

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §291.3 and §291.144; and adopts new §291.147.

Sections 291.144 and 291.147 are adopted *with changes* to the text and will be republished. Section 291.3 is adopted *without changes* to the proposed text as published in the August 22, 2008, issue of the Texas Register (33 TexReg 6736) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2007, the 80th Legislature passed House Bill (HB) 149, relating to water utilities. HB 149 amended Texas Water Code (TWC), Chapter 13, Subchapter C, by adding §13.046, which requires the commission by rule to provide a streamlined process to allow the retail public utility that takes over the nonfunctioning retail water or sewer utility to apply for a ruling on the reasonableness of the newly implemented rates. The bill further requires the commission to establish, in consultation with the utility, a reasonable amount of time for the retail public utility to bring the water or wastewater system into compliance, and prohibits the commission from imposing a penalty during this period for any violation that existed at the time the nonfunctioning system was taken over.

On January 16, 2008, the commission approved for proposal a set of rules (Rule Project 2007-048-291-PR) that contained amendments to implement HB 149. This rule proposal was published in the February 1, 2008 issue of the *Texas Register* (33 TexReg 871). During the comment period for the proposed rule, the commission received comments that caused it to reconsider the way it was implementing HB 149 and the commission withdrew the sections of the proposed rule related to HB 149 from that rulemaking.

The rules adopted in the *Texas Register* today are the commission's implementation of HB 149.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§291.3, Definitions of Terms

The commission adopts a definition for "nonfunctioning system" in §291.3(28). The commission adopts the following definition: A retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §291.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §291.143 of this title (relating to Operation of a Utility by a Temporary Manager). This adopted definition increases the number of systems that qualify as nonfunctioning. By being classified as a nonfunctioning system, a system can qualify to have a temporary manager or receiver appointed. The individual appointed will have the necessary expertise to help the nonfunctioning system move toward compliance. The commission adopts this change to provide guidance in implementing TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. The subsequent definitions were relettered to accommodate this new definition.

Subchapter J: Enforcement, Supervision, and Receivership

§291.144, Fines and Penalties

The commission adopts §291.144(b) which would mandate that the commission not impose a penalty on the retail public utility taking over the nonfunctioning system for a period to be determined in cooperation with the retail public utility, which includes municipalities, districts, river authorities, and other local governments to ensure that the commission did not impose a penalty on an entity taking over a

nonfunctioning utility. The commission adopts this change to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. With the addition of adopted subsection (b), the implied subsection (a) becomes subsection (a). The commission also deletes the catchline in the implied subsection (a). The commission also correctly references "Water Code" as "Texas Water Code."

§291.147, Temporary Rates for Services Provided for a Nonfunctioning System

The commission adopts new §291.147 which would establish a procedure for a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that acquires a nonfunctioning system to charge a temporary rate to recover the reasonable costs incurred for interconnection or other costs incurred in making services available and any other reasonable costs incurred to bring the nonfunctioning system into compliance. The commission adopts this new section to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules 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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to implement provisions enacted in HB 149 of the 80th

Legislature. Generally, these rules are intended to impact only the economic regulation of water and sewer providers. More specifically, the provisions provide a streamlined process to allow a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that takes over a nonfunctioning retail water or sewer system to implement temporary rates and to apply for a ruling on the reasonableness of the newly implemented rates. It also allows the commission to establish a reasonable amount of time for the retail public utility that takes over a nonfunctioning system to bring the water or wastewater system into compliance. Furthermore, it prohibits the commission from imposing a penalty during this period for any violation that existed at the time the nonfunctioning system was taken over. The adopted rules are not intended to have any impact on environmental regulations. Furthermore, this rulemaking does not qualify as a major environmental rule because it will not have an adverse economic effect. Based on the foregoing, the adopted rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

This rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of

these four applicability requirements because the adopted rules: (1) are specifically required by state law, namely the TWC, and do not exceed a standard set by federal law; (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; and (4) the adopted rules will not be adopted solely under the general powers of the commission.

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

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted amendments to Chapter 291 and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The intent of the adopted rules is to implement amendments enacted in HB 149 of the 80th Legislature.

The adopted rules would substantially advance the intent of the rulemaking by creating a streamlined process to allow a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that takes over a nonfunctioning water or sewer system to implement temporary rates and to apply for a ruling on the reasonableness of the newly

implemented rates. It also allows the commission to establish a reasonable amount of time for the retail public utility that takes over a nonfunctioning system to bring the water or wastewater system into compliance, during which the commission will not impose a penalty for any violation that existed at the time the nonfunctioning system was taken over.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted 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. More specifically, these rules implement retail water and sewer utility rate regulations, and other related regulations of retail water and sewer service providers, none of which imposes any burdens or restrictions on private real property. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The proposal was published in the August 22, 2008 *Texas Register* (33 TexReg 6736). The commission held a public hearing for this rule on September 18, 2008, in Austin, Texas. Due to potential impacts from Hurricane Ike, the public comment period for this rulemaking was extended by two weeks and closed on October 6, 2008.

The commission received written comments from Thompson & Knight, LLP, on behalf of American States Utility Services, Inc. (American States) and Bickerstaff Heath Delgado Acosta, LLP, on behalf of the City of Houston (Houston).

American States supported the rule. Houston suggested changes to the proposed rule as described in the RESPONSE TO COMMENTS section of the preamble.

RESPONSE TO COMMENTS

American States commented that they are in support of proposed §291.144(b) and §291.147.

The commission appreciates these comments in support of the proposed rules.

Houston commented that the proposed rule allows implementation of a temporary rate upon notice to the Executive Director. Houston recommends that the proposed rule be changed to require notice of the temporary rate to be sent to a municipality with original jurisdiction over the nonfunctioning system at the same time the notice is sent to the executive director. Pursuant to TWC, §13.042, a municipality has original jurisdiction over the rates and services of a utility operating within its corporate limits unless the

municipality surrenders original jurisdiction to the TCEQ.

The commission agrees that TWC, §13.042, gives municipalities original jurisdiction over rates and services of a utility operating within its corporate limits unless the municipality surrenders original jurisdiction to the TCEQ. With original jurisdiction, municipalities can set their own requirements for utilities that operate within their boundaries. In this adopted rule, the commission only requires a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality to provide notice to the executive director that the retail public utility has begun charging a temporary rate. Therefore, the commission made no change with regard to this comment.

Houston commented that as the rule is currently proposed, there is no time limit under which a retail public utility may charge the "temporary rate." Houston asserts that without a time limit, the retail public utility taking over a nonfunctioning system could evade the rate review process of a municipality because there is no limit on how long the "temporary rate" may be charged. Houston recommends that the temporary rate approved by the TCEQ come under the authority of a municipality's original jurisdiction and lose the "temporary" status after the rate is established by the municipality. Houston asks that the TCEQ require inside municipal limit retail public utilities that have set a temporary rate to file a rate application with the municipality having original jurisdiction within 180 days after the TCEQ sets the temporary rate. Houston stated that the temporary rate would then be subject to the municipality's original rate jurisdiction under TWC, §13.042.

The commission responds that under the commission's revisions to the rule, temporary rates will

not apply to a water or sewer utility under the original rate jurisdiction of a municipality. For all other retail public utilities, §291.147(c) requires the executive director to issue an order regarding the reasonableness of the temporary rate. The commission expects that the executive director will include a time limit or benchmarks for the suspension of the temporary rates in the order. Additionally, the commission responds that an across-the-board 180-day deadline for the suspension of the temporary rate and a requirement of a rate application at the end of that deadline are both unnecessary. The commission anticipates that in some cases 180 days will be a reasonable time period for a temporary rate while in other instances it may be too long. Requiring a specific deadline will undermine the purpose of this rulemaking, which is to provide the commission flexibility in allowing a retail public utility to charge temporary rates when taking over a nonfunctioning utility. This allows the retail public utility to focus its efforts on complying with regulations relating to public health and safety and avoid unnecessary costs of time and money involved in formal rate proceedings. The commission has made no change in response to this comment.

Houston commented and asked the TCEQ to clarify that, when a municipality takes over a nonfunctioning system inside the municipality's corporate limits, the municipality is not required to go through the TCEQ to set rates for the system. Houston recommends that since the TCEQ has appellate jurisdiction under TWC, §13.043(b) for the municipality, a municipality sets the rates for retail public utilities inside its corporate limits, that municipality would be exempt from this requirement.

The commission acknowledges that municipalities have original rate jurisdiction over water and sewer utilities within their corporate limits under TWC, §13.042. Thus, the commission has revised

§291.147(a) by adding language to specifically define that only a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality need to submit notice to the executive director for a determination regarding the reasonableness of their rates.

Houston commented and asked the TCEQ to change the word "utility," in §291.144(b) to "retail public utility." The word "utility" is mentioned twice in the section. The term "utility" is a defined term, and does not have the same meaning as "retail public utility."

The commission agrees that the terms "utility" and "retail public utility" have different meanings and that "retail public utility" should be the term used in §291.144(b). The commission changed the term "utility" to "retail public utility" in §291.144(b) in response to this comment.

Houston commented that the TCEQ should clarify the term "takes over" in §291.147(a). Houston claims that it is unclear what actions by a retail public utility would be considered a "take over." Houston asks, "Has a retail public utility taken over a nonfunctioning utility if it simply takes over the operations of the system, but does not acquire the system?" Houston recommends that this term be defined, or that the TCEQ clarify that "take over" includes operating a system without acquiring it.

The commission responds that it is implicit in the term "takes over" that this will include any situation in which a retail public utility assumes the operational responsibilities for a nonfunctioning system whether the retail public utility has acquired the system or not. The commission made no change in response to this comment.

Houston commented that the TCEQ change the term "nonfunctioning retail public water and sewer utility service provider" in §291.147(a) to "nonfunctioning system." Houston recommends this change to avoid any confusion and to ensure consistency throughout the rules.

The commission responds that, as much as possible, it attempts to track the language of the statute. The legislature used both the terms "nonfunctioning retail water or sewer service provider" and "nonfunctioning system" in HB 149, §13.046(a). In this section of the bill, the legislature was referring to the provider of service to the nonfunctioning system and the nonfunctioning system separately and did not intend to create a separate definition for each term. The commission made no change in response to this comment.

Houston commented that the TCEQ define reasonable costs and outline what could be included in determining the "reasonable costs" incurred to interconnect a system, to make service available, or to bring the system into compliance. Houston also recommends that the TCEQ require the retail public utility to submit documentation to justify the reasonableness of the costs incurred at the time it provides written notice to the executive director, and as proposed above, to the municipality.

The commission acknowledges that creating the streamlined process envisioned by the legislature may require the executive director to make a subjective determination of what is a "reasonable cost." Certainly, costs associated with interconnecting a system, bringing a system into compliance, and making service available could all be "reasonable costs." However, the commission does not want to limit potential other costs which may be reasonable in some situations; therefore, the

commission has not included a definition for "reasonable costs." Additionally, the commission does not feel it is necessary to change the rule to require the retail public utility to submit documentation because §291.47(c) already states that the executive director will consider information submitted by the retail public utility taking over the nonfunctioning system and the customers of the nonfunctioning system in deciding whether the temporary rates are reasonable. The commission will issue an order within 90 days of receiving notice of the temporary rate increase; therefore, if the retail public utility fails to provide any information within that 90-day period, the executive director would deem the temporary rates to be unreasonable. The commission made no change in response to this comment.

SUBCHAPTER A: GENERAL PROVISIONS

§291.3

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under the TWC and TWC, §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. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system.

The adopted amendment implements TWC, §13.046.

§291.3. Definitions of Terms.

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

(1) Acquisition adjustment--

(A) The difference between:

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

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

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

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

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

(3) **Affected person**--Any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed; any retail public utility affected by any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

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

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

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

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

(D) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by any person or corporation that owns or controls directly or indirectly

5.0% or more of the voting securities of any utility or by any person or corporation in any chain of successive ownership of 5.0% of those utility securities;

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

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

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

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

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

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

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

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

(10) **Certificate of Convenience and Necessity**--A permit issued by the commission which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area.

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

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

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

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

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

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

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

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

(19) **Landowner**--An owner or owners of a tract of land including multiple owners of a single deeded tract of land as shown on the appraisal roll of the appraisal district established for each county in which the property is located.

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

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

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

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

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

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

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

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

(28) **Nonfunctioning system**--A retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §291.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §291.143 of this title (relating to Operation of a Utility by a Temporary Manager).

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

(30) **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.

(31) **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.

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

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

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

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

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

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

(38) **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.

(39) **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.

(40) **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.

(41) **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.

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

(43) **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.

(44) **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.

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

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

(47) **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.

(48) **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.

(49) **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.

(50) **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.

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

(52) **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.

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

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

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

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

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

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

(55) **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.

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.144, §291.147

STATUTORY AUTHORITY

The amendment and new section are adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under the TWC and TWC, §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. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system.

The adopted amendment and new section implement TWC, §13.046.

§291.144. Fines and Penalties.

(a) Fines and penalties collected under Texas Water Code, Chapter 13, from a retail public utility that is not a public utility in other than criminal proceedings shall be paid to the commission and deposited in the general revenue fund.

(b) The commission shall provide a reasonable period for a retail public utility that takes over a nonfunctioning system to bring the nonfunctioning system into compliance with commission rules, during which the commission may not impose a penalty for any deficiency in the system that is present at the time the retail public utility takes over the nonfunctioning system. The commission must consult with the retail public utility before determining the period and may grant an extension of the period for good cause.

§291.147. Temporary Rates for Services Provided for a Nonfunctioning System.

(a) Notwithstanding other provisions of this chapter, upon sending written notice to the executive director, a retail public utility other than a municipally owned utility or a water and sewer utility subject to the original rate jurisdiction of a municipality that takes over the provision of services for a nonfunctioning retail public water or sewer utility service provider may immediately begin charging the customers of the nonfunctioning system a temporary rate to recover the reasonable costs incurred for

interconnection or other costs incurred in making services available and any other reasonable costs incurred to bring the nonfunctioning system into compliance with commission rules.

(b) Notice of the temporary rate must be provided to the customers of the nonfunctioning system no later than the first bill which includes the temporary rates.

(c) Within 90 days of receiving notice of the temporary rate increase, the executive director will issue an order regarding the reasonableness of the temporary rates. In making the determination, the executive director will consider information submitted by the retail public utility taking over the provision of service, the customers of the nonfunctioning system, or any other affected person.