

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 rule proposed in the *Texas Register* today is the commission's proposal for implementing HB 149.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§291.3, Definitions of Terms

The commission proposes to add a definition for "nonfunctioning system" in §291.3(28). The commission proposes 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). The 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 proposes 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 proposed new definition.

Subchapter J: Enforcement, Supervision, and Receivership

§291.144, Fines and Penalties

The commission proposes to amend §291.144 to add §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 proposes this change to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. With the addition of proposed subsection (b), the current implied subsection (a) became subsection (a). The commission also

proposes to delete the catchline in the existing implied subsection (a). The commission also proposes to correctly reference "Water Code" as "Texas Water Code."

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

The commission proposes new §291.147 which would establish a procedure for a retail public utility 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 proposes this new section to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules are expected to provide incentives for retail public utility providers to take over nonfunctioning retail public utility providers to ensure the continued provision of public utility services.

The proposed rules amend Chapter 291 to provide a streamlined process allowing a retail public utility taking over a nonfunctioning retail water or sewer utility to apply for a ruling by the agency on the reasonableness of newly implemented rates to recover service costs. The agency would be required to consult with the utility to establish a reasonable timeframe to bring the water or wastewater system into compliance with agency rules. The proposed rules would also prohibit the agency from imposing penalties during this period for violations existing at the time the nonfunctioning system was taken over

by the functioning retail public utility. Since the proposed rules would allow a local government to recoup reasonable costs and avoid the payment of penalties for certain violations, positive fiscal implications are expected for local governments providing retail water and sewer services to an area previously serviced by a nonfunctioning water or sewer utility.

There are approximately 1,375 retail water systems and 589 retail sewer systems owned by local governments. It is not known how many local governments might choose to take over a nonfunctioning retail water or sewer utility, but staff expects at least one municipality will take over a nonfunctioning system in the near future.

PUBLIC BENEFITS AND COSTS

Nina 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 the provision of continuous water or sewer service for areas where the water or sewer system is nonfunctioning.

By providing a streamlined process to establish reasonable fees that allow a retail public utility to recoup costs it may incur to bring a nonfunctioning water or sewer system into compliance and by not imposing penalties while a system is brought into compliance, the proposed rules should encourage businesses or individuals that own retail public utilities to provide water and sewer service to areas where systems have ceased to function properly. The costs of bringing a nonfunctioning system into compliance are impacted by economies of scale. If the customer base is large, the cost increase for each customer is expected to be minimal. If the customer base is small, the cost increase to recoup interconnection and other costs would have a greater impact on customers. Any reasonable cost increase will avoid the inconvenience costs and

public health costs that might occur with a nonfunctioning, non-compliant water or sewer system.

Currently, there are two large businesses that own retail public utilities in the state. It is not known how many retail public utilities owned by businesses or individuals will choose to take over nonfunctioning water or sewer systems and bring them into compliance. However, since they may apply to the agency to increase rates to a reasonable level to recoup costs of bringing nonfunctioning systems into compliance, businesses and individuals that own retail public utilities are not expected to experience any adverse fiscal implications as a result of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. There are currently 143 investor owned retail sewer systems and 601 investor owned retail water systems in the state that are small or micro-businesses. Since the proposed rules will allow any small or micro-business to recoup reasonable costs of bringing a nonfunctioning water or sewer system they may take over into compliance, these providers are not expected to experience adverse fiscal implications due to implementation of the proposed rules.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 rule 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 proposed 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 the retail public utility that takes over a nonfunctioning retail water or sewer system to implement temporary rates and apply for a ruling on the reasonableness of the newly implemented rates and establishes 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. The proposed 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 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. 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 proposed 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 proposed rules will not be adopted solely under the general powers of the commission.

Based on the foregoing, 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 regarding this draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

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

The proposed rules would substantially advance the intent of the rulemaking by creating a streamlined process to allow the retail public utility that takes over a nonfunctioning water or sewer system to implement temporary rates and apply for a ruling on the reasonableness of the newly implemented rates and by establishing a reasonable amount of time for the retail public utility to bring the nonfunctioning 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 proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed 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 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on September 18, 2008, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, 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. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-014-291-PR. The comment period closes September 22, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Tammy Benter, Utilities and Districts Section, Water Supply Division, at (512) 239-6136.

SUBCHAPTER A: GENERAL PROVISIONS

§291.3

STATUTORY AUTHORITY

The amendment is 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. 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 proposed 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.

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

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

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

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

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

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

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

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

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

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

(39) [(38)] **Reconnect fee**--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in

§291.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.144, §291.147

STATUTORY AUTHORITY

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

§291.144. Fines and Penalties.

(a) [Disposition.] 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 utility takes over the nonfunctioning system. The commission must consult with the 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 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) The retail public utility must provide notice of the temporary rate 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.