Legislature. The commission also proposes 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 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. 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 proposes these revisions to identify voided areas, ensure county records remain updated, and give municipalities the opportunity to reinstate the voided areas.

The commission also proposes to add new subsection (c)(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 proposes these amendments 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 proposes to add a new subsection (d) to §291.105. This new subsection would 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). This proposed subsection 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, this subsection specifies that this section may not be construed as limiting the power of municipalities to incorporate or extend their boundaries by annexation. Finally, this subsection 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 proposes this amendment to implement TWC, §13.247, as amended by the 79th Legislature.

The commission proposes an amendment to §291.106, Notice for Applications for Certificates of Convenience and Necessity, which outlines the requirements for notice related to applications for CNNs, 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 proposes to amend 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 proposes 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 proposes a new subsection (b)(3) to §291.106, which would require the applicant to mail notice to each owner of a tract of land that is at least 50 acres and is wholly or partially included in the area proposed to be certified. The commission proposes this amendment to implement TWC, §13.246(a)(1), as amended by the 79th Legislature. The commission also proposes to renumber the paragraphs in subsection (b) to accommodate proposed new paragraph (3). The commission proposes to add subsection (e) to §291.106, which would define utility service provider as a retail public utility other than a district subject to TWC, §49.452. The commission proposes this amendment to implement TWC, §13.257(a), as amended by the 79th Legislature.

The commission proposes to add subsection (f) to §291.106, which would 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 and to send evidence to the executive director that it has been recorded. This subsection 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 proposes this amendment to implement TWC, §13.257(r), as amended by the 79th Legislature.

The commission proposes to add subsection (g) to §291.106, which would 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 proposes this amendment to implement TWC, §13.257.

The commission proposes to add subsection (h) to §291.106, which would 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 proposes an 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 proposes to add language to subsection (a) that would specify when the 120-day period begins. Staff has received questions regarding when the 120-day period begins, therefore, to eliminate confusion regarding this date, the commission proposes this change.

The commission proposes an 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 proposes to amend 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 proposes this amendment to implement TWC, §13.254(a), as amended by the 79th Legislature. In subsection (a)(1), the commission proposes to add the language “is incapable of providing service,” as a condition that may lead to revocation or amendment of a CCN. The commission proposes this amendment to implement TWC, §13.254(a)(1), as amended by the 79th Legislature.

The commission also proposes new subsection (b) to §291.113, which would 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 CNN so that the area may receive service from another retail public utility. This subsection also lists the items that the petitioner must demonstrate to the commission. The commission proposes this amendment to implement TWC, §13.254(a)(1), as amended by the 79th Legislature.

In §291.113(b)(1)(A), the commission proposes to add to the requirement that the area for which service is sought be shown on a map with descriptions according to §290.105(a)(2). The commission proposes this amendment to ensure that exclusions from CCNs are held to the same mapping

requirements as a new CCN or CCN amendment. This will help the commission ensure the accuracy of the CCN data.

The commission proposes in §291.113 new subsection (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 proposes new 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 new subsection (e) to specify that Texas Government Code, Chapter 2001 does not apply to any petition filed under subsection (b). The commission proposes these revisions to implement TWC, §13.254(a-2) - (a-4), as amended by the 79th Legislature. The commission also proposes to add 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 proposes to 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 proposes to add 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 proposes 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 shall 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 proposes to add new 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 proposes to 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 proposes to 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 proposes to delete the words "at a minimum." Additionally, the commission proposes to 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 proposes to add 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 proposes to modify the factor "the impact

on future revenues” by adding “lost from existing customers.” The commission proposes this amendment to implement TWC, §13.254(g), as amended by the 79th Legislature.

The commission also proposes to delete existing subsections (h) - (m) and to add new subsections (l) - (p) in §291.113. Proposed new subsection (l) would allow the commission to order a retail public utility that has lost certificated service rights to another 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 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 proposes this amendment to implement TWC, §13.2551(a), as amended by the 79th Legislature.

Proposed new subsection (m) would 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 proposes this amendment to implement TWC, §13.2551(b), as amended by the 79th Legislature.

Proposed new subsection (n) would 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 proposed subsection also lists what the terms may include. The commission proposes this amendment to implement TWC, §13.2551(c), as amended by the 79th Legislature.

Proposed new subsection (o) would 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 proposes this amendment to implement TWC, §13.2551(d), as amended by the 79th Legislature.

Proposed new 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 proposes 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 proposes an 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 proposes to add as a factor the effect on landowners. In subsection (i)(8), the commission proposes to add as a factor the feasibility of landowners obtaining services from alternate sources. The commission proposes these changes to ensure that landowners, as defined in §291.3, are considered when the commission is making its decision.

The commission proposes an 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 proposes to add language to subsection (a) providing that this provision does not negate the requirements of TWC, §13.301. The commission also proposes to add a new 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 proposes these revisions to avoid delays in processing by clarifying what is needed for processing.

The commission proposes an amendment to §291.119, Filing of Maps, which requires that at the request of the commission each utility and water supply or sewer service corporation shall file with the commission a map or maps showing all its facilities and illustrating separately facilities for production, transmission, and distribution of its services, and that 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. The commission proposes to amend this section to require each public utility and water supply or sewer service corporation to file this information without being requested to do so by the commission. The commission proposes this amendment to implement TWC, §13.244(b), as amended by the 79th Legislature.

The commission proposes new §291.120, Single Certification in Incorporated or Annexed Areas, which would 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 proposed to implement TWC, §13.255.

In addition to public comment on the proposed rules, the commission expressly requests public comment on the following issues: 1) 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 which is void; 2) 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; 3) 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; 4) 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; and 5) 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, minor fiscal implications are anticipated for the agency and other units of state government. Fiscal implications are also anticipated for local governments, water supply corporations, and investor-owned utilities as a result of administration or enforcement of the proposed rules. The proposed rulemaking would amend certain sections of this chapter concerning CCNs.

The proposed rules would implement provisions of HB 2876 and SB 425, in addition to clarifying existing rule language. HB 2876 requires the revision of the criteria for obtaining, amending, transferring, and decertifying CCNs for water and sewer service as well as requiring CCN holders to file a copy of their service area maps in county deed records. SB 425 changes the definition of affected county in TWC, §16.341, by adding “that is located in whole or part within 100 miles of an international border and contains the majority of the area of a municipality with a population of more than 250,000.” Other changes under the proposed rules will clarify CCN definitions, requirements, and procedures and give regulated entities more guidance regarding CCN actions.

Impact on Agency Revenue

The proposed rules would increase agency revenue in the Water Resource Management Account by charging a \$100 fee to approve contracts between retail public utilities and customers, under TWC, §13.248. Staff estimates that it will receive ten to 20 of these contracts per year, and revenue may increase by \$1,000 to \$2,000 annually.

Impact on Local Governments

Implementation of the requirements of HB 2876 will increase application costs for some local governments. Costs are expected to increase for mailing notices, obtaining consent from landowners, exercising rights of eminent domain, and putting survey data into an acceptable GIS format. These increases could range from \$1,000 to \$10,000 depending on the applicant and the type of application submitted. Application costs under the current rules range from \$1,000 to \$20,000 per application. Local governments hold approximately 720 water CCNs and 555 sewer CCNs. Staff expects to receive 10 to 20 CCN applications per month from all CCN holders, which include local governments, water supply corporations, and investor-owned utilities. It is estimated that approximately 42% of CCN applications will be filed by local governments. Local governments that hold CCNs will see increased costs when applying to obtain, amend, transfer, or decertify CCNs as well as having land excluded from CCN areas. Statewide, total CCN application costs for local governments could increase as much as \$50,000 to \$1 million per year.

When decertifying a CCN or excluding land from a CCN area, local governments may have additional compensation costs to pay landowners or utilities. These costs are expected to vary widely and be determined on a case-by-case basis. If a CCN case is contested, there may be additional hearing costs including attorney and consultant fees. These also are expected to vary widely on a case-by-case basis. Costs for copying and filing maps in county deed records will also vary across the state.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more clear, concise requirements pertaining to CCNs, resulting in higher rates of compliance with agency rules.

Nonprofit water supply corporations and investor-owned utilities hold approximately 1,418 water CCNs and 195 sewer CCNs. These entities will see the same \$1,000 to \$10,000 increase in application costs as those experienced by local governments. It is estimated that 18% of CCN applications are filed by water supply corporations and 5% are filed by large investor-owned utilities. Total CCN application costs statewide for these entities could increase as much as \$28,000 to \$552,000 per year.

Water supply corporations and investor-owned utilities may incur additional compensation costs to pay landowners or other utilities if their land is excluded from a CCN or if a CCN is decertified. These costs are expected to vary widely and be determined on a case-by-case basis. If a CCN case is contested, there may be additional hearing costs including attorney and consultant fees, which will also vary on a case-to-case basis. Costs for copying and filing maps in county deed records will also vary across the state.

Some landowners that have their land excluded from a utility's CCN area may experience cost savings if they can obtain less expensive water or sewer service from another entity. The amount of savings will vary depending on the circumstances involved.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications may be anticipated for small or micro-businesses. A small business is defined as having fewer than 100 employees or less than \$1 million in annual gross receipts. A micro-business is defined as having no more than 20 employees. It is estimated that 35% of the CCN applications filed each year will be filed by small investor-owned utilities. It is not known how many investor-owned utilities could be classified as micro-businesses. CCN application costs are expected to increase by \$1,000 to \$10,000 per application and approximately ten to 12 CCN applications per month are expected to be filed. Statewide these costs could be as much as \$42,000 to \$840,000 per year. The annual cost per employee for a small investor-owned utility to file a CCN application is estimated to increase as much as \$420 to \$8,400.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed 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 proposed rulemaking is to implement portions of SB 425 of the 79th Legislature, which changes the definition of affected county. Generally, these proposed 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 proposed rules are not intended to have any impact on environmental regulation. Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed 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 proposed rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The primary purpose of the proposed rulemaking is to make changes to rules governing CCNs for water and sewer service. A secondary intent of the proposed rulemaking is to change the definition of affected county to be consistent with the TWC. The proposed rules would 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 proposed rules would 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 proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed 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 proposed 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 Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 25, 2005, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building C, Room 131E. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

All comments should reference Rule Project Number 2005-036-291-PR. Comments must be received

by 5:00 p.m., October 31, 2005. The proposed rules may be viewed on the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Michelle Abrams, Utilities and Districts Section, at (512) 239-6014.

SUBCHAPTER A: GENERAL PROVISIONS

§§291.3, 291.5, 291.7

STATUTORY AUTHORITY

The amendments are proposed 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 proposed 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, [shall] 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. [any part of which is within 50 miles of an international border.]

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

(21) [(20)] **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 [pursuant to] its authority under the Texas Water Code.

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

(23) [(22)] **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 [which] 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) [(23)] **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) [(24)] **Membership fee** -- A fee assessed each water supply or sewer service corporation service applicant that [which] 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 [pursuant to] 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) [(25)] **Municipality** -- A city, existing, created, or organized under the general, home rule, or special laws of this state.

(27) [(26)] **Municipally owned** [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) [(27)] **Person** -- Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(29) [(28)] **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) [(29)] **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) [(30)] **Potable water** -- Water that is used for or intended to be used for human consumption or household use.

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

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

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

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

(36) [(35)] **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 [the] 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) [(36)] **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) [(37)] **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) [(38)] **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) [(39)] **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) [(40)] **Safe drinking water revolving fund** -- The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal [Federal] program established under [pursuant to] the provisions of the Safe Drinking Water Act and as defined in Texas Water Code, §15.602.

(42) [(41)] **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) [(42)] **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) [(43)] **Sewage** -- Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

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

(46) [(45)] **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) [(46)] **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) [(47)] **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) [(48)] **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) [(49)] **Utility** -- The definition of utility is that definition given to water and sewer utility in this subchapter.

(51) [(50)] **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) [(51)] **Water use restrictions** -- Restrictions implemented to reduce the amount of water that [which] may be consumed by customers of the system due to emergency conditions or drought.

(53) [(52)] **Water supply or sewer service corporation** -- Any nonprofit[,] corporation organized and operating under [the] 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 [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) [(53)] **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 [Utility Rates and Services Section, Water Utilities Division], Mail Code 153, Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], 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 [which] is intended to institute a proceeding before the commission shall be accompanied by the appropriate filing fee as required by [the] Texas Water Code, §5.701 [§5.235] and §13.4521, and costs of mailing notice, if any.

(1) A rate change application filed with the commission under [the] 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 [the] 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 [the] Texas Water Code, §13.251, or notice of intent to sell, assign, lease, or rent a

water or sewer system under [the] 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 [the] Texas Water Code, §5.701 [§5.235], which should accompany all other applications and petitions. A filing fee is not required for appeals or complaints filed under [the] Texas Water Code, §13.043(b) or §13.187(e) [§13.187(b)].

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 proposed 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 proposed 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 [new] 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 whether any landowners, prospective landowners, tenants, or residents have requested service, which may include:

(A) economic needs;

(B) environmental needs;

(C) written application or requests for service; or

(D) reports or market studies demonstrating 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 history, or 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; [and]

(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 [utility] 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 [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 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 [certificates of convenience and necessity] or for an amendment to a certificate must [shall] 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 the proposed service area by: [a State Highway County Map, or equivalent, which clearly defines the proposed service area of the applicant. Service boundaries shall conform to verifiable landmarks such as roads, creeks, and railroads. Separate maps shall be filed for each county in which the retail public utility operates;]

(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) separate maps showing current and proposed certificated areas for each county in which the retail public utility operates;

(F) a general location map; and

(G) other maps as requested by the executive director;

(3) a description of any requests for service in the proposed service area; [other more detailed maps as may be specified in the application form;]

(4) [an original and three copies of] 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; [a schedule for the ultimate construction of all proposed facilities, keyed to maps showing where such facilities will be located to provide service;]

(7) a description of the sources of funding for all facilities; [source of funding for 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 Definition of Terms); or

(10) to the extent known, a description of current and projected land uses, including densities; [any other information that the executive director may reasonably require]

(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 50 acres; and

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

(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, a copy of the approval letter for the commission-approved plans and specifications or commission-approved preliminary engineering reports unless §290.39(j)(1)(D) of this title (relating to General Provisions) applies;

(15) for a sewer CCN, a wastewater permit or proof that a wastewater permit application has been filed with the commission; 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 described by paragraph (3)(B) of this subsection must 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. The portion of any CCN that extends beyond the extraterritorial jurisdiction of the municipality without the consent of the landowner is void on September 1, 2005. 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. A municipality that holds a CCN, a portion of which is void under this subsection, 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.

(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 2, 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 prior to filing an eminent domain lawsuit to acquire a substandard water or sewer system.

(B) 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 the commission shall take such requested action.

§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 [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 [Instructions for Completing an Application for a Certificate of Convenience and Necessity]; and

(3) a statement that persons who wish to intervene or comment upon the action sought should contact the Utilities and Districts [Utility Rates and Services] Section, Water Supply [Utilities] Division, Texas Commission on Environmental Quality [Natural Resource Conservation Commission], 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 [certificate of public convenience and necessity], 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 [extra-territorial] jurisdiction that [which] overlaps the proposed service area boundaries.

(2) For applications for an amendment of a CCN [certificate of public convenience and necessity], 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 [extra-territorial] jurisdiction that [which] 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 50 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) [(3)] 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) [(4)] 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) [(5)] 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 [certificate of convenience and necessity] 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 latter of:

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

(2) unless notice has been waived by the executive director, the last date the applicant mailed the required notices as stated in the applicant's affidavit of notice; or

(3) unless notice has been waived by the executive director, 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 [Texas Department of Health]; 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 [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 [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 [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 [The] certificate holder has failed to file a cease and desist action under [pursuant to] Texas Water Code [(TWC)], §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. 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) 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.

(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 or executive director 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) [(b)] 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 [TWC], §13.242(c).

(g) [(c)] 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) [(d)] 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) [(e)] 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) [(f)] 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) [(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 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 [for the taking, damaging, or loss of personal property, including the retail public utility's business,] is just and adequate shall [at a minimum] include: the amount of the retail public utility's debt allocable for service to the area in question [the 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 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 [and expenses of the retail public utility]; 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.

(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.

[h) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time. If there were no current customers in the area decertified and no immediate loss of revenues or if there are other valid reasons determined by the commission, installment payments as new customers are added in the decertified area may be an acceptable method of payment.]

[i) On the request of a municipality with a population of more than 1.3 million served by a public utility, the commission at any time after notice and hearing may revoke the public utility's CCN if it finds that the public utility:]

[(1) has never provided, is no longer providing, or has failed to provide continuous and adequate service as defined in §291.93 of this title (relating to Adequacy of Water Service) or §291.94 of this title (relating to Adequacy of Sewer Service) in the municipality requesting the revocation; or]

[(2) has been grossly or continuously mismanaged or has grossly or continuously not complied with applicable statutes, commission rules, or commission orders.]

[(j) If the certificate is revoked under subsection (i) of this section, the municipality that requested the revocation shall operate the decertified public utility for an interim period necessary for the municipality to gain commission approval to acquire the decertified public utility's facilities and to transfer the decertified public utility's CCN. The municipality must apply in accordance with commission rules.]

[(k) The monetary amount to be paid for the facilities of a public utility decertified under subsection (i) of this section shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified public utility and the municipality. 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 municipality.]

[(l) For the purpose of implementing subsection (k) of this section, the value of real property shall be determined according to the standards set forth in Texas Property Code, Chapter 21, governing actions in eminent domain.]

[(m) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time.]

§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) [Chapter 263] of this title (relating to Applicability [Final Approval By Executive Director, Evaluation of Request for Contested Case Hearing]).

(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.

Each public [On request by the commission, each] utility and water supply or sewer service corporation shall file with the commission a map or maps 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.

(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.