The Texas Natural Resource Conservation Commission (commission) adopts new §§37.5001, 37.5002, and 37.5011, relating to Financial Assurance for Public Drinking Water Systems and Utilities. Section 37.5011 is adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10803). Sections 37.5001 and 37.5002 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendments is to specify acceptable forms of financial assurance required of public drinking water systems, water and wastewater utilities. The rules are intended in part to comply with the requirements of the Safe Drinking Water Act Amendments of 1996, which require states to ensure that new community water systems and new nontransient, noncommunity water systems demonstrate financial capacity. Senate Bill 1, Article 6, 75th Legislature, 1997, granted the commission the authority to require financial assurance in certain defined circumstances. Financial assurance may be required for systems that were constructed without approval; have a history of non-compliance; for applicants requesting approval for a certificate of convenience; for a person establishing, purchasing, or acquiring a retail public utility; for a person acquiring a controlling interest through a purchase of stock in a utility; or for a utility that is subject to commission enforcement action to ensure continuous and adequate utility service. The commission has made changes in the adopted rule to more closely follow statutory authority.

Concurrently with this amendment, the commission is adopting amendments to Chapters 290 and 291 that specify under what conditions financial assurance will be required. Please refer to the preambles to

Chapters 290 and 291 for additional information. The amendments in this chapter specify acceptable forms of financial assurance when required by provisions of these rules.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the rule is to regulate the form of financial assurance required of certain water and sewer service utilities, not to protect the environment or reduce the risks to human health from environmental exposure. The rules will not materially affect the economy, a sector of the economy, productivity, competition, jobs, or the environment. The effect is not material because it is estimated that the cost to a utility to comply with the financial assurance requirement will range from one half of a percent to ten percent of the amount of the financial assurance. Furthermore the rules are adopted under the following specific state laws: Texas Water Code, §§13.246, 13.253, 13.301, and 13.302, and the Health and Safety Code, §341.035 and §341.0355. Those statutes do not expressly limit the form and amount of financial assurance that the commission may require of public drinking water systems and utilities, and therefore the rules do not exceed the limitation of those statutes. The financial assurance provision is adopted in part to comply with the requirements of the Safe Drinking Water Act Amendments of 1996, but there are no specific limitations on the amount or form of financial assurance in those statutes, therefore the rules do not exceed the requirements of that statute.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rules is to specify acceptable forms of financial assurance required of public drinking water systems and utilities. The rules will substantially advance this specific purpose by specifying acceptable forms of financial assurance that may be required by the commission. Promulgation and enforcement of these rules will not burden private real property because these rules only prescribe the form of financial assurance that may be otherwise imposed on a water or sewer service provider by the commission.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

Consumers Union (CU) submitted comments that were generally supportive of the proposed rules, but suggested changes. The following paragraph summarizes written and oral comments received.

CU commented that surcharges and rate increases should not be the sole form of financial assurance for prospective owners or operators as proposed in §37.5011. In the case of acquisitions, CU believes an acquiring utility which relies solely on ratepayer funds as financial assurance has not added financial strength to the new utility.

The commission agrees and has modified §290.39(n) to clarify the circumstances under which surcharges and rate increases may be allowed as a form of financial assurance. The commission has limited the scope as to who may be allowed to use rate increases or surcharges. The commission has done this by moving the text of §290.39(o) into §290.39(n)(3) which specifically allows the use of rate increases or surcharges under specific conditions. These conditions include a public drinking water supply system constructed without approval, or a public drinking water supply system with a history of noncompliance, or one subject to a commission enforcement action.

The commission has made additional changes to §37.5011(b) to correct references.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this

state, and to implement Texas Water Code, §§13.246, 13.253, 13.301, and 13.302, and the Health and Safety Code, §341.035 and §341.0355.

SUBCHAPTER O : FINANCIAL ASSURANCE FOR PUBLIC DRINKING WATER SYSTEMS AND UTILITIES

§§37.5001-37.5002, 37.5011

§37.5001. Applicability.

This subchapter applies to public water systems and retail public utilities required to provide evidence of financial assurance under Chapter 290 of this title (relating to Public Drinking Water), or Chapter 291 of this title (relating to Utility Regulation).

§37.5002. Definitions.

For definitions of words and terms and other definitions not found in Subchapter A of this Chapter, relating to General Financial Assurance Requirements, see §290.38, of this title (relating to Rules and Regulations for Public Water Systems), and §291.3, of this title (relating to Definitions of Terms).

§37.5011. Financial Assurance for a Public Water System or Retail Public Utility.

(a) Financial assurance demonstrations shall comply with the wordings of the mechanisms as described in Subchapter A of this chapter (relating to General Financial Assurance Requirements), Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure), Subchapter C

of this chapter (relating to Financial Assurance Mechanisms for Closure), and Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure), except operation should be substituted for closure and the appropriate statutory reference to Public Drinking Water or Utility Regulation should be cited in the mechanism.

(b) The prospective owner or operator of a public water system may be ordered to provide adequate financial assurance to operate the system as specified in §290.39(f) of this title (relating to General Provisions.) A public water system that was constructed without approval or has a history of noncompliance or is subject to commission enforcement action as specified in §290.39(n) of this title (relating to General Provisions), may be required to provide financial assurance to operate the system in accordance with applicable laws and rules. Financial assurance may be required of an applicant requesting approval for a certificate or a certificate amendment or a person establishing, purchasing or acquiring a retail public utility as specified in §291.102(d) of this title (relating to Criteria for Considering and Granting Certificates or Amendments), and §291.109(c) of this title (relating to Report of Sale, Merger, Etc: Investigation; Disallowance of Transaction). A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial assurance as specified in §291.111(c) of this title (relating to Purchase of Voting Stock in Another Utility). The commission may order a utility that has failed to provide continuous and adequate service to provide financial assurance to ensure that the system will be operated as required by §291.114 of this title, (relating to Requirements to Provide Continuous and Adequate Service). Such financial assurance will allow for payment of improvements and repairs to the water or sewer system.

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(c) If rate increases or customer surcharges are determined by the executive director to be an acceptable form for demonstrating financial assurance in accordance with §290.39(n)(3) of this title, (relating to General Provisions), such funds shall be deposited into an escrow account with an escrow agent that has the authority to act as an escrow agent and whose escrow operations are regulated and examined by a Federal or State agency. At least annually a statement of the account shall be submitted to the executive director.

The commission adopts an amendment to §80.3, relating to Judges, without changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10805). The text of the rule will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendment is to delegate to Administrative Law Judges the authority to issue interim rate orders under Texas Water Code Chapter 13 as provided by Texas Water Code, §5.311, as amended by Senate Bill 1, Article 6, 75th Legislature, 1997. This authorization to issue interlocutory orders will save time and unnecessary expense by providing a simplified procedure for setting interim rates prior to final commission action on the rate case.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the amendment is to make the rule consistent with statutory authority, by allowing an Administrative Law Judge to issue interim rate orders under Texas Water Code, Chapter 13, not to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The

specific purpose of the rule is to delegate the authority to the State Office of Administrative Hearings (SOAH) to set interim rates under Texas Water Code, Chapter 13. The rule will substantially advance this specific purpose by expressly granting SOAH judges the authority to issue interim rate orders under Texas Water Code, Chapter 13. Promulgation and enforcement of the rule will not burden private real property which is the subject of the rules because the rule is a procedural rule that provides a more streamlined administrative process for setting interim rates.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rule was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

No written or oral comments were received on the proposed amendment to §80.3, relating to Judges.

STATUTORY AUTHORITY

The section is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and to implement Texas Water Code §5.311, which allows the commission to delegate to SOAH the authority to issue interlocutory orders related to interim rates under Texas Water Code, Chapter 13.

SUBCHAPTER A : GENERAL RULES

§80.3

§80.3. Judges.

(a) - (b) (No change.)

(c) Judges shall have authority to:

(1) - (13) (No change.)

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code Chapter 13; and

(16) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§290.38-290.40, 290.42-290.47, 290.102, and 290.116, relating to public drinking water. Section 290.38, relating to public drinking water supply systems, §290.39, relating to general provisions, and §290.45, relating to minimum water system capacity requirements, are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10807). Amendments to §§290.40, 290.42-290.44, 290.46, 290.47, 290.102, and 290.116 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULE

The purpose of the adopted amendments is to implement sections of Senate Bill 1, Article 6, 75th Legislature, 1997 related to ensuring the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility with the State Board of Plumbing Examiners regarding plumbers, customer service inspections, and backflow prevention devices; update definitions to maintain consistency with the federal Safe Drinking Water Act Amendments of 1996; and make organizational and wording changes to improve the readability of the rules.

In §290.38, relating to Public Drinking Water Supply Systems, several definitions of technical terms have been moved from Subchapter F, §290.102, relating to Definitions. The intent is to place all technical words common to both subchapters in §290.38. Technical terms only used in Subchapter F are now defined in §290.102. Definitions of “connection” and “public water system” have been amended in response to the Safe Drinking Water Act Amendments of 1996. The intent is to expand the definition of those terms as broadly as the federal definitions, but not to regulate any public water

system or activity not encompassed in the federal definitions. The term "licensed professional engineer" is defined to be consistent with the terminology contained in recent amendments to Article 3271a, Texas Civil Statutes. Accordingly, in the rules, use of the words "registered engineer" have been changed to "licensed professional engineer."

Amendments to §290.39, relating to General Provisions, implement new Texas Water Code, §13.241, changes to Texas Water Code, §13.253, and changes to Health and Safety Code, §341.0315 and §341.035, as enacted by Senate Bill 1, Article 6, 75th Legislature, 1997 related to public drinking water supply system requirements, approval of plans and specifications, business plans, and financial assurance required of some public water systems. The section specifies when approvals, business plans, and financial assurance are required.

Amendments to §290.46, relating to Minimum Acceptable Operating Practices for Public Drinking Water Systems, are to clarify the relationship between the commission's rules regarding customer service inspections, the prevention of cross connections and illegal lead materials in public water systems and the State Board of Plumbing Examiners' rules regulating plumbers. A customer service inspection under these rules is not a plumbing inspection as defined by the State Board of Plumbing Examiners. Similarly §290.47(d), Appendix D, relating to Sample Service Inspection Certification, is amended to remove any acts from the customer service inspection that might be construed as a plumbing inspection.

Section 290.102, relating to Definitions, deletes technical terms now defined in §290.38. Definitions contained in Title 40 Code of Federal Regulations §141.2 and a standard industry source are

incorporated into this section by reference to maintain consistency between the state and federal safe drinking water programs. Definitions in §290.102 have been expanded to include terms from §290.116, relating to Control of Trihalomethanes in Drinking Water, and subsections of that provision have been renumbered.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the adopted amendments is to ensure the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility between the commission and the State Board of Plumbing Examiners regarding plumbers and customer service inspections; update definitions to maintain consistency with the federal Safe Drinking Water Act; and make organizational and wording changes to improve readability of the rules. The rules do not exceed any requirement of state or federal law. The rules do not exceed any requirement of a delegation agreement or contract between the commission and an agency or representative of the federal government. These rules would implement Senate Bill 1, Article 6, 75th Legislature, 1997.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rules is to implement sections of Senate Bill 1, Article 6, 75th Legislature, 1997

related to ensuring the technical, managerial and financial capacity of public water systems; clarify the delineation of responsibility between the commission and the State Board of Plumbing Examiners regarding plumbers and customer service inspections; update definitions to maintain consistency with the federal Safe Drinking Water Act; and make organizational and wording changes to update definitions and improve readability of the rules. The rules will substantially advance this specific purpose by requiring public water suppliers, including some mobile home parks and investor owned utilities, to prepare a business plan or provide financial assurance of its ability to provide service. These mobile home parks and investor owned utilities may own private real property. The preparation of a business plan will not burden private real property, because this is a procedural requirement designed to demonstrate the financial capability of the public water system. Preparation of the business plan and requirements for financial assurance are part of the agency's efforts to comply with the Safe Drinking Water Act Amendments of 1996, specifically §1420 which would reduce federal funds to the state revolving loan fund unless the agency has the "legal authority or other means to ensure that all new … water systems … demonstrate technical, managerial, and financial capacity …." Other than the public water systems required to prepare business plans, private real property is not subject to these regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action or authorization

identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

RULES REVIEW

The commission, concurrently with these adopted amendments to Chapter 290, has completed its review of Chapter 290, Subchapters D through G, concerning Public Drinking Water. This review was in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. See the Adopted Rules Review section of this issue of the Texas Register for additional information on the rules review of this chapter.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held on November 2, 1998, in Austin. The comment period closed November 23, 1998.

Consumers Union (CU), Independent Water and Sewer Companies of Texas, Inc. (IWSCOT), the City of Irving, and Texas Rural Water Association (TRWA), submitted comments. The City of Irving generally supported the proposed rules, but suggested changes to §290.46. The following paragraphs summarize the comments received.

The City of Irving commented that the rules should contain a definition for customer service inspection.

The commission has made no change in response to this comment. The term, customer service inspection is only used in §290.46(j), relating to customer service inspections, where the term is explained in paragraph (5). Because the term is only used in that one section, a separate definition is not warranted. The commission has further elected to define the term in the rules so that important limitations and qualifications on the term are clearly brought to the attention of the reader.

CU submitted general comments that supported proposed amendments to §290.39. TRWA and IWSCOT commented that §290.39(a) requiring business plans for new systems does not apply to counties and retail public utilities.

The commission agrees with the TRWA and IWSCOT comment and has clarified the rule to reference the Health and Safety Code provision setting forth the exemptions to required business plans.

Simultaneous with the publication of these proposed amendments to Chapter 290, the commission had published proposed amendments to Chapter 37. Consumers Union (CU) submitted comments to the proposed amendments to Chapter 37. CU commented that surcharges and rate increases should not be the sole form of financial assurance for prospective owners or operators as proposed in §37.5011.

In order to respond to the comment on proposed amendments to Chapter 37, the commission modified §290.39(n) to clarify the circumstances under which surcharges and rate increases may

be allowed as a form of financial assurance. See the preamble to the adopted amendments to Chapter 37 for additional details.

TRWA and IWSCOT commented that the last sentence in §290.39(a) goes beyond statutory authority and lists the statutory provisions it believes the rule implements as Health and Safety Code §§341.035, 341.0355, and 341.0356.

The commission has deleted the last sentence because it is not necessary, and because the mere editing of it could be misinterpreted as the commission's declaration on issues that are broader than the point raised by the commenters.

The City of Irving commented that in §290.46(j)(5) the language regarding how a customer service inspection may be part of a more comprehensive plumbing inspection and a customer service inspector should report any violations immediately to the local entity's plumbing inspection department, should be moved to a guidance document or made clear that these are options not requirements.

The commission has made no changes in response to this comment. The commission has used the terms "may" and "should" which are intended as discretionary language. Further clarification is not necessary. The commission notes that reporting of violations to the local plumbing inspection department may be either an enforceable state or local requirement.

The City of Irving further objected to the lack of a definition of contaminant. The City of Irving commented that such a definition should either be as defined in 40 CFR 141.2 or as defined in the American Water Works Association (AWWA) M-14 manual.

The commission has made no changes in response to this comment. The commission notes that it does define contamination. Contamination is used in the rules to cover not only cross-connection control, but also other subject areas, such as Drinking Water Standards, §290.101 et. seq. Because the term is used by the rules to cover other situations, an industry definition in current manuals of practice for cross-connection control would be too narrow a definition.

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Health and Safety Code, §341.031 which gives the commission the power to establish standards for public drinking water and to adopt rules to implement the federal Safe Drinking Water Act. Section 290.39 implements Health and Safety Code, §§341.0315, 341.035, 341.0355, and 341.0356.

SUBCHAPTER D : RULES AND REGULATIONS FOR PUBLIC WATER SYSTEMS

§§290.38, 290.39, 290.40, 290.42, 290.43, 290.44, 290.45, 290.46, 290.47

§290.38. Public Drinking Water Supply Systems.

Definitions. The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. If a word or term used in this title is not contained in the following list, its definition shall be as shown in Title 40 Code of Federal Regulations §141.2. Other technical terms used shall have the meanings or definitions listed in the latest edition of "Glossary, Water and Wastewater Control Engineering," prepared by a joint editorial board representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association, and the Water Pollution Control Federation.

(1) **ABPA** - The American Backflow Prevention Association, P.O. Box 1563, Akron, Ohio 44309-1563.

(2) **ANSI standards** - The standards of the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

(3) **Approved laboratory** - A laboratory certified and approved by the Texas Department of Health to analyze water samples to determine their compliance with maximum allowable constituent levels.

(4) **ASME standards** - The standards of the American Society of Mechanical Engineers, 346 East 47th Street, New York, New York 10017.

(5) **ASSE** - The American Society of Sanitary Engineering, P.O. Box 40362, Bay Village, Ohio 44140.

(6) **ASTM standards** - The standards of the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19102.

(7) **Auxiliary power** - Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as auxiliary power in areas which are not subject to large scale power outages due to natural disasters.

(8) **AWWA standards** - The latest edition of the applicable standards as approved and published by the American Water Works Association, 6666 W. Quincy Avenue, Denver, Colorado 80235.

(9) **Community water system** - A public water system which has a potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis.

(10) **Connection** - A single family residential unit or each commercial or industrial establishment to which drinking water is supplied from the system. As an example, the number of service connections in an apartment complex would be equal to the number of individual apartment units. When enough data is not available to accurately determine the number of connections to be served or being served, the population served divided by three will be used as the number of connections for calculating system capacity requirements. Conversely, if only the number of connections is known, the connection total multiplied by three will be the number used for population served. For the purposes of this definition, a dwelling or business which is connected to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection if:

(A) the water is used exclusively for purposes other than those defined as human consumption (see human consumption definition);

(B) the commission determines that alternative water to achieve the equivalent level of public health protection provided by the drinking water standards is provided for residential or similar human consumption, including, but not limited to, drinking and cooking; or

(C) the commission determines that the water provided for residential or similar human consumption is centrally treated or is treated at the point of entry by a provider, a pass through entity, or the user to achieve the equivalent level of protection provided by the drinking water standards.

(11) **Contamination** - The presence of any foreign substance (organic, inorganic, radiological or biological) in water which tends to degrade its quality so as to constitute a hazard or impair the usefulness of the water.

(12) **Cross-connection** - A physical connection between a public water system and either another supply of unknown or questionable quality, any source which may contain contaminating or polluting substances, or any source of water treated to a lesser degree in the treatment process.

(13) **Disinfectant** - Any oxidant, including but not limited to chlorine, chlorine dioxide, chloramines, and ozone added to the water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogenic microorganisms.

(14) **Disinfection** - A process which inactivates pathogenic organisms in the water by chemical oxidants or equivalent agents.

(15) **Drinking water** - All water distributed by any agency or individual, public or private, for the purpose of human consumption or which may be used in the preparation of foods or beverages or for the cleaning of any utensil or article used in the course of preparation or consumption of food or beverages for human beings. The term "Drinking Water" shall also include all water supplied for human consumption or used by any institution catering to the public.

(16) **Drinking water standards** - The commission rules covering drinking water standards in §§290.101 - 290.121 of this title (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

(17) **Elevated storage capacity** - That portion of water which can be stored at least 80 feet above the highest service connection in the pressure plane served by the storage tank.

(18) **Emergency power** - Either mechanical power or electric generators which can enable the system to provide water under pressure to the distribution system in the event of a local power failure. With the approval of the executive director, dual primary electric service may be considered as emergency power in areas which are not subject to large scale power outages due to natural disasters.

(19) **Ground water under the influence of surface water** - Any water beneath the surface of the ground with:

(A) significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as Giardia Lambia or Cryptosporidium, or

(B) significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions.

(20) **Health hazard** - Any conditions, devices or practices in the water supply system and/or its operation which create, or may create, a danger to the public health and well-being of the water consumer. An example of a health hazard is a structural defect in the water supply system, whether of location, design, or construction, which may regularly or occasionally prevent satisfactory purification of the water supply or cause it to be contaminated from extraneous sources.

(21) **High health hazard** - A cross-connection, potential cross-connection, or other situation involving any substance that could cause death, illness, spread of disease, or has a high probability of causing such effects if introduced into the potable drinking water supply.

(22) **Human consumption** - Uses by humans in which water can be ingested into or absorbed by the human body. Examples of these uses include, but are not limited to drinking, cooking, brushing teeth, bathing, washing hands, washing dishes, and preparing foods.

(23) **Interconnection** - A physical connection between two public water supply systems.

(24) **Intruder-resistant fence** - A fence six feet or more in height, constructed of wood, concrete, masonry, or metal with three strands of barbed wire extending outward from the top of the fence at a 45 degree angle and have the smooth side of the fence on the outside wall. In lieu of the barbed wire, the fence must be eight feet in height. The fence must be in good repair and close enough to surface grade to prevent intruder passage.

(25) **Licensed Professional Engineer** - An engineer who maintains a current license through the Texas Board of Professional Engineers in accordance with its requirements for professional practice.

(26) **Maximum daily demand** - In the absence of verified historical data, maximum daily demand means 2.4 times the average daily demand of the system.

(27) **MCL** - Maximum Contaminant Level.

(28) **mg/l** - Milligrams per liter, a measure of concentration, equivalent to and replacing parts per million (ppm) in the case of dilute solutions.

(29) **Monthly Reports of Water Works Operations** - The daily record of data relating to the operation of the system facilities compiled in a monthly report.

(30) **NFPA standards** - The standards of the National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts, 02269-9101.

(31) **NSF** - The National Sanitation Foundation and refers to the listings developed by the Foundation, P.O. Box 1468, Ann Arbor, Michigan 48106.

(32) **Noncommunity water system** - Any public water system which is not a community system.

(33) **Nontransient noncommunity water system** - A public water system that is not a community water system and regularly serves at least 25 of the same persons at least six months out of the year.

(34) **psi** - Pounds per square inch.

(35) **Peak hourly demand** - In the absence of verified historical data, peak hourly demand means 1.25 times the maximum daily demand (prorated to an hourly rate) if a public water supply meets the commission's minimum requirements for elevated storage capacity and 1.85 times the maximum daily demand (prorated to an hourly rate) if the system uses pressure tanks or fails to meet the commission's minimum elevated storage capacity requirement.

(36) **Plumbing inspector** - Any person employed by a political subdivision for the purpose of inspecting plumbing work and installations in connection with health and safety laws and ordinances, who has no financial or advisory interest in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Texas State Board of Plumbing Examiners.

(37) **Plumbing ordinance** - A set of rules governing plumbing practices which are at least as stringent and comprehensive as one of the following nationally recognized codes:

(A) Southern Standard Plumbing Code.

(B) Uniform Plumbing Code.

(C) National Standard Plumbing Code.

(38) **Public health engineering practices** - Requirements in these sections or guidelines promulgated by the commission.

(39) **Public water system** - A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total

number of individuals served by the combined systems total 25 or more at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.

(40) **Sanitary control easement** - A legally binding document securing all land, within 150 feet of a public water supply well location, from pollution hazards. This document must fully describe the location of the well and surrounding lands and must be filed in the County records to be legally binding.

(41) **Sanitary survey** - An onsite review of the water source, facilities, equipment, operation and maintenance of a public water system, for the purpose of evaluating the adequacy for producing and distributing safe drinking water.

(42) **Service pump** - Any pump that takes treated water from storage and discharges to the distribution system.

(43) **Transfer pump** - Any pump which conveys water from one point to another within the treatment process or which conveys water to storage facilities prior to distribution.

(44) **Transient noncommunity water system** - A public water system that is not a community water system and serves at least 25 persons at least 60 days out of the year, yet by its characteristics, does not meet the definition of a nontransient noncommunity water system.

(45) **Uniform Fire Code** - The standards of the International Conference of Building Officials, 5360 Workman Mill Rd., Wittier, California, 90601-2298.

(46) **Water Supply Protection Specialist** - Any person who holds a license endorsement issued by the Texas State Board of Plumbing Examiners to engage in the inspection, in connection with health and safety laws and ordinances, of the plumbing work or installation of a public water system distribution facility or of customer owned plumbing connected to that system's water distribution lines.

§290.39. General Provisions.

(a) Authority for requirements. The Texas Health and Safety Code, Chapter 341, Subchapter C prescribes the duties of the commission relating to the regulation and control of public drinking water systems in the State. These statutes require that the commission ensure that public water systems: supply safe drinking water in adequate quantities, are financially stable and technically sound, promote use of regional and area-wide drinking water systems, and review completed plans and specifications and business plans for all contemplated public water systems not exempted by Health and Safety Code §341.035(d). The statutes also require the commission be notified of any subsequent material changes,

improvements, additions, or alterations in existing systems and, consider compliance history in approving new or modified public water systems.

(b) Reason for these sections and minimum criteria. These sections have been adopted to ensure regionalization and area-wide options are fully considered, the inclusion of all data essential for comprehensive consideration of the contemplated project, or improvements, additions, alterations or changes thereto and to establish minimum standardized public health design criteria in compliance with existing state statutes and in accordance with good public health engineering practices. In addition, minimum acceptable financial, managerial, technical and operating practices must be specified to ensure that facilities are properly operated to produce and distribute a safe, potable water.

(c) Required actions and approvals prior to construction. A person may not begin construction of a public drinking water supply system unless the executive director determines the following requirements have been satisfied and approves construction of the proposed system.

(1) A person proposing to install a public drinking water system within the extraterritorial jurisdiction of a municipality; or within one-half mile of the corporate boundaries of a district, or other political subdivision providing the same service; or within one-half mile of a certificated service area boundary of any other water service provider shall provide to the executive director evidence that:

(A) written application for service was made to that provider; and

(B) all application requirements of the service provider were satisfied, including the payment of related fees.

(2) If a person is not required to complete the steps in paragraph (1) of this subsection or if a person completes the steps in paragraph (1) of this subsection , and is denied service or determines the existing provider's cost estimate is not feasible for the development to be served, the person shall submit to the executive director:

(A) plans and specifications for the system; and

(B) a business plan for the system.

(d) Submission of plans.

(1) Plans, specifications, and related documents will not be considered unless they have been prepared under the direction of a licensed professional engineer. All engineering documents must have engineering seals, signatures and dates affixed in accordance with the rules of the Texas State Board of Registration for Professional Engineers.

(2) Detailed plans must be submitted for examination at least 30 days prior to the time that approval, comments or recommendations are desired. From this, it is not to be inferred that final action will be forthcoming within the time mentioned.

(3) The limits of approval are as follows.

(A) The commission's Water Utilities Division furnishes consultation services as a reviewing body only, and its licensed professional engineers may neither act as design engineers nor furnish detailed estimates.

(B) The commission's Water Utilities Division does not examine plans and specifications in regard to the structural features of design, such as strength of concrete or adequacy of reinforcing. Only the features covered by these sections will be reviewed.

(C) The consulting engineer and/or owner must provide surveillance adequate to assure that facilities will be constructed according to approved plans and must notify the commission's Water Utilities Division in writing upon completion of all work.

(e) Submission of planning material. In general, the planning material submitted shall conform to the following requirements.

(1) Engineering reports are required for new water systems and all surface water treatment plants. Engineering reports are also required when design or capacity deficiencies are identified in an existing system. The engineering report shall include, at least, coverage of the following items:

(A) statement of the problem or problems;

(B) present and future areas to be served, with population data;

(C) the source, with quantity and quality of water available;

(D) present and estimated future maximum and minimum water quantity demands;

(E) description of proposed site and surroundings for the water works facilities;

(F) type of treatment, equipment, and capacity of facilities;

(G) basic design data, including pumping capacities, water storage and flexibility of system operation under normal and emergency conditions; and

(H) the adequacy of the facilities with regard to delivery capacity and pressure throughout the system.

(2) All plans and drawings submitted may be printed on any of the various papers which give distinct lines. All prints must be clear, legible and assembled to facilitate review.

(A) The relative location of all facilities which are pertinent to the specific project shall be shown.

(B) The location of all abandoned or inactive wells within 1/4 mile of a proposed wellsite shall be shown or reported.

(C) If staged construction is anticipated, the overall plan shall be presented, even though a portion of the construction may be deferred.

(D) A general map or plan of the municipality, water district, or area to be served shall accompany each proposal for a new water supply system.

(3) Specifications for construction of facilities shall accompany all plans. If a process or equipment which may be subject to probationary acceptance because of limited application or use in Texas is proposed, the commission, at its discretion, may give limited approval. In such case, the owner must be given a bonded guarantee from the manufacturer covering acceptable performance. The specifications shall include a statement that such a bonded guarantee will be provided the owner and shall also specify those conditions under which the bond will be forfeited. Such bond will be transferrable. The bond shall be retained by the owner and transferred when a change in ownership occurs.

(4) Copies of each fully executed sanitary control easement shall be provided to the commission prior to placing the well into service. Each original easement document must be recorded in the deed records at the county courthouse. See §290.47(c) of this title (relating to Appendices) for a suggested form.

(f) Submission of business plans. The prospective owner of the system or the person responsible for managing and operating the system must submit a business plan to the executive director that demonstrates that the owner or operator of the proposed system has available the financial, managerial, and technical capability to ensure future operation of the system in accordance with applicable laws and rules. The executive director may order the prospective owner or operator to demonstrate financial assurance to operate the system in accordance with applicable laws and rules as specified in Chapter 37, Subchapter O, of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by commission rule, unless the executive director finds that the business plan demonstrates adequate financial capability. A business plan shall include the information and be presented in a format prescribed by the executive director. For community water systems, the business plan shall contain, at a minimum, the following elements:

(1) description of areas and population to be served by the potential system;

(2) description of drinking water supply systems within a two mile radius of the proposed system, copies of written requests seeking to obtain service from each of those drinking water supply systems, and copies of the responses to the written requests;

(3) time line for construction of the system and commencement of operations;

(4) identification of and costs of alternative sources of supply;

(5) selection of the alternative to be used and the basis for that selection;

(6) identification of the person or entity which owns or will own the drinking water system and any identifiable future owners of the drinking water system;

(7) identification of any other businesses and public drinking water system(s) owned or operated by the applicant, owner(s), parent organization, and affiliated organization(s);

(8) an operations and maintenance plan which includes sufficient detail to support the budget estimate for operation and maintenance of the facilities;

(9) assurances that the commitments and resources needed for proper operation and maintenance of the system are, and will continue to be, available, including the qualifications of the organization and each individual associated with the proposed system;

(10) for retail public utilities as defined by Texas Water Code, §13.002:

(A) projected rate revenue from residential, commercial, and industrial customers; and

(B) pro forma income, expense, and cash flow statements;

(11) identification of any appropriate financial assurance, including those being offered to capital providers;

(12) a notarized statement signed by the owner or responsible person that the business plan has been prepared under his direction and that he is responsible for the accuracy of the information; and

(13) other information required by the executive director to determine the adequacy of the business plan or financial assurance.

(g) Business plans not required. A person is not required to file a business plan if the person:

(1) is a county;

(2) is a retail public utility as defined by Texas Water Code, §13.002, unless that person is a utility as defined by that section;

(3) has executed an agreement with a political subdivision to transfer the ownership and operation of the water supply system to the political subdivision; or

(4) is a noncommunity nontransient water system and the person has demonstrated financial assurance under Texas Health & Safety Code, Chapter 361 or 382 or Texas Water Code, Chapter 26.

(h) Beginning and completion of work.

(1) No person may begin construction on a new public water system before receiving written approval of plans and specifications and, if required, approval of a business plan from the executive director. No person may begin construction of modifications to a public water system without providing notification to the executive director and submitting and receiving approval of plans and specifications if requested in accordance with subsection (j) of this section.

(2) The commission's Water Utilities Division shall be notified in writing by the design engineer or the owner when construction is started.

(3) Upon completion of the water works project, the engineer or owner will notify the commission's Water Utilities Division in writing as to its completion and attest to the fact that the completed work is substantially in accordance with the plans and change orders on file with the commission.

(i) Changes in plans and specifications. Any addenda or change orders which may involve a health hazard or relocation of facilities, such as wells, treatment units, and storage tanks, shall be submitted to the executive director for review and approval.

(j) Changes in existing systems or supplies. Changes or additions to existing systems which result in an increase in production, treatment, or storage capacity shall require written notification to the executive director. Changes or additions in existing distribution systems shall require written notification to the executive director when the change or addition is greater than 10% of the existing distribution capacity or 250 connections, whichever is smaller. The executive director shall determine whether engineering plans and specifications will be required after initial notification of the extent of the modifications. The owner shall submit plans and specifications as determined by the executive director in accordance with subsection (c) of this section. The commission will not require planning material on distribution line extensions from a political entity (county, municipality, district or water authority) when the entity has its own internal engineering review staff or is required, by local ordinance, to submit the material to another political entity for review and approval. The review staff must be separate and apart from the engineering staff or firm charged with the design of the distribution extension under review. The planning material must be reviewed and certified to be in compliance with §290.44 of this title (relating to Water Distribution) by a licensed professional engineer in the employ of the review entity. The effect of the distribution system improvements on compliance with §290.45 of this title (relating to Minimum Water System Capacity Requirements) must be evaluated. Should the proposed distribution system improvements result in an exceedance of the capacity

requirements, written notice of the extent of the proposed improvements must be submitted to the executive director.

(k) Planning material acceptance. Planning material for improvements to an existing system which does not meet the requirements of all sections of these regulations will not be considered unless the necessary modifications for correcting the deficiencies are included in the proposed improvements, or unless the executive director determines that reasonable progress is being made toward correcting the deficiencies and no immediate health hazard will be caused by the delay.

(l) Exceptions. Requests for exceptions to one or more of these sections shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality.

(1) The exception must be requested in writing and must be substantiated by carefully documented data. The request for an exception should precede the submission of engineering plans and specifications for a proposed project.

(2) Any exception granted by the commission is subject to revocation.

(3) Any request for an exception which is not approved by the commission in writing is denied.

(m) Notification of system startup or reactivation. The owner or responsible official must provide written notification to the commission of the startup of a new public water supply system or reactivation of an existing public water supply system. This notification must be made immediately upon meeting the definition of a public water system as defined in §290.38 of this title (relating to Definitions).

(n) The commission may require the owner or operator of a public drinking water supply system that was constructed without the approval required by Texas Health & Safety Code, §341.035, that has a history of noncompliance with Texas Health and Safety Code, Chapter 341, Subchapter C or commission rules, or that is subject to a commission enforcement action to take the following action:

(1) Provide the executive director with a business plan that demonstrates that the system has available the financial, managerial, and technical resources adequate to ensure future operation of the system in accordance with applicable laws and rules. The business plan must fulfill all the requirements for a business plan as set forth in subsection (f) of this section.

(2) Provide adequate financial assurance of the ability to operate the system in accordance with applicable laws and rules. The executive director will set the amount of the financial assurance, after the business plan has been reviewed and approved by the executive director. The amount of the financial assurance will equal the difference between the amount of projected system revenues and the projected cash needs for the period of time prescribed by the executive director. 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), and will be as specified by the executive director.

(3) If the executive director relies on rate increases or customer surcharges as the form of financial assurance, such funds shall be deposited in an escrow account as specified in Chapter 37, Subchapter O , of this title, (relating to Financial Assurance for Public Drinking Water Systems and Utilities), and released only with the approval of the executive director.

§290.40. Cessation of Construction and Operations.

(a) A public water supply system shall stop operations on receipt of a written notification of the executive director or an order of the commission issued under this section.

(b) The executive director or the commission may order a public water supply system to stop operations if:

(1) the system was constructed without approved plans and specifications and a business plan as required under §290.39, (relating to General Provisions); or

(2) the executive director determines that the system presents an imminent health hazard.

(c) A notification or order issued under this section may be delivered by facsimile, by personal service, or by mail.

(d) A water supply system subject to notification or an order under this section, on written request, is entitled to an opportunity to be heard by the commissioners at a commission meeting.

(e) The public water supply system may not resume operations until the commission, the executive director, or a court authorizes the resumption.

(f) No person or entity may construct or operate a public drinking water system in violation of these sections or the drinking water standards.

(g) No person or entity may distribute drinking water to the public in violation of these sections or the drinking water standards.

§290.42. Water Treatment.

(a) - (e) (No change.)

(f) Other treatment processes. The adjustment of fluoride ion content, special treatment for iron and manganese reduction, special methods for taste and odor control, demineralization, and other proposals covering other treatment processes will be considered on an individual basis, pursuant to

§290.39(g) of this title (relating to General Provisions). Package-type treatment systems and their components shall be subject to all applicable design criteria in this section. Where innovative/alternate treatment systems are proposed, the licensed professional engineer must provide pilot test data, data collected at similar full-scale operations, and proof of a one year manufacturers performance warrantee/guarantee assuring that the plant will produce an effluent of 0.5 NTU or less in at least 95% of the measurements taken each month. Pilot test data must be representative of the actual operating conditions which can be expected over the course of the year.

(g) - (j) (No change.)

§290.43. Water Storage.

(a) - (b) (No change.)

(c) Design and construction of clear wells, standpipes, ground storage tanks, and elevated tanks. All facilities for potable water storage shall be covered and designed, fabricated, erected, tested and disinfected in strict accordance with current American Water Works Association (AWWA) standards and shall be provided with the minimum number, size and type of roof vents, man ways, drains, sample connections, access ladders, overflows, liquid level indicators and other appurtenances as specified in these rules. Bolted tanks shall be designed, fabricated, erected and tested in strict accordance with current AWWA Standard D103. The roof of all tanks shall be designed and erected so

that no water ponds at any point on the roof and, in addition, no area of the roof shall have a slope of less than 0.75 inch per foot.

(1) (No change.)

(2) All roof openings shall be designed in accordance with current AWWA standards. If an alternate 30 inch diameter access opening is not provided in a storage tank, the primary roof access opening shall not be less than 30 inches in diameter. Other roof openings required only for ventilating purposes during cleaning, repairing or painting operations shall be not less than 24 inches in diameter or as specified by the licensed professional engineer. An existing tank without a 30-inch in diameter access opening must be modified to meet this requirement when major repair or maintenance is performed on the tank. Each access opening shall have a raised curbing at least four inches in height with a lockable cover that overlaps the curbing at least two inches in a downward direction. Where necessary, a gasket shall be used to make a positive seal when the hatch is closed. All hatches shall remain locked except during inspections and maintenance.

(3) - (7) (No change.)

(8) All clear wells, ground storage tanks, standpipes, and elevated tanks shall be painted, disinfected, and maintained in strict accordance with current AWWA standards. However, no temporary coatings, wax grease coatings, or coating materials containing lead will be allowed. No other coatings will be allowed which are not approved for use (as a contact surface with potable water)

by the United States Environmental Protection Agency (EPA), National Sanitation Foundation (NSF), or the United States Food and Drug Administration (FDA). All newly installed coatings must conform to ANSI/NSF Standard 61 and must be certified by an organization accredited by ANSI.

(9) - (10) (No change.)

(d) - (f) (No change.)

§290.44. Water Distribution.

(a) Design and standards. All potable water distribution systems including pump stations, mains, and both ground and elevated storage tanks, shall be designed, installed and constructed in accordance with current American Water Works Association (AWWA) standards with reference to materials to be used and construction procedures to be followed. In the absence of AWWA standards, commission review may be based upon the standards of the American Society for Testing and Materials (ASTM), commercial and other recognized standards utilized by licensed professional engineers.

(1) - (5) (No change.)

(b) (No change.)

(c) Minimum water line sizes. These are minimum requirements for domestic flows only and do not consider fire flows. These requirements should be exceeded when the licensed professional engineer deems it necessary. It should be noted that the required sizes are based strictly on the number of customers to be served and not on the distances between connections or differences in elevation or the type of pipe. No new water line under two inches in diameter will be allowed to be installed in a public water system distribution system. These minimum line sizes do not apply to individual customer service lines. **Figure §290.44 (c)**

Maximum Number of Connections	Minimum Line Size (inches)
10	2
25	2.5
50	3
100	4
150	5
250	6
>250	8 and larger

(d) (No change.)

(e) Location of water lines.

(1) - (4) (No change.)

(5) Where the nine foot separation distance cannot be achieved, the following criteria shall apply:

(A) New Waterline Installation - Parallel Lines.

(i) Where a new potable waterline parallels an existing, non-pressure or pressure rated wastewater line/force main and the licensed professional engineer is able to determine that the existing line is not leaking, the new potable waterline shall be located at least two feet above the existing line, measured vertically, and at least four feet away, measured horizontally, from the existing line. Every effort shall be exerted not to disturb the bedding and backfill of the existing wastewater line.

(ii) Where a new potable waterline parallels an existing pressure rated wastewater line and it cannot be determined by the licensed professional engineer if the existing line is leaking, the existing wastewater line shall be replaced with a 150 psi pressure rated pipe. The new potable waterline shall be located at least two feet above the new wastewater line, measured vertically, and at least four feet away, measured horizontally, from the replaced wastewater line.

(iii) (No change.)

(B) (No change.)

(6) - (9) (No change.)

(f) - (h) (No change.)

(i) Water hauling. When drinking water is distributed by tank truck or trailer, it must be accomplished in the following manner:

(1) (No change.)

(2) The equipment used to haul the water must be approved by the executive director and must be constructed as follows:

(A) (No change.)

(B) The tank shall be watertight and of an approved material which is impervious and easily cleaned and disinfected. Any paint or coating and any plastic or fiberglass materials used as contact surfaces must be approved by the United States Environmental Protection Agency, the United States Food and Drug Administration, or the National Sanitation Foundation. Effective January 1, 1993, any newly installed surfaces shall conform to ANSI/NSF Standard 61 and must be certified by an organization accredited by ANSI.

(C) - (L) (No change.)

§290.45. Minimum Water System Capacity Requirements.

(a) - (f) (No change.)

(g) Exceptions. Requests for exceptions to one or more of these Minimum Water System Capacity Requirements shall be considered on an individual basis. Any water system which requests an exception must demonstrate to the satisfaction of the executive director that the exception will not compromise the public health or result in a degradation of service or water quality as specified in §290.39(l) of this title (relating to General Provisions).

(1) (No change.)

(2) Although elevated storage is the preferred method of pressure maintenance for systems of over 2500 connections, it is recognized that local conditions may dictate the use of alternate methods utilizing hydropneumatic tanks and on-site emergency power equipment. Exceptions to the elevated storage requirements may be obtained based on application to and approval of the executive director. Special conditions apply to systems qualifying for an elevated storage exception.

(A) The system must submit documentation sufficient to assure that the alternate method of pressure maintenance is capable of providing a safe and uninterrupted supply of water under pressure to the distribution system during all demand conditions.

(i) A signed and sealed statement by a licensed professional engineer must be provided which certifies that the pressure maintenance facilities are sized, designed and capable of providing a minimum pressure of at least 35 psi at all points within the distribution network at flow rates of 1.5 gpm per connection or greater. In addition, the engineer must certify that the emergency power facilities are capable of providing the greater of the average daily demand or 0.35 gpm per connection while maintaining distribution pressures of at least 35 psi, and that emergency power facilities powering production and treatment facilities are capable of supplying at least 0.35 gpm per connection to storage.

(ii) The system's licensed professional engineer must conduct a hydraulic analysis of the system under peak conditions. This must include an analysis of the time lag between the loss of the normal power supply and the commencement of emergency power as well as the minimum pressure that will be maintained within the distribution system during this time lag. In no case shall this minimum pressure within the distribution system be less than 20 psi. The results of this analysis must be submitted to the commission for review.

(iii) For existing systems, the system's licensed professional engineer must provide continuous 24 hour pressure chart recordings of distribution pressures maintained during past power failures, if available. The period reviewed should not be less than three years.

(B) - (D) (No change.)

(3) (No change.)

§290.46. Minimum Acceptable Operating Practices for Public Drinking Water Systems.

(a) - (i) (No change.)

(j) Customer Service Inspections. Effective January 1, 1996, a customer service inspection certification shall be completed prior to providing continuous water service to new construction, on any existing service when the water purveyor has reason to believe that cross-connections or other potential contaminant hazards exist, or after any material improvement, correction, or addition to the private water distribution facilities. See §290.47(d) of this title (relating to Appendices).

(1) (No change.)

(2) As potential contaminant hazards are discovered, they shall be promptly eliminated to prevent possible contamination of the water supplied by the public water system. The existence of a

serious threat to the integrity of the public water supply shall be considered sufficient grounds for immediate termination of water service. Service can be restored only when the source of potential contamination no longer exists, or until sufficient additional safeguards have been taken.

(3) Copies of properly completed inspection certifications must be kept on file by the water purveyor and made available, upon request, for commission review. These certifications shall be retained for a minimum of ten years. If the suggested certification form (see Appendix D) is not used, the Inspection Certifications must minimally include the name and registration number of the inspector, the type of registration (Plumbing Inspectors, Water Supply Protection Specialists, Certified Operator, etc.), and be dated and signed. It must also certify that:

(A) No direct connection between the public drinking water supply and a potential source of contamination exists. Potential sources of contamination are isolated from the public water system by an air-gap or an appropriate backflow prevention assembly in accordance with commission regulations. See §290.44(h) of this title (relating to Backflow, siphonage).

(B) - (C) (No change.)

(D) No pipe or pipe fitting which contains more than 8.0% percent lead exists in private water distribution facilities installed on or after July 1, 1988.

(E) No solder or flux which contains more than 0.2% percent lead exists in private water distribution facilities installed on or after July 1, 1988.

(4) These customer service inspection requirements are not considered acceptable substitutes for and shall not apply to the sanitary control requirements stated in §290.115(5) of this title.

(5) A customer service inspection is an examination of the private water distribution facilities for the purpose of providing or denying water service. This inspection is limited to the identification and prevention of cross connections, potential contaminant hazards and illegal lead materials. The customer service inspector has no authority, and no obligation, beyond the scope of the commission's regulations. A customer service inspection is not a plumbing inspection as defined and regulated by the Texas State Board of Plumbing Examiners (TSBPE). A customer service inspector is not permitted to perform plumbing inspections. State statutes and TSBPE adopted rules require that TSBPE licensed plumbing inspectors perform plumbing inspections of all new plumbing and alterations or additions to existing plumbing within the municipal limits of all cities, towns and villages with 5000 or more inhabitants or within smaller, like entities which have adopted the Plumbing License Law by ordinance. Such entities may stipulate that the customer service inspection be performed by the plumbing inspector as a part of the more comprehensive plumbing inspection. Where such entities permit customer service inspectors to perform customer service inspections, the customer service inspector should report any violations immediately to the local entity's plumbing inspection department.

(k) - (q) (No change.)

(r) Data on water system ownership and management. The commission shall be provided with information regarding water system ownership and management.

(1) When a water system changes ownership, a written notice of the transaction must be provided to the commission. When applicable, notification shall be in accordance with Chapter 291 of this title (relating to Utility Regulation). Those systems not subject to Chapter 291 of this title shall notify the commission of changes in ownership by providing the name of the current and prospective owner or responsible official, the proposed date of the transaction, and the address and phone number of the new owner or responsible official. The information listed above and the system's public drinking water supply identification number, and any other information necessary to properly identify the transaction shall be provided to the commission 120 days before the date of the transaction.

(2) (No change.)

(s) - (y) (No change.)

§290.47. Appendices.

(a) Appendix A. Recognition as a Superior or Approved Public Water System. **Figure §290.47(a)**

APPENDIX A

Requirements. Public water supply systems which achieve and maintain recognition must exceed the minimum acceptable standards of the commission in these sections.

(1) To attain recognition as a "Superior Public Water System", the following additional requirements must be met:

(A) Physical facilities shall comply with the requirements in these sections.

(B) There shall be a minimum of two certified operators with additional operators required for larger systems.

(C) The system's microbiological record for the previous 24 months period shall indicate no violations (frequency, number or MCL) of the drinking water standards.

(D) The quality of the water shall comply with all primary water quality parameters listed in the drinking water standards.

(E) The chemical quality of the water shall comply with all secondary constituent levels listed in the drinking water standards.

(F) The system's operation shall comply with applicable state statutes and minimum acceptable operating practices set forth in §290.46 of this title (relating to Minimum Acceptable Operating Practices for Public Drinking Water Supplies).

(G) The system's capacities shall meet or exceed minimum water system capacity requirements set forth in §290.45 of this title (relating to Minimum Water System Capacity Requirements).

(H) The system shall have at least two wells, two raw water pumps or a combination of these with enough capacity to provide average daily consumption with the largest well or pump out of service. This requirement shall also apply to treatment plant pumps necessary for operation in accordance with §290.42 of this title (relating to Water Treatment).

(I) The water system shall be well maintained and the facilities shall present a pleasing appearance to the public.

(2) To attain recognition as an "Approved Public Water System," all additional requirements listed under subsection (a)(1) of this section with exception of secondary constituents, subsection (a)(1)(E) of this section must be met. Public water systems which provide water quality that exceeds the secondary chemical standards may be excluded from this recognition program at the discretion of the executive director.

Signs. Systems which have met the requirements for recognition as a superior or approved system may erect signs denoting this honor.

Inspections. To receive or maintain recognition as a superior or approved water system, the system must be inspected and evaluated by commission personnel as to physical facilities, appearance and operation. Systems which fail to meet the above requirements in this section will be denied recognition or will have their recognition revoked. The signs shall be immediately removed on notice from the executive director.

(b) Appendix B. Sample Service Agreement. **Figure §290.47(b)**

SERVICE AGREEMENT

I. PURPOSE. The NAME OF WATER SYSTEM is responsible for protecting the drinking water supply from contamination or pollution which could result from improper private water distribution system construction or configuration. The purpose of this service agreement is to notify each customer of the restrictions which are in place to provide this protection. The utility enforces these restrictions to ensure the public health and welfare. Each customer must sign this agreement before the NAME OF WATER SYSTEM will begin service. In addition, when service to an existing connection has been suspended or terminated, the water system will not re-establish service unless it has a signed copy of this agreement.

II. RESTRICTIONS. The following unacceptable practices are prohibited by State regulations.

A. No direct connection between the public drinking water supply and a potential source of contamination is permitted. Potential sources of contamination shall be isolated from the public water system by an air-gap or an appropriate backflow prevention device.

B. No cross-connection between the public drinking water supply and a private water system is permitted. These potential threats to the public drinking water supply shall be eliminated at the service connection by the installation of an air-gap or a reduced pressure-zone backflow prevention device.

C. No connection which allows water to be returned to the public drinking water supply is permitted.

D. No pipe or pipe fitting which contains more than 8.0% lead may be used for the installation or repair of plumbing at any connection which provides water for human use.

E. No solder or flux which contains more than 0.2 percent lead can be used for the installation or repair of plumbing at any connection which provides water for human use.

III. SERVICE AGREEMENT. The following are the terms of the service agreement between the NAME OF WATER SYSTEM (the Water System) and NAME OF CUSTOMER (the Customer).

A. The Water System will maintain a copy of this agreement as long as the Customer and/or the premises is connected to the Water System.

B. The Customer shall allow his property to be inspected for possible cross-connections and other potential contamination hazards. These inspections shall be conducted by the Water System or its designated agent prior to initiating new water service; when there is reason to believe that cross-connections or other potential contamination hazards exist; or after any major changes to the private water distribution facilities. The inspections shall be conducted during the Water System's normal business hours.

C. The Water System shall notify the Customer in writing of any cross-connection or other potential contamination hazard which has been identified during the initial inspection or the periodic reinspection.

D. The Customer shall immediately remove or adequately isolate any potential cross-connections or other potential contamination hazards on his premises.

E. The Customer shall, at his expense, properly install, test, and maintain any backflow prevention device required by the Water System. Copies of all testing and maintenance records shall be provided to the Water System.

IV. ENFORCEMENT. If the Customer fails to comply with the terms of the Service Agreement, the Water System shall, at its option, either terminate service or properly install, test, and maintain an appropriate backflow prevention device at the service connection. Any expenses associated with the enforcement of this agreement shall be billed to the Customer.

CUSTOMER'S SIGNATURE:_____
DATE:_____

(c) Appendix C. Sample Sanitary Control Easement Document for a Public Water Well. Figure 290.47 (c)

SANITARY CONTROL EASEMENT

DATE: , 19

GRANTOR(S):

GRANTOR'S ADDRESS:

GRANTEE:

GRANTEE'S ADDRESS:

SANITARY CONTROL EASEMENT:

Purpose, Restrictions, and Uses of Easement:

1. The purpose of this easement is to protect the water supply of the well described and located below by means of sanitary control.

2. The construction and operation of underground petroleum and chemical storage tanks and liquid transmission pipelines, stock pens, feedlots, dump grounds, privies, cesspools, septic tank or sewage treatment drainfields, improperly constructed water wells of any depth, and all other construction or operation that could create an insanitary condition within, upon, or across the property subject to this easement are prohibited within this easement. For the purpose of the easement, improperly constructed water wells are those wells which do not meet the surface and subsurface construction standards for a public water supply well.

3. The construction of tile or concrete sanitary sewers, sewer appurtenances, septic tanks, storm sewers, and cemeteries is specifically prohibited within a 50-foot radius of the water well described and located below.

4. This easement permits the construction of homes or buildings upon the Grantor's property as long as all items in Restrictions Nos. 2 and 3 are recognized and followed.

5. This easement permits normal farming and ranching operations, except that livestock shall not be allowed within 50 feet of the water well.

The Grantor's property subject to this Easement is described in the documents recorded at:

Volume , Pages of the Real Property Records of County, Texas.

Property Subject to Easement:

All of that area within a 150 foot radius of the water well located feet at a radial of degrees from the corner of Lot , of a Subdivision of Record in Book , Page of the County Plat Records, County, Texas.

TERM:

This easement shall run with the land and shall be binding on all parties and persons claiming under the Grantor(s) for a period of two years from the date that this easement is recorded; after which time, this easement shall be automatically extended until the use of the subject water well as a source of water for public water systems ceases.

ENFORCEMENT:

Enforcement of this easement shall be proceedings at law or in equity against any person or persons violating or attempting to violate the restrictions in this easement, either to restrain the violation or to recover damages.

INVALIDATION:

Invalidation of any one of these restrictions or uses (covenants) by a judgement or court order shall not affect any of the other provisions of this easement, which shall remain in full force and effect.

FOR AND IN CONSIDERATION, of the sum of One Dollar ($1.00) and for other good and valuable consideration paid by the Grantee to the Grantor(s), the receipt of which is hereby acknowledged, the Grantor does hereby grant and convey to Grantee and to its successors and assigns the sanitary control easement described in this easement.

GRANTOR(S)

By:

ACKNOWLEDGMENT

STATE OF TEXAS §
§
COUNTY OF §

BEFORE ME, the undersigned authority, on the day of , 19 , personally appeared _____ known to me to be the person(s) whose name(s) is(are) subscribed to the foregoing instrument and acknowledged to me that executed the same for the purposes and consideration therein expressed.

Notary Public in and for
THE STATE OF TEXAS
My Commission Expires:

Typed or Printed Name of Notary

Recorded in Courthouse, , Texas on , 19

(d) Appendix D. Sample Service Inspection Certification. **Figure 290.47(d)**

Service Inspection Certification

Name of PWS _____
PWS I.D.# _____
Location of Service _____

I _____, upon inspection of the private water distribution facilities connected to the aforementioned public water supply do hereby certify that, to the best of my knowledge:

		Compliance	Non-Compliance
(1)	No direct connection between the public drinking water supply and a potential source of contamination exists. Potential sources of contamination are isolated from the public water system by an air gap or an appropriate backflow prevention assembly in accordance with Commission regulations.	☐	☐
(2)	No cross-connection between the public drinking water supply and a private water system exists. Where an actual air gap is not maintained between the public water supply and a private water supply, an approved reduced pressure-zone backflow prevention assembly is properly installed and a service agreement exists for annual inspection and testing by a certified backflow prevention device tester.	☐	☐
(3)	No connection exists which would allow the return of water used for condensing, cooling or industrial processes back to the public water supply.	☐	☐
(4)	No pipe or pipe fitting which contains more than 8.0% lead exists in private water distribution facilities installed on or after July 1, 1988.	☐	☐
(5)	No solder or flux which contains more than 0.2% lead exists in private water distribution facilities installed on or after July 1, 1988.	☐	☐

Water service shall not be provided or restored to the private water distribution facilities until the above conditions are determined to be in compliance.

I further certify that the following materials were used in the installation of the private water distribution facilities:

Service lines Lead ☐ Copper ☐ PVC ☐ Other ☐
Solder Lead ☐ Lead Free ☐ Solvent Weld ☐ Other ☐

I recognize that this document shall become a permanent record of the aforementioned Public Water System and that I am legally responsible for the validity of the information I have provided.

_____ _____
Signature of Inspector Registration Number

_____ _____
Title Type of Registration

_____
Date

(e) Appendix E. Boil Water Notification. **Figure 290.47(e)**

BOIL WATER NOTIFICATION
[INSERT NAME OF SYSTEM]

Due to conditions which have occurred recently in the water system, the Texas Natural Resource Conservation Commission has required the system to notify all customers to boil their water prior to consumption.

To ensure destruction of all harmful bacteria and other microbes, water for drinking, cooking, and ice making should be boiled and cooled prior to consumption. The water should be brought to a vigorous rolling boil and then boiled for two minutes. In lieu of boiling, you may purchase bottled water or obtain water from some other suitable source. When it is no longer necessary to boil the water, water system officials will notify you.

If you have questions regarding this matter you may contact (a) at (b) .

(a) Utility Official(s) (b) Phone Number(s)

INSTRUCTIONS:

List more than one utility official and phone number. Do not list the commission as the primary contact. If a customer wishes to call the commission, please have them call 512/239-6020.

(f) Appendix F. Sample Backflow Prevention Assembly Test and Maintenance Report. **Figure §290.47 (f)**

The following form must be completed for each assembly tested. A signed and dated original must be submitted to the public water supplier for recordkeeping purposes:

BACKFLOW PREVENTION ASSEMBLY TEST AND MAINTENANCE REPORT

NAME OF PWS: _____
PWS I.D. # _____
LOCATION OF SERVICE: _____

The backflow prevention assembly detailed below has been tested and maintained as required by TNRCC regulations and is certified to be operating within acceptable parameters.

TYPE OF ASSEMBLY

☐ Reduced Pressure Principle ☐ Pressure Vacuum Breaker
☐ Double Check Valve ☐ Atmosphere Vacuum Breaker

Manufacturer_____ Size _____
Model Number_____ Located At _____
Serial Number_____

	Reduced Pressure Principle Assembly			Pressure Vacuum Breaker	
	Double Check Valve Assembly			Air Inlet	Check Valve
	1st Check	2nd Check	Relief Valve	Opened at _____psid	_____psid
Initial Test	DC-Closed Tight ☐ RP-_____psid Leaked ☐	Closed Tight ☐ Leaked ☐	Opened at _____psid	Did not Open ☐	Leaked ☐
Repairs and Materials Used					
Test After Repair	DC-Closed Tight ☐ RP_____psid	Closed Tight ☐	Opened at _____psid	Opened at _____psid	_____psid

The above is certified to be true.
Firm Name _____ Certified Tester _____
Firm Address _____ Cert. Tester No. _____ Date_____

(g) Appendix G. Operator and/or Employment Notice. Figure 290.47 (g)

Section 290.46(e), Operation by Certified Personnel, paragraph 4, requires certified operators to provide a written, dated, and signed notice listing the public water systems which they operate or are employed. This is required when applying for, renewing, or upgrading a certificate of competency. This notice must be amended in writing within 10 days of any change in responsibility.

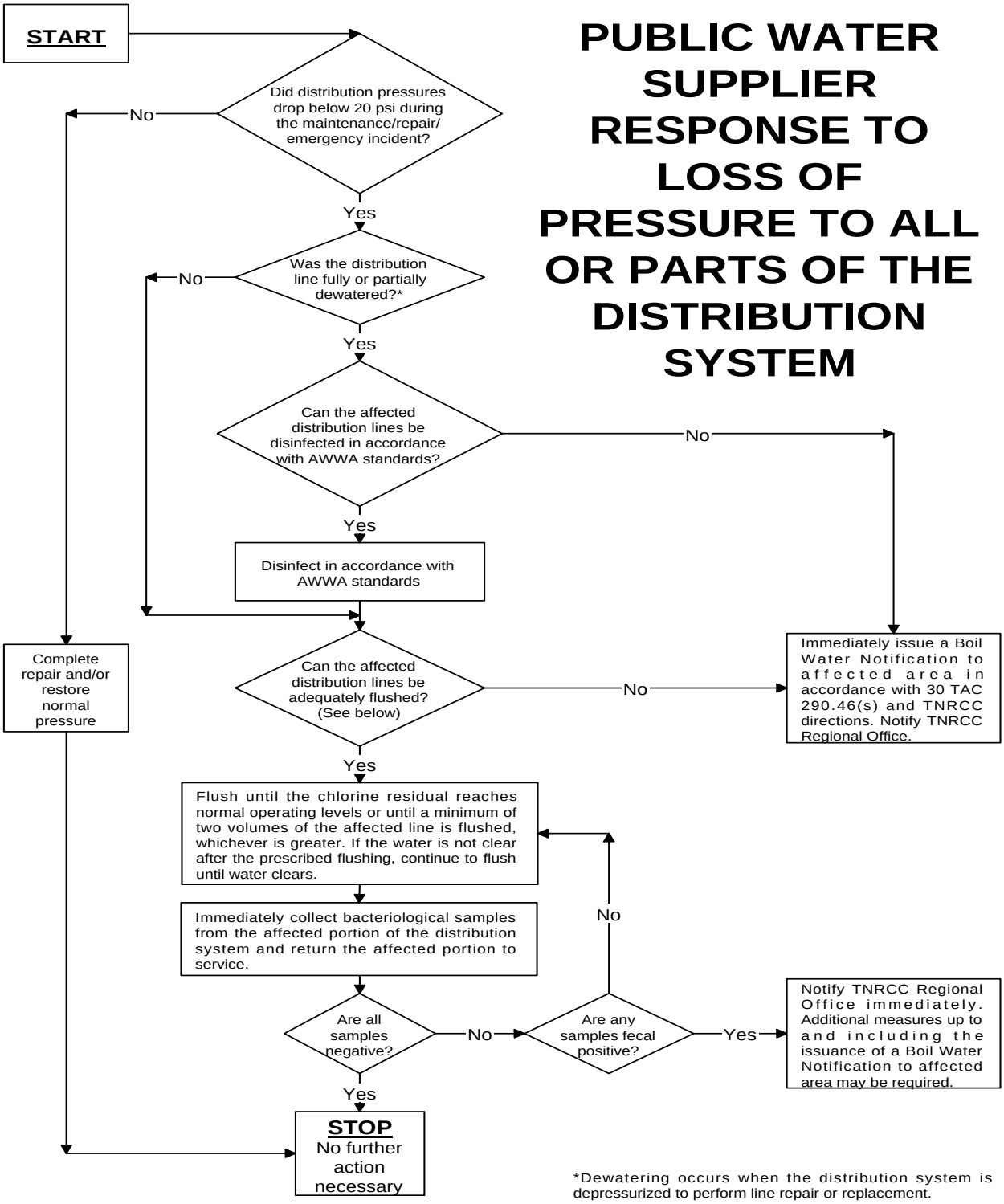
SYSTEM NAME	I.D. #	COUNTY
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Signature of Operator Social Security Number

Grade of Certificate Expiration Date

This notice should be submitted to the Operator Certification Section, Compliance Support Division, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

(h) Appendix H. Special Precautions Flowchart. **Figure 290.47 (h)**



SUBCHAPTER F : DRINKING WATER STANDARDS GOVERNING DRINKING WATER QUALITY AND REPORTING REQUIREMENTS FOR PUBLIC WATER SUPPLY SYSTEMS

§290.102, §290.116

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Health and Safety Code, §341.031 which gives the commission the power to establish standards for public drinking water and to adopt rules to implement the federal Safe Drinking Water Act.

§290.102. Definitions.

The following definitions shall apply in the interpretation and enforcement of these standards. If a word or term used in this subchapter is not contained in the following list, its definition shall be as shown in 30 TAC §290.38 or in Title 40 Code of Federal Regulations §141.2. Other technical terms used shall have the meanings or definitions listed in the latest edition of "Glossary, Water and Wastewater Control Engineering," prepared by a joint editorial board representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association, and the Water Pollution Control Federation.

(1) **Halogen** - means one of the chemical elements chlorine, bromine, or iodine.

(2) **Total Trihalomethanes (TTHM)** - means the sum of the concentration in milligrams per liter of the trihalomethane compounds (trichloromethane, i.e., chloroform; dibromochloromethane; bromodichloromethane; tribromomethane, i.e., bromoform) rounded to two significant figures.

(3) **Trihalomethane (THM)** - means one of the family of organic compounds named as derivatives of methane, wherein three of the four hydrogen atoms in methane are each substituted by a halogen atom in the molecular structure.

§290.116. Control of Trihalomethanes in Drinking Water.

(a) The maximum contaminant level (MCL) for total trihalomethanes shall be 0.10 milligrams/liter. The MCL shall apply only to those systems which serve a population of 10,000 or more individuals.

(b) Sampling and analytical requirements for total trihalomethanes:

(1) For the purpose of this section, the minimum number of samples required to be taken shall be based on the number of treatment plants used by the system, except that multiple wells drawing raw water from a single aquifer shall be considered as one treatment plant for determining the minimum number of samples. All samples taken within one sampling period shall be collected within a 24-hour period.

(2) For all community water systems utilizing surface water sources in whole or in part, and for all water systems utilizing only groundwater sources that have not been determined to qualify for the reduced monitoring requirements of paragraph (4) of this subsection, analyses for total trihalomethanes shall be performed on at least four samples of water per quarter from each treatment plant used by the system. At least 25 percent of the samples shall be taken at locations within the distribution system reflecting the maximum residence time of the water in the system. The remaining 75 percent shall be taken at representative locations in the distribution system, taking into account number of persons served, different sources of water, and different treatment methods employed. The results of all analyses per quarter shall be arithmetically averaged and reported to the commission within 30 days of the system's receipt of such results. All samples collected shall be used in computing the average, unless the analytical results are invalidated for technical reasons.

(3) Upon the written request of a community water system, the monitoring frequency required by paragraph (2) of this subsection may be reduced by the commission to a minimum of one sample analyzed for TTHM's per quarter taken at a point in the distribution system reflecting the maximum residence time of the water in the system, upon a written determination by the commission that the data from at least one year of monitoring in accordance with paragraph (2) of this subsection and local conditions demonstrate that total trihalomethane concentrations will be consistently below the maximum contaminant level.

(A) If at any time during which the reduced monitoring frequency prescribed under this subsection applies, the results from any analysis exceed 0.10 milligrams/liter of TTHM's and

such results are confirmed by at least one check sample taken promptly after such results are obtained, or if the system makes any significant change to its source of water or treatment program, the system shall immediately begin monitoring in accordance with the requirements of paragraph (2) of this subsection.

(B) If a system is required to begin monitoring in accordance with paragraph (2) of this subsection, such monitoring shall continue for at least one year before a reduction in monitoring frequency may be considered.

(4) Upon the written request to the commission, a community water system utilizing only groundwater sources may seek to have the monitoring frequency reduced to a minimum of one sample for maximum TTHM potential per year taken at a point in the distribution system reflecting maximum residence time of the water in the system. The system shall submit to the commission the results of at least one sample analyzed for maximum TTHM potential taken at a point in the distribution system reflecting the maximum residence time of the water in the system. The system's monitoring frequency may only be reduced upon a written determination by the commission that, based upon the data submitted by the system, the system has a maximum TTHM potential of less than 0.10 milligrams/liter and that, based upon an assessment of the local conditions of the system, the system is not likely to approach or exceed the maximum contaminant level for TTHM's. The results of all analyses shall be reported to the commission within 30 days of the system's receipt of such results. All samples collected shall be used for determining whether the system must comply with the monitoring

requirements of paragraph (2) of this subsection, unless the analytical results are invalidated for technical reasons.

(A) If at any time during which the reduced monitoring frequency prescribed under this subsection is in effect, the result from any analysis taken by the system for the maximum TTHM potential is equal to or greater than 0.10 milligrams/liter, and such results are confirmed by at least one check sample taken promptly after such results are received, the system shall begin immediately to monitor in accordance with the requirements of paragraph (2) of this subsection.

(B) If it becomes necessary to begin monitoring in accordance with paragraph (2) of this subsection, such monitoring shall continue for at least one year before the monitoring frequency may be reduced.

(C) In the event of any significant change to the system's raw water or treatment program, the system shall immediately analyze an additional sample for maximum TTHM potential taken at a point in the distribution system reflecting the maximum residence time of the water in the system for the purpose of determining whether the system must comply with the monitoring requirement of paragraph (2) of this subsection.

(5) Compliance with the MCL of 0.10 milligrams/liter for total trihalomethanes shall be determined based on a running annual average of quarterly samples collected by the system as prescribed in paragraph (2) of this subsection. If the average of samples covering any 12-month period

exceeds the maximum contaminant level, the supplier of water shall report to the commission within 30 days and notify the public as required under §290.103(8) of this title (relating to Standards of Chemical Quality). Monitoring after public notification shall be at a frequency designated by the commission and shall continue until a monitoring schedule as a condition of a variance, exemption, or enforcement action shall become effective.

(6) Before a community water system makes any significant modification to its existing treatment process for the purpose of achieving compliance with this subsection, the system must submit and obtain commission approval of a detailed plan setting forth its proposed modifications and those safeguards that it will implement to ensure that the bacteriological quality of the drinking water served by such system will not be adversely affected by such modifications.

(7) All analyses for determining compliance with the provisions of this subsection shall be conducted in accordance with the procedures required by the U.S. Environmental Protection Agency.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§291.1, 291.3, 291.21, 291.25, 291.29, 291.31, 291.32, 291.34, 291.41, 291.76, 291.87, 291.93, 291.101-291.103, 291.106, 291.107, 291.109, 291.111, 291.113, 291.114, and 291.138; the repeal of §291.15 and §291.16; and new §§291.15, 291.34, 291.140, 291.144, and 291.150-291.153, concerning Utility Regulation. Sections 291.3, 291.29, 291.31, 291.32, 291.34, 291.41, 291.87, 291.93, 291.102, 291.106, 291.109, 291.111, 291.114, 291.144, 291.151, and 291.152 are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10818). The amendments to §§291.1, 291.21, 291.25, 291.76, 291.101, 291.103, 291.107, 291.113, and 291.138; the repeal of §291.15 and §291.16; and new §§291.15, 291.140, 291.150, and 291.153 are adopted without changes and will not be republished.

Simultaneous with the publication of the proposed rules on October 23, 1998, the commission also proposed amendments to 30 TAC §§291.121-291.127, concerning Utility Submetering. The commission will take final action on those Utility Submetering rules at a later date and will publish those final rules in a later *Texas Register*.

EXPLANATION OF THE ADOPTED RULES

The purpose of the adopted amendments is to implement sections of Senate Bill 1, Article 5, for Notice of Wholesale Water Supply Contract, and Article 6, 75th Legislature, 1997, related to ensuring the technical, managerial, and financial capacity of public water and sewer utility service providers and rate flexibility; streamline or clarify existing rules, and update references and definitions.

The provisions of the current §291.15, relating to Jurisdiction of Municipality: Surrender of Jurisdiction, are moved to a new §291.150, relating to Jurisdiction of Municipality: Surrender of Jurisdiction. A new provision is adopted for §291.15, Notice of Wholesale Water Supply Contract. This section is intended to implement new Texas Water Code, §13.143 enacted by Senate Bill 1, 75th Legislature, 1997. The provisions of the current §291.16, relating to Applicability of Commission Service Rules Within the Corporate Limits of a Municipality, are moved to a new §291.151, relating to the same subject matter.

Section 291.21, relating to Form and Filing of Tariffs, adds provisions regarding rate adjustments to implement phased rates under §291.34, relating to Alternative Rate Methods, and downward rate adjustments to the list of minor changes the executive director may make to tariffs. Subsection (c)(8) is added to add the requirement that the tariff must address the form of payments that will be accepted for utility services.

Section 291.29, relating to Interim Rates, was reworded to clarify that certain actions taken by the commission may also be taken by an administrative law judge as provided by Texas Water Code, §5.311, as amended by Senate Bill 1 (1997). The section also updates references to the State Office of Administrative Hearings (SOAH). Both the word “Judge” and “SOAH” are defined in 30 TAC Chapter 3, concerning Definitions. This section also makes other minor amendments designed to clarify meaning.

Section 291.31(e), relating to Cost of Service, provides for, over and above what is allotted under traditional cost of service in a rate case, a positive acquisition adjustment for utility plant, property, and

equipment acquired from another retail public utility in a sale, merger, etc., of utility service areas. A positive acquisition adjustment is intended to provide an incentive for utilities to facilitate consolidation and regionalization. The subsection provides eligibility criteria for when an acquisition adjustment is allowed, a methodology for calculating the amount of the adjustment, and procedural requirements. The rule would only allow an acquisition adjustment for a sale and transfer of a utility that has filed an application on or after September 1, 1997, and the sale on that application closed thereafter.

The adopted §291.31(d), relating to Recovery of Positive Acquisition Adjustment, would allow a positive acquisition adjustment for transfers where the utility is acquired through a stock purchase with a subsequent asset transfer and which is a part of what is essentially a single sale transaction.

Amendments to §291.32, relating to Rate Design, authorize a utility to seek and obtain, in a rate change proceeding, a water conservation surcharge. The water conservation surcharge would allow a utility to generate revenue above the utility's usual cost of service as authorized by Texas Water Code, §13.183, as amended by Senate Bill 1, 75th Legislature, 1997. The subsection sets out criteria for when a water conservation surcharge would be permissible, and establishes restrictions on the disposition of funds collected by the surcharge. Subsection (d) provides that the commission may, in a rate proceeding, authorize collection of an additional surcharge to provide funds for debt repayments and reserve funds.

The new §291.34, relating to Alternative Rate Methods, implements Texas Water Code, §13.183 and §13.184, as amended by Senate Bill 1, 75th Legislature, 1997, which authorize the commission to set

utility rates on factors other than rate of return and those specified in Texas Water Code, §13.185. The new section implements three non-traditional rate methods: single issue rate changes, phased and multi-step rate changes, and the cash needs method. The single issue rate change allows a utility to file a simplified rate case limited to only one issue. A utility may wish to consider a single issue rate change when faced with a cost increase in a single cost component. Phased and multi-step rate changes allow a utility to phase in a rate increase approved in one rate case rather than filing several separate rate cases. The cash needs method of rate setting allows the recovery of reasonable and prudently incurred debt service cost, including principal, interest, and reasonable cash reserves and other expenses not allowed under standard methods of establishing rates. The new section sets out criteria and conditions for the use of each of these alternative rate methods.

The commission intends that the alternative rate method of §291.34 would be available only for rate applications filed after the effective date of the final rule. Rate applications filed before the effective date of the final rule must use the traditional rate methods specified in the current rules.

Amendments to §291.41, relating to Appeal of Ratemaking Pursuant to the Texas Water Code, §13.043, update statutory references, add a notice requirement, and are intended to relate to actions for which the commission has express statutory authority. The notice requirement expressly provides for the existing practice of the commission to require the retail public utility to provide written notice of a hearing being held pursuant to §291.41(c) to all affected customers, rather than having notice provided by the chief clerk.

Amendments to §291.76, relating to Regulatory Assessment, are intended to require the utility to remit the regulatory assessment fee to the commission on an annual basis, rather than allowing the utility the option of paying on a quarterly basis, and to remove the allowance for retaining 10% when payments are made quarterly, in order to be consistent with statutory authority.

Amendments to §291.87, relating to Billing, set out procedures for a utility to implement a voluntary program to collect voluntary contributions to a volunteer fire department or emergency medical service as part of the utility's regular customer bill.

Amendments to §291.93, relating to Adequacy of Water Utility Service, change the time for filing a report regarding system capacity. Under the adopted rule, a retail public utility must analyze its system capacity after a commission field inspection. If the retail public utility has reached 85% of its capacity, it must file a planning report explaining how it will provide service to the remaining areas within its certificated area, within 90 days from the date of the commission letter detailing the results of the inspection. This change was made to conform to the statute and agency practice.

Amendments to Subchapter G, relating to Certificates of Convenience and Necessity, implement provisions of Senate Bill1, Article 6, 75th Legislature, 1997. Section 291.101, relating to Certificate Required, would add a condition that a water district may not provide service within an area where a retail public utility holds a certificate of convenience and necessity, or within the boundaries of another water district, without the district's consent unless the water district proposing to provide service has obtained a certificate of convenience and necessity for that area from the commission. Amendments to

§291.102, relating to Criteria for Considering and Granting Certificates or Amendments, update the section to conform to amendments to Texas Water Code, §13.241 and §13.246 made by Senate Bill 1, 75th Legislature, 1997, and to add requirements to demonstrate that regionalization or consolidation is not economically feasible. Amendments to §291.103, relating to Certificates Not Required, update the section to conform to amendments to Texas Water Code, §49.352. The amendments to §291.109, relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction, add requirements for the applicant in a sale or merger of a water or sewer system to demonstrate the financial, managerial, and technical capability to provide continuous and adequate service. If the entity acquiring the system cannot demonstrate adequate financial capability, the commission may require the provision of financial assurance in an amount determined by the commission. The form of the financial assurance will be as provided in the new 30 TAC Chapter 37, Subchapter O, concerning Financial Assurance for Public Drinking Water Systems and Utilities. The amendments to §291.111, relating to Purchase of Voting Stock in Another Utility, are similar to the provisions of §291.109, except those provisions that relate to purchase of a water system by transferring of voting stock in a utility. Amendments to §291.113, relating to Revocation or Amendment of Certificate, implement Texas Water Code, §13.254 as amended by Senate Bill 1, 75th Legislature, 1997, and generally track that statute. Other amendments in this subchapter update references to current statutes.

Section 291.106(b)(1), relating to Notice for Application for Certificates of Convenience and Necessity, provides that cities and other retail public utilities within a specified distance from the proposed service area must receive notice of an application for issuance or amendment of a certificate of public convenience and necessity. The adopted rule increases the specified distance from a two-mile radius to

a five-mile radius for applications for a new Certificate of Convenience and Necessity. By this amendment, the commission intends in applications for Certificates of Convenience and Necessity to solicit comment from a wider audience on the appropriateness of the proposed system versus regional service from an existing system. The commission believes that a more rigorous inquiry on regionalization than is the current practice is legislatively mandated by Health and Safety Code, §341.0315(b) and Water Code, §26.003.

Section 291.138, relating to Filing of Rate Data, is intended to remove a requirement that providers of water or sewer service for resale must file an annual report. In place of the mandatory report, the rule would allow the commission the option to require that a report be filed. Providers of water or sewer service for resale would only have to file a report within 30 days of receiving a written request for the report from the executive director.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" because the specific intent of the amendment is to regulate water and sewer service utilities and not to protect the environment or reduce risks to human health from environmental exposure. The provisions in the adopted rules related to demonstrating the technical, managerial, and financial capacity of utilities are in partial response to the federal Safe Drinking Water Act Amendments of 1996, and are also specifically required by Senate

Bill1, Article 5 (Notice of Wholesale Water Supply Contract), and Article 6, 75th Legislature, 1997.

The adopted rules do not exceed an express requirement of state or federal law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement sections of Senate Bill 1, 75th Legislature, 1997, specifically Article 5, relating to Notice of Wholesale Water Supply Contracts, and Article 6, relating to ensuring the technical, managerial, and financial capacity of utilities; to allow the commission to set water and sewer utility rates based on factors other than rate of return and those specified in Texas Water Code, §13.185; streamline existing rules; and to make the rules consistent with recent statutory changes. The rules will substantially advance this specific purpose by requiring applicants for Certificates of Convenience and Necessity to demonstrate or provide financial assurance of its ability to provide service; specifying alternative rate methodologies for water and sewer utilities; eliminating certain required reports to the agency; clarifying existing rules; and amending rules to reflect recent legislative changes. Promulgation and enforcement of these rules will not burden private real property because the requirement to demonstrate its ability to provide service is a procedural requirement designed to demonstrate the financial capability of the utility; and because existing methodologies for setting water or sewer rates are retained in effect. The adopted rules only provide additional methodologies that a water or sewer utility may choose to use in a rate case.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

RULES REVIEW

The commission, concurrently with these adopted amendments to Chapter 291, has completed its review of Chapter 291, concerning Utility Regulation. This review is in accordance with the General Appropriations Act, Article IX, §167, 75the Legislature, 1997. See the Adopted Rules Review section of this issue of the *Texas Register* for additional information on the rules review of this chapter.

HEARING AND COMMENTERS

A public hearing on these proposals was held on November 2, 1998, in Austin, and the comment period closed November 23, 1998.

Consumers Union (CU) and the Public Interest Counsel (PIC) of the commission submitted comments and generally supported the proposed amendments, while also offering specific changes.

The Independent Water and Sewer Companies of Texas, Inc., AquaSource, Inc., Associates Utility Company, Astro Commercial Enterprises, Bandera River Ranch Water Company, BBR Water Company, BBS Water Company, Blue Bell Manor Utility Company, Bradberry Water Supply,

Bulverde Utility Company, Calico Water Supply, Castle Water, Champ's Water Company, Clear Lakes Water System, Comal Water Company, Council Creek Village, Crystal Springs Water Company, C & P Utilities, C-Willow Water Company, Deercreek Water Works, Deer Run Water System, Diamond Water Company, G & S Utilities, Harper Water Company, Hays Water Company, Highland Utilities, Hi-Texas Water Company, Holiday Oaks Water System, Industrial Utilities Services, Jones-Owen Company, Kerrville South Water Company, Lake McQueeny Estates Water Company, Lake Vista Utility Company, Lake Whitney Water Company, Lakewood Water Corporation, Lomas Water Company, Mitchell County Utility Company, Payne Utilities, Inc., Pine Trails Utilities, Plum Creek Water Company, Quadvest, Rivercrest Water Supply, Silverleaf Resorts, Southern Sanitary Corporation, Southern Utilities Company, Southern Water Corporation, Southwest Utilities, Tall Timbers Estates Utilities, Tall Timbers Utility Company, Inc., Tanglewood Water Company (Tanglewood), Technology/Hydraulics, Tecon Water Companies (Tecon), Texas Water Systems, Texoma Services Corporation (Texoma), Walker Water Works, Water Services, and Woodmark Utilities, submitted similar suggested changes. These commenters will hereinafter be referred to collectively as IWSCOT.

Also offering specific changes were: Texas Rural Water Association (TRWA), Philip Utilities Management Corporation (Philip), Tecon Water Companies (Tecon), and the City of Austin. The following paragraphs summarize the written and oral comments received.

COMMENTS ON RATE FLEXIBILITY AND RATEMAKING

IWSCOT questioned the intent and purpose of including the form of payment to be accepted by the utility in its tariff.

This language was included to allow the utility to be able to restrict the form of payment to reasonable forms of payment and to be allowed to reject payment for unreasonable forms of payment, such as paying the bill in pennies.

IWSCOT proposed that a capital reserve account including a debt service reserve be allowed in the cost of service.

The commission has made no changes in response to this comment. The commission recognizes that there can be a seasonal shortfall of revenues and that there is a need for planning and budgeting on the utility's part. Current ratemaking formulas include an extra allowance of 1/8th of operations and maintenance expense to be included in the cost of service. Additionally, while not designed specifically to fund a reserve, the inclusion of an allowance for depreciation does provide funds that are not cash flow related. Proposed rules would allow for the establishment of a debt service and debt reserve fund. Reserves for future capital needs have the effect of requiring current customers to pay for future improvements, the benefits of which they may not enjoy.

Texoma commented that the language related to the period of refund or surcharge which results from interim rates should be consistent. Subsection (f) requires that the retail public utility refund or credit against future bills all sums collected in excess of the rate finally ordered by the commission. Subsection (g) allows the retail public utility to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

The commission agrees with this comment and has added "…in a reasonable number of monthly installments…" to §291.29(f) to make the time periods consistent.

Tanglewood commented that the commission should ensure that the amount of an acquisition adjustment is sufficient to assure regionalization statewide.

The commission has made no changes in response to this comment. The rule includes adequate incentives to ensure that the acquisition adjustment will be effective statewide. If experience with the adopted rule does not bear this out, the commission will consider changes in future rule packages.

IWSCOT and Tecon commented that wording in §291.31(d)(1) should be changed from "…as part of a sale and transfer of utility service area…" to "…as part of a sale, transfer, or merger of utility service area…."

The commission agrees in part with the need for a change and has modified the language to agree with statutory language by changing it to "…as part of a sale, merger, etc. of utility service area…."

IWSCOT, Philip, and Tecon all recommended that the effective date of the acquisition adjustments be September 1, 1997. CU commented that the effective date should be the effective date of the rules and should not be retroactively applied. PIC commented that the rules should apply prospectively to all rate applications filed after the effective date of the rules.

The commission has made changes in response to these comments. Senate Bill 1 granted the commission the authority to promulgate alternative ratemaking rules and the use of an acquisition adjustment is included as an alternative ratemaking process. The authority was permissive, not mandatory, and it is not clear that the legislature mandated that an acquisition adjustment be included in these rules. While industry knew that the commission was considering including an acquisition adjustment in the rules, they were also kept informed and were told on a number of occasions that there were no assurances that they would be eligible for one prior to the effective date of the rules or that one would even be included in the proposed rules.

The commission believes that acquisition adjustments could help create an incentive for regionalization. There has been considerable discussion related to the criteria that must be included for a utility to obtain an adjustment. The proposed rules went through several

iterations. CU, IWSCOT, and Tecon were included in several stakeholders meetings where the adjustment and other modifications to the rules were discussed.

Notwithstanding the arguments that purchasers should not be penalized for delays in the rulemaking process, many of the purchase agreements in question were tied to final adoption of the rules. Many other sales were consummated with the understanding that the purchaser may not be able to obtain an acquisition adjustment.

In many cases, the purchase prices were not based on actual value of the system assets, but set at an arbitrary per connection value, suggesting that, in several cases, the purchasers had not done a thorough evaluation of the system.

Additionally, the Notice of Intent to Sell Facilities and Transfer the Certificate of Convenience and Necessity form includes language that "[t]his transaction will have the following effect on the current customer's rates and services: _____." Because most of the sales are between regulated entities and: (1) rates cannot be changed as a result of the transaction; AND (2) acquisition adjustments have not been allowed, the typical response is "NONE." It should be pointed out that the notice is sent only to the customers of the system being acquired, not to any of the existing customers of the acquiring utility. As a result, none of the customers were given the opportunity at the time of the sale to evaluate the impact of the sales price and subsequent acquisition adjustment on their rates. The commission believes that the original notice is not sufficient to allow the effective date of this provision to be September 1, 1997, unless additional notice is provided. Without requiring additional notice provisions, the customers will not have

been given an opportunity to know of the impact on their rates as a result of the sale and will only learn of the impact on their rates when they are provided notice of a rate change. The notice should also contain sufficient information to allow each customer to calculate the impact of the adjustment on an individual water bill.

In order for the commission to allow an acquisition adjustment on sales since September 1, 1997, that acquisition adjustment must meet the standards which will apply for all sales after the effective date of these rules. This means that the utility will be required to provide an analysis of the purchase price as described in the response to the next comment. Without a definitive standard, the determination of an adjustment would undoubtedly lead to contested hearings to determine the amount of the adjustment. And the final result would likely turn on the actual value of the system versus the purchase price with the commission having to be the final arbiter.

The commission agrees in part with the PIC comments that acquisition adjustments should be considered in all rate cases filed after the effective date of the rules; however, the commission believes that this would then make acquisition adjustments available to all previous sales, including those which occurred prior to September 1, 1997, during a time when there was no authority to consider them.

After considering all of the comments, the commission has changed §291.31(d)(1) to reflect that a positive acquisition adjustment will be considered for all sales resulting from applications filed on or after September 1, 1997, and the sale on that application closed thereafter, and that the

adjustment is subject to the cap discussed in response to the next comment. The amount of the acquisition adjustment will be determined as part of a rate case.

CU, IWSCOT, Philip, and Tecon all commented on the need for a clearly defined standard for determining the amount of an eligible acquisition adjustment. IWSCOT and Tecon jointly requested a change to the guidelines for establishing the amount of an acquisition adjustment. They suggested that the standard should be based on a range of amounts based on a per capita impact to customers and the size of the customer base of the acquiring utility. Texoma agreed with using a range, but proposed different levels and also urged adoption of a method that did not favor only systems with a large customer base. Philip requested an alternative change to the guidelines. They suggested that the standard be limited to the difference between: the current depreciated replacement cost of the plant, property, and equipment being acquired; and its original cost less accumulated depreciation.

The commission agrees in part with these comments and has added language to the rules which further clarifies and defines the criteria for an acquisition adjustment. Basing the standard on a range of amounts based on per capita impacts still leaves the actual determination of the adjustment open to dispute and is not based on information that relates to the actual value of the assets being purchased. Because it is based on an arbitrary impact on rates, it can also have the effect of setting the sales price at artificial levels of value. It would also seem to give an unfair advantage to utilities with a large customer base. There are a number of smaller well-run utilities that should be included in the pool of potential buyers. The standard now included relates to the replacement cost of the assets being purchased. There are a number of indices that are accepted by the engineering and construction industry. The information could be easily verified by all parties. It would provide an even playing field for all size utilities. It would be the cap for the

amount of the purchase price to be included in the rates of the customers. It would not restrict the amount of the purchase price. A purchaser could pay more, but it would have to look for economies of scale and improved operations to provide a return on those excess funds. This proposal would also ensure that the purchaser has done a thorough investigation into the infrastructure and reliability of the system, an important criteria for demonstrating financial, managerial, and technical capacity.

IWSCOT and Tecon commented that wording in §291.31(d)(1) should be changed from "…a positive acquisition adjustment may be allowed…" to "…a positive acquisition adjustment will be allowed…."

The commission agrees with the proposed language and has changed the wording accordingly. It should be noted that the purchaser bears the burden of proof that it has met all of the other criteria associated with this section.

IWSCOT, Philip, and Tecon either commented on or supported the recommendation that an acquisition adjustment should be allowed to the extent that the property is used and useful either at the time of the acquisition or as a result of the acquisition.

The commission agrees with the recommendation and has modified §291.31(d)(1) to reflect that.

Philip commented that there is no reason for an acquisition adjustment to be considered in light of the financial impact on the acquiring utilities existing customers.

The commission has made no changes in response to these comments. Acquisition adjustments can have an impact on the rates of the acquiring utility's customers if the utility intends to develop system-wide rates. Uncontrolled continued acquisitions can have an impact on the utility's ability to provide adequate service. There should be a benefit to the customers if they are going to have their rates increased.

Philip proposed that in addition to the requirement that the sale be the result of an arm's length transaction that there should be a requirement for full disclosure of any and all transactions between the buyer and seller entered into as a part or condition of the sale being proposed.

The commission agrees, and has modified §291.31(d)(1)(D) to include that requirement.

IWSCOT and Tecon commented that the definition of a multi-stage sale found in §291.31(d)(1)(F) be changed to eliminate the word "concurrently."

The commission agrees in part with this comment. The commission's intent for the use of "concurrently" was to identify those transactions which really are just vehicles for tax savings and it never intended to limit the period of time for which they would be considered. However, the commission fully intended that the use of such a sales vehicle would be fully disclosed at the time of the application for a sale. The commission has modified §291.31(d)(1)(F) to remove the word "concurrently" and to add a requirement for full disclosure.

IWSCOT, Philip, and Tecon commented that an acquisition adjustment should be applied to a stand-alone stock purchase, not just as a part of a multi-staged stock purchase/asset transfer agreement. IWSCOT commented that the beneficial tax consequences of selling stock would result in lower sales prices and that without a stock sale, the price would be higher and the purchaser would have to pay more for the acquisition and would therefore have less funds with which to make necessary repairs and improvements.

The commission has made no changes in response to these comments. The commission has acknowledged that a multistage stock purchase/asset transfer is an acceptable reason for establishing an acquisition adjustment and it is included in the rules to address the concern that an acquisition adjustment would not be allowed because the transaction would have been between affiliated parties. Without allowing this multistage stock purchase/asset transfer, the new shareholder and the subsequent owner would be affiliates and would then be unable to obtain an acquisition adjustment. It was never contemplated that stock transfers would in and of themselves qualify for an acquisition adjustment.

Stand-alone stock transfers do not change the legal entity responsible for the utility. The corporation continues to be the responsible entity for maintaining the utility. Stock transfers are off-book transactions which have no effect on the financial records of the utility. There is no acceptable way to record the cost of purchasing the shares on the corporation's books.

It may be true that by disallowing a positive acquisition adjustment on a stand-alone stock sale, the purchase price and acquisition adjustment would be higher. However, with the implementation of a cap on the amount of an acquisition adjustment, this argument is moot.

The commission is not persuaded by the argument that the higher the purchase price, the lower the amount of funds the purchaser will have available to make necessary repairs and improvements. If a purchaser is to be considered to have financial, managerial, and technical capacity, then it must be able to show that it has not only the financial wherewithal to purchase the system and make the improvements, but also the managerial capacity to negotiate a sales price which will enable it to do both. Failing to consider the consequences of the sales price on its ability to maintain the utility for the long run is an indication that it does not have that capacity and perhaps should not have made the purchase.

Philip commented that the period of amortization for the acquisition adjustment should not exceed the weighted average remaining life of the acquired assets. CU commented that the return allowed on the acquisition adjustment should be limited to a risk-free rate of return.

The commission agrees with the Philip comment and has changed §291.31(d)(2) to include that language.

The commission has made no changes as a result of the CU comments. The use of the cap previously discussed would require that return is to be applied only to those costs which are

related to the assets being purchased. Additionally, under the new rules, the purchaser will be required to meet other criteria for including the acquisition adjustment including improved service and quality of water. Operating the utility, even with an acquisition adjustment, carries an element of risk. Therefore, using the utility's weighted cost of capital as the rate of return acknowledges that risk.

IWSCOT, Philip, and Tecon commented that the determination of the amount of an acquisition could be determined at the time of the approval of the sale; however they recognize that an acquisition adjustment can only be implemented as a part of a rate change application. CU commented that allowing the determination of the acquisition adjustment as a part of the sale application can facilitate some sales. CU further commented that it would be appropriate only if the customers are provided with the same rights of notice and intervention as in a regular rate case and if the purchaser meets its burden of proof regarding specific, measurable, and verifiable customer benefits.

The commission has made no changes in response to this comment. The use of a cap for determining the amount of an acquisition adjustment provides the purchaser with a degree of certainty about the amount of the acquisition adjustment. Additionally, there is no statutory authorization to hold a hearing on a sale when the purchase price is in dispute. The commission does agree that the acquisition adjustment can only be implemented as a part of a rate change application.

IWSCOT and Tecon commented that language should be added which limits the amount of an acquisition adjustment in future sale/purchases.

The commission has made no changes in response to this comment. Since all acquisition adjustments are determined by relating the depreciated replacement cost to the book value of the assets, the argument is moot.

Tanglewood and Texoma commented that the rules relating to rate design need to be expanded to specifically detail the rate-making process to provide consistency of application of the rules.

The commission has made no changes in response to this comment. Consistency with the process is important, and the commission strives to maintain that consistency. However, no two utilities will have the same set of conditions or expenses. Promulgating rules to cover every variation and situation is not possible.

CU commented that the rules related to conservation rates should be applied to both residential and commercial customers equally.

The commission agrees with this comment and has modified the rules to include all customer classes.

CU commented that the commission needs to set a reasonable standard for the first block of usage for all customer classes.

The commission agrees that this is a worthy goal, but does not have the data necessary to make this determination at this time. Therefore, no changes were made in response to this comment.

CU commented that the authority for alternative rates is contained in Article 6 of Senate Bill 1, which is entitled "Small Community Assistance." CU further commented that the rules related to alternative rates do not contain such a distinction and therefore the rules should be limited to use by small systems.

The commission has made no changes in response to these comments. Small communities were not defined in Senate Bill 1, Article 6, 75th Legislature, 1997. Senate Bill 1 was divided into various sections for organizational purposes. The title is not determinative. One must look to the individual statutory provisions for applicability.

CU commented that Article 6 of Senate Bill 1 contains a requirement that "[I]n determining to use alternative ratemaking methodologies, the regulatory authority shall assure that rates, operations, and service are just and reasonable to the consumers and to the utilities."

The commission agrees with this comment and has added this language to §291.34(a).

CU commented that the rules would allow a utility to use several alternate rate methods at the same time or successively and that this should not be allowed.

The commission has made no changes in response to this comment. The rules contain three methodologies for alternate ratemaking: 1) single issue rate changes; 2) phased and multi-step rate changes; and 3) the cash needs method.

The single issue rate change may not be used if the utility is using the cash needs method. Additionally, the utility must file a complete rate change application within three years following the effective date of the single issue rate change request.

The phased or multi-step rate change may be used under either the utility or cash needs method. However, unless the utility meets certain criteria, it may not apply for another rate increase during the period of the phase-in rate intervals.

If the cash needs method is being used, the utility is barred from using the utility method for five years after beginning to use the cash needs method.

IWSCOT commented that a single issue rate case should be extended to include all of the ancillary costs associated with that single issue.

The commission disagrees in part with this comment. The basis for the rules related to Single Issue Rate Cases was that utilities often have a significant increase in a single cost, either from the addition of capital items or an increase in an operations and maintenance cost. Rather than require a full rate case filing for that one item, this provision would allow the utility to increase its rates for that one item. By limiting any proceedings to a single item with all other costs remaining the same, the utility could react quickly to that increase and not have to incur costs for a consultant or a protracted rate appeal process. However, the rules have been changed to include both depreciation and return for capital items. This would be a benefit to the customers for the same reasons.

CU commented that the rules should delineate the type and/or magnitude of the expenditures that would be eligible for this single issue treatment and that they should be limited to one per year.

The commission has made no changes in response to this comment. While designed to allow the utility to limit the costs associated with a full rate change application, it will still be required to meet all notice requirements and possible contested hearings. The utility will have to weigh the cost of the process against the cost of the increased expense. This alone should have the effect of limiting the size of the expense for which a single issue rate change is requested.

The rules limiting the timing for subsequent rate change applications apply to this type of change. The utility may not file any kind of rate change more often than every 12 months unless it meets the criteria set forth in the rules.

CU commented that the use of the word "elect" for both the phased and multi-step method and the cash needs method is inappropriate, but that the utility may "request" and the commission may approve the use of these methods.

The commission agrees with this comment and has replaced "elect" with "request" in the sections related to alternative rates. Further, it has changed the language of §291.34(c)(1) to improve the readability of that section.

CU commented that §291.34(c)(1)(G) would allow the utility to use the phased and multi-step rate methodology for any reason.

The commission is making no additional changes in response to this comment. As noted in the prior comment, the commission has changed the rules to reflect that a utility may request the use of this methodology. Section 291.34(c)(1)(G) was included to ensure that the utility had the opportunity to request the use of this methodology if there were other conditions not listed, but which are known and could have an impact on the financial capacity of the utility. The utility is required to provide information in the original notice of the phased rate.

IWSCOT commented that the Cash Needs method should be expanded to include a return for the utility's business and regulatory risks, even if there are no financial risks.

The commission has made no changes in response to this comment. The commission's intent was not to allow this method to be used in every instance. The rules contain criteria that limit its applicability to those cases where there is a clear indication that its use will enable a troubled utility to survive and acquire financial, managerial, and technical capacity and improve service to its customers. In most cases, this method eliminates most if not all of the risk for operating the utility.

CU commented that in order for a utility to share in any excess funds in the cash reserve account, that the utility must also demonstrate that it has also improved its financial, managerial, and technical capacity. CU further commented that customers should be provided notice and allowed comment on the distribution of the excess funds.

The commission agrees in part with these comments and has included language which ties the utility's share to both cost savings and an improvement in its financial, managerial, and technical capacity. The commission has also added language to this provision that requires that the utility provide an explanation of how the excess funds were distributed at the same time as the refund or credit is issued to the customers. In order for the utility to keep a portion of the excess it must first demonstrate to the executive director that it has improved its financial, managerial, and technical capacity.

IWSCOT commented that the requirements that records be available at "all reasonable hours" as required by §291.74 needs to be clarified.

The commission has made no changes in response to this comment. The relevant section was not opened as a part of this package and therefore there was no notice of potential changes. However, the comment is being considered for inclusion in a subsequent rule package.

IWSCOT commented that late payment penalties should be increased from $2.00 or 5.0%, to $15 for residential customers and 10% for all other customers.

The commission agrees in part with this comment and has increased the late payment penalty to $5.00 or 10% for all customers.

The City of Austin commented that the phrase "the billed amount" relating to provisions for including voluntary contributions for certain emergency services is misleading.

The commission has modified the language in this provision to make it clear that the charge is voluntary and does not have to be paid by the customer.

IWSCOT and Water Services commented that the commission should include water rights held for future use in the cost of service and the rates to be charged to the customers.

The commission has made no change is response to this comment. The issue of whether water rights are used and useful in providing water service hinges on a number of factors. The

commission believes that the treatment of water rights in a rate proceeding should be on a case-by-case basis.

TRWA commented that the §291.41(j) notice requirement on appeals is not authorized by Senate Bill 1, is unreasonable, and is burdensome as written.

The commission agrees, and has modified the rule to limit the notice requirement to appeals by ratepayers filed under Water Code, §13.043(b).

COMMENTS ON CERTIFICATES OF CONVENIENCE AND NECESSITY

In written comment and oral testimony IWSCOT commented that the two-mile radius provision in §291.102(e)(1) and (2) is overly broad because it presents an applicant with the responsibility of identifying water and sewer service providers within that area, rather than only "public" drinking water and sewer service providers. IWSCOT also commented that applicants should only have to consider providers within the radius who are registered with the commission. IWSCOT and TRWA commented that proposed §291.102 exceeds statutory authority if applied to applications to amend existing Certificates of Convenience and Necessity. TRWA cites Water Code, §13.241 in support of its comment.

The commission agrees that the word "public" in the appropriate places in §291.102(e)(1) and (2) should be added to clarify which systems should be contacted. However, the commission disagrees that the rule should be limited to those public drinking water and sewer service providers

"registered with the commission." The word "registered" could mean providers who hold public water system identification numbers (in the case of water suppliers) but are not certificated, such as municipalities and districts. Generally, persons needing to secure water and sewer utility services often call on the staff in the Water Utilities Division to help them identify existing certificated providers. However, since all providers may not be certificated and not identified on agency maps, applicants should not limit their search, but should take extra steps to thoroughly assess the availability of service from an existing provider.

The commission agrees in part and disagrees in part with the comment as to the applicability of §291.102 to applications for new certificates and certificate amendments. In drafting a rule to implement new §13.241 in Senate Bill 1, the commission modified existing §291.102. However, the effort to integrate the requirements of new §13.241 into an existing rule which serves to implement the long-standing statutory requirements of §13.246 (which applies to new certificates and amendments) has created some confusion. Therefore, the commission has modified §291.102 to recite rule requirements for §13.241 first, to be followed by existing rules which implement §13.246. However, it should be noted that the commission has, and will use, the authority to require business plans from public water systems that were constructed without approval, that have a history of noncompliance with commission rules, or that are subject to a commission enforcement action.

In written comment and oral testimony IWSCOT commented that the requirement in §291.102(e)(6) that persons seeking to install a new system provide an analysis of the cost of obtaining alternative

service from an existing provider within the two-mile radius creates a virtual barrier for such persons because the rule assumes such information is available.

The commission disagrees with this comment. The purpose of this requirement is to force these persons to diligently pursue service from existing providers maximizing regionalization goals. The major portion of this analysis prepared by a potential applicant will be a summary and personal analysis of the information satisfying §291.102(a)(3)(A)-(E).

IWSCOT commented that the notice requirement in §291.106 to neighboring utilities within five miles be limited to applicants for new service areas which would require the construction of new stand-alone water or sewer systems.

The proposed rule does impose the five-mile notice requirement on applications for new certificates, but has been clarified to distinguish it from the notice requirement in §291.106(b)(2) for applications to amend a certificate.

GENERAL COMMENTS

IWSCOT commented on the requirement for providing the commission with a certified copy of any wholesale water supply contract by asking how a utility can comply with the rules if there is no written contract and if the rules cover all wholesale water sales.

The commission has made no changes in response to this comment. The rules track the statutory language. The lack of a written contract does not relieve the utility of the notice requirements. It is also the position of the commission that these types of arrangements should be reduced to writing. The statute is clear that it applies to any and all wholesale water supply contracts.

Texoma commented that a waiver for the requirement to submit a report when the system's capacity has reached 85% would not be necessary if capacity is increased to meet or exceed demand above 85% capacity.

The commission agrees with this comment, but has made no changes in response to this comment. If the system is no longer in violation of this rule, no action would be necessary. However, the commission has made changes in the wording to reflect actual commission practices related to inspections.

IWSCOT commented that the definitions and other sections of 30 TAC Chapters 290 and 291, specifically noting §291.3 and §291.89(a)(4), do not adequately define the meter requirements for multiple unit service such as apartments, condominiums, and mobile home parks.

The commission agrees that clarification of the definitions and requirements for meters in Chapters 290 and 291 are needed. However, §291.89(a)(4) is not open for comment. The commission will propose clarifying amendments in a subsequent rule package. At that time, it will make any necessary changes to the definitions in §291.3.

IWSCOT commented that §291.14(a)(2), relating to Emergency Interconnections, should be modified to prohibit the issuance of an emergency order if it could unreasonably diminish service to customers of the retail public utility required to serve.

The commission disagrees with the need to clarify this section. When the commission issues an emergency order for an interconnection, it considers the impacts on both retail public utilities and should have the flexibility to make the decision which is in the public interest. Since determination of whether the interconnection will "unreasonably diminish" service by the retail public utility being ordered to serve will in any event be a judgement call by the commission based on the facts of the case at hand, addition of this language will not add any clarity to this section and could only serve to limit the commission's ability to effectively address crisis situations.

IWSCOT commented that there is a need for more clarity about alternate systems of accounts, but there is no process for the commission to adopt an alternate system of accounts as provided under §291.72(1).

The commission agrees with the comment that more clarity needs to be provided for "approved systems of accounts" as alternates to the National Association of Regulatory Utility Commissioners (NARUC) system, but disagrees with the comment that there is no process for the executive director to approve alternate accounting systems. The executive director has in the past "approved" individual accounting systems for utilities when rate cases were filed by accepting the systems in use by the utilities without requiring changes. The executive director should be

allowed the flexibility of amending such a system through the publication process. Accordingly, the executive director will publish, in 1999, a system of accounts and recordkeeping guide which will address these concerns. These publications will clarify the "approved" system and add more uniformity.

IWSCOT commented that the requirements that records be available at "all reasonable hours" as required by §291.74 needs to be clarified.

The commission agrees that clarification of "all reasonable hours" is appropriate, but does not agree that the proposed language "normal business hours" will necessarily provide enough clarity. The commission will propose clarifying language to address the concern that requests for records might be made at times that would be unnecessarily burdensome to the utility.

IWSCOT commented that §291.83(a)(3), related to Disputed Debt to Another Utility, needs to be clarified to prevent abuse by a new service applicant.

The commission agrees that the rule should be clarified as to which utilities the rule refers and the type of documentation that a service applicant must provide. The commission does not agree that time limits on resolution of disputes should be established over issues which the commission rules already address or over which the commission has no jurisdiction or that the service applicant be required to notify the new utility of the resolution of the dispute. Once service is established, service cannot be disconnected for failure to pay a bill to another utility. The customer is

required to pay a deposit if required by the new utility's tariff so the new utility does not incur any unreasonable risk if it provides service to the service applicant. The current rule does not provide a payment exemption from any charges due to the new utility.

IWSCOT commented that in §291.84(j), better documentation is needed to demonstrate that a new service applicant has a right to receive service at a specified location.

The commission agrees that such a provision is needed. However, the type of documentation should be specified by the rule and not left up to the utility to decide if it is satisfactory. The commission notes that the section is not open for comment. The commission will propose clarifying language in a subsequent rule package.

IWSCOT commented that in §291.84(f), a utility should be allowed to require additional deposits any time a utility amends its tariff from a current customer who has not been disconnected for nonpayment, or if the customer has paid late payment penalties in three of the last 12 months.

The commission disagrees that additional deposits should be required of a current customer except for those reasons currently specified in this subsection. This subsection already authorizes additional deposits for customers that are truly credit risks. A customer with a history of late payments would not have been entitled to a refund of the deposit paid when service was established under §291.84(h), so the scenario described is unlikely.

IWSCOT commented that in §291.85(a)(3) and (4) a utility needs longer time periods to provide service.

The commission agrees that the time to restore service where service has previously been provided should be extended to three working days and the time where construction is required should be extended to ten working days. However, the relevant section is not open as a part of this rule package. The commission will propose this change in a subsequent rule package.

IWSCOT commented that a new service applicant should be required to install a cut-off valve on the customer side of the meter before receiving service in §291.86(a)(2)(B).

The commission agrees that it is reasonable. However, the relevant section is not open as a part of this rule package. The commission will propose this change in a subsequent rule package.

IWSCOT commented that extension policies as currently written in §291.86(d)(2)(A) and (B) are unreasonable or result in preferential treatment of individual service applicants. IWSCOT further suggested that the rebate period in §291.86(d)(2)(C) should be limited to five years.

The commission has made no changes in response to this comment. Utilities are expected to make investments in facilities and recover their investment through depreciation and return on the investment over the useful life of the assets. To require a new customer to pay up front for the cost of all of the facilities used to serve him would mean that the new customer would have a

greater investment than existing customers, even though the new customer would be required to pay the same monthly rates, which would in fact be discriminatory to the new customer. There is a provision for exceptions to be granted in certain situations. The commission has no evidence that using a five-year period for rebates to customers is substantially more expensive or burdensome than the current seven-year period, which provides more opportunity for the customer to receive some of the investment back.

IWSCOT commented that in §291.86(d)(4) a residential customer with a one-inch meter and sprinkler system should be treated as a developer when determining extension costs.

The commission agrees that a residential customer with a one-inch meter and sprinkler system may place a somewhat higher demand than a standard residential customer with a 5/8-inch meter but disagrees that the difference is significant enough to place that customer in the same category as a developer for purposes of determining extension fees. The commission has not made changes to this section.

IWSCOT commented that in §291.87(e)(2)(F) surcharges should not be required to be listed as a separate line item on bills.

The commission has not made any changes in response to this comment. Surcharges have been used in this manner for many years with little apparent problems due to billing programs. Because surcharges are for a definite time period and for a specific amount, customers need to be

able to see these special charges as a line item and in addition when the surcharge ends, it should drop off the bill rather than having the monthly charge drop without an apparent reason.

IWSCOT commented that the limitations on refunds and backbilling in §291.87(g) violate Water Code, §13.001(c) and §13.189 and should be repealed.

The commission agrees in part, but disagrees that the limitations on refunds and backbilling violate §13.001(c) and §13.189. Unless a customer has tampered with the meter, bypassed the meter, or diverted service, the utility controls meter reading and billing. If the utility is monitoring its meters, billing, and collections in a prudent manner, it should catch errors within a reasonable time period. However, the commission agrees that a longer period than six months, perhaps one year, is reasonable for the utility to catch and correct the errors. However, the relevant section is not open as a part of this rule package. The commission will propose a modification in accordance with this response in a subsequent rule package.

IWSCOT commented that under §291.87(n) a utility should be allowed to disconnect a customer for failure to pay for negligence or damages.

The commission agrees in part that a utility should be allowed to disconnect a customer for failure to pay for some negligence or damages other than meter tampering or service diversion. However, the commission disagrees that a customer should be disconnected for all charges related to the situations mentioned in this subsection. This area can be very contentious because only in

rare instances does a utility employee or some other disinterested person actually observe the damage being committed by a customer. In addition, some of the costs incurred by a utility in dealing with these situations are already being recovered in its rates. However, the relevant section is not open as a part of this rule package. The commission will propose revisions to this subsection in a subsequent rule package.

IWSCOT commented that in §291.87(k)(1) a customer should not be allowed to avoid disconnection by disputing a bill at the last minute.

The commission agrees in part with this comment. However, the relevant section is not open as a part of this rule package. The commission will propose changes to this rule in a subsequent rule package.

IWSCOT commented that in §291.88(g) a utility should not be required to disconnect service upon a customer request within 24 hours of receiving the request, but should be allowed a full working day.

The commission agrees in part that it is reasonable to allow the utility to disconnect on the next working day, but may propose slightly different wording. However, the relevant section is not open as a part of this rule package. The commission will propose a modification to this rule in a subsequent rule package.

IWSCOT commented that §291.88(h)(1) relating to reconnection time period after a customer that has been disconnected for nonpayment pays the outstanding balance should be changed from 24 hours to "one working day."

The commission agrees in part that the current rule may require modified dates for disconnections and allow extra time for customers to pay and that modifications to the rule should be made. However, the commission does not agree that the wording change proposed is the best way to deal with the issue, so a modified rule will be proposed. The relevant section is not open as a part of this rule package. The commission will propose a modification to this rule in a subsequent rule package.

Texoma and Plum Creek Water Company commented that the current limitation of $25 for a reconnect fee in §291.88(h)(2)(C) is too low and does not cover the actual cost to the utility.

The commission has made no changes in response to this comment. The commission agrees that utilities do not recover the cost in full in the $25 fee, but disagrees that it should be set at $50 or more. The commission believes that water service is essential and a customer who is struggling to pay a $25 or $30 water bill should not be unnecessarily punished by having to pay $50 or more additional dollars for a reconnect fee. Expenses not included in the $25 fee may be collected by the utility through rates which are distributed over the whole customer base. The commission believes that the current $25 fee coupled with having service disconnected for some time period is

a sufficient deterrent to encourage customers who are able to pay to do so before being disconnected.

IWSCOT commented that §291.89(n) is not a complete listing of situations that should be included in meter tampering, bypass, or diversion.

The commission agrees. However, the relevant section is not open as a part of this rule package. The commission will propose a revised rule in a subsequent rule package.

ADDITIONAL CHANGES

Senate Bill 1, 75th Legislature, 1997, had amended the Health and Safety Code, §341.0485 to create a Water Utility Improvement Account. The account was to receive civil or administrative penalties for violation of Health and Safety Code, Chapter 341. Funds deposited in the account could be used for capital improvements or operating and maintenance expenses for certain qualified water and sewer systems. The 75th Legislature also passed House Bill (HB) 2948, which abolished special accounts not enumerated in the bill. The Water Utility Improvement Account was not listed in HB 2948. Accordingly, the commission has not adopted any rules referring to the Water Utility Improvement Account.

The commission has made some other changes to the adopted rules to update references, correct grammar, or typographical errors. These changes do not result in any change in the intent expressed in the proposed rules.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.15 implements Texas Water Code, §13.143 (Notice of Wholesale Water Supply Contract). Section 291.31 implements Texas Water Code, §13.183. Section 291.34 implements Texas Water Code, §13.183 and §13.184. Section 291.87 implements Texas Water Code, §13.143 (Voluntary Contributions). Section 291.101 implements Texas Water Code, §49.215(d). Section 291.102 implements Texas Water Code, §13.241 and §13.246. Section 291.103 implements Texas Water Code, §49.352. Section 291.109 implements Texas Water Code, §13.301. Section 291.111 implements Texas Water Code, §13.302. Section 291.113 implements Texas Water Code, §13.254. Section 291.114 implements Texas Water Code, §13.252. Section 291.125(c) implements Texas Water Code, §13.504. Section 291.140 implements Texas Water Code, §13.411. Section 291.144 implements Texas Water Code, §13.418 and Texas Health and Safety Code, §341.0485. Section 291.152 implements Texas Water Code, §13.045. Section 291.153 implements Texas Water Code, §13.086.

CHAPTER 291

UTILITY REGULATION

SUBCHAPTER A : GENERAL PROVISIONS

§§291.1, 291.3, 291.15

§291.1. Purpose and Scope of this Chapter.

This chapter is intended to establish a comprehensive regulatory system under Texas Water Code Chapter 13 to assure rates, operations, and services which are just and reasonable to the consumer and the retail public utilities, and to establish the rights and responsibilities of both the retail public utility and consumer. This chapter shall be given a fair and impartial construction to obtain these objectives and shall be applied uniformly regardless of race, color, religion, sex, or marital status. This chapter shall also govern the procedure for the institution, conduct and determination of all water and sewer rate causes and proceedings before the commission. These sections shall not be construed so as to enlarge, diminish, modify, or alter the jurisdiction, powers, or authority of the commission or the substantive rights of any person.

§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:

(A) that has a per capita income that averaged 25 % below the state average for the most recent three consecutive years for which statistics are available and an unemployment rate that averaged 25 % above the state average for the most recent three consecutive years for which statistics are available; and

(B) any part of which is within 50 miles of an international border.

(3) **Affected person** - 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) **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.

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

(11) **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.

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

(13) **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.

(14) **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.

(15) **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.

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

(17) **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 pursuant to its authority under the Texas Water Code.

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

(19) **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 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.

(20) **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.

(21) **Membership fee** - A fee assessed each water supply or sewer service corporation service applicant 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 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.

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

(23) **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.

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

(25) **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.

(26) **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.

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

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

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

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

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

(32) **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.

(33) **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.

(34) **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.

(35) **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.

(36) **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.

(37) **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 pursuant to the provisions of the Safe Drinking Water Act and as defined in Water Code, §15.602.

(38) **Service** - Any act performed, anything furnished or supplied, and any facilities 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.

(39) **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.

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

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

(42) **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.

(43) **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.

(44) **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.

(45) **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.

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

(47) **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.

(48) **Water rationing** - Restrictions implemented to reduce the amount of water which may be consumed by customers of the system due to emergency conditions or drought.

(49) **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. 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.

(50) **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.

§291.15. Notice of Wholesale Water Supply Contract.

(a) Notification. A district or authority created under Texas Constitution, §52, Article III, or §59, Article XVI, a retail public utility, a wholesale water service, or other person providing a retail public utility with a wholesale water supply shall provide the commission with a certified copy of any wholesale water supply contract with a retail public utility within 30 days after the date of the execution of the contract.

(b) Information. The submission must include the amount of water being supplied, term of the contract, consideration being given for the water, purpose of use, location of use, source of supply, point of delivery, limitations on the reuse of water, and any other condition or agreement relating to the contract. The certified copy of the contract should be submitted to the Water Utilities Division of the commission.

SUBCHAPTER A : GENERAL PROVISIONS

§291.15, §291.16

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.15. Jurisdiction of Municipality: Surrender of Jurisdiction.

§291.16. Applicability of Commission Service Rules Within the Corporate Limits of a Municipality.

SUBCHAPTER B : RATES, RATE MAKING AND RATE/TARIFF CHANGES

§§291.21, 291.25, 291.29, 291.31, 291.32, 291.34

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.31 implements Texas Water Code, §13.183. Section 291.34 implements Texas Water Code, §13.183 and §13.184.

§291.21. Form and Filing of Tariffs.

(a) Approved tariff. No utility shall directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as noted in this subsection. A utility may charge the rates proposed under the Texas Water Code, §13.187(a) (relating to Statement of Intent to Change Rates) after the proposed effective date, unless the rates are suspended or the commission or a judge sets interim rates. The regulatory assessment required in Texas Water Code §5.235(n) does not have to be listed on the utility's approved tariff to be charged and collected but shall be included in the tariff at the earliest opportunity. A person who possesses facilities used to provide water utility service or a utility that holds a certificate of public convenience and necessity to provide water service which enters into an

agreement pursuant to Texas Water Code §13.250(b)(2), may collect charges for wastewater services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes and filing of tariffs.

(1) (No change.)

(2) Minor Tariff Changes. Except for an affected county, a public utility's approved tariff may not be changed or amended without commission approval. An affected county can change rates for water or wastewater service without commission approval but must file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The executive director may approve the following minor changes to tariffs:

(i) service rules and policies;

(ii) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by the applicable sections;

(iii) implementation of a purchased water or sewage treatment provision, a temporary water rate provision in response to mandatory reductions in water use imposed by a court, government agency, or other authority, or water use fee provision previously approved by the commission;

(iv) surcharges over a time period determined by the executive director to reflect the change in the actual cost to the utility for sampling costs, commission inspection fees, or at the discretion of the executive director, other governmental requirements beyond the utility's control;

(v) addition of the regulatory assessment as a separate item or to be included in the currently authorized rate;

(vi) addition of a provision allowing a utility to collect wastewater charges pursuant to an agreement under the Texas Water Code, §13.250(b)(2); or

(vii) rate adjustments to implement authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs.

(B) The addition of an extension policy to a tariff or a change to an existing extension policy does not qualify as a minor tariff change because it must be approved or amended in a rate change application.

(3) Tariff Revisions and Tariffs Filed With Rate Changes. The utility shall file three copies of each revision or in the case of a rate change, the number required in the application form. Each revision shall be accompanied by a cover page which contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(4) Each rate schedule must clearly state the territory, subdivision, city, or county wherein said schedule is applicable.

(5) Tariff sheets are to be numbered consecutively. Each sheet shall show an effective date, a revision number, section number, sheet number, name of the utility, the name of the tariff, and title of the section in a consistent manner. Sheets issued under new numbers are to be designated as original sheets. Sheets being revised should show the number of the revision, and the sheet numbers shall be the same.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, shall contain sections setting forth:

(1) - (5) (No change.)

(6) the extension policy;

(7) an approved water rationing plan; and

(8) the form of payment to be accepted for utility services.

(d) - (l) (No change.)

§291.25. Rate Change Applications, Testimony and Exhibits.

(a) - (b) (No change.)

(c) An original of the completed rate filing package and the number of copies specified in the application form shall be submitted and filed with the commission. In the event that the proposed rate change becomes the subject of a hearing, the commission may require or allow, in addition to copies of the rate filing package, prefiled testimony and exhibits in support of the rate change request.

(d) (No change.)

(e) All intervenors or protestants shall file the specified number of copies of their prepared testimony, if required, and exhibits within the time period specified by the judge assigned to the application.

(f) - (g) (No change.)

§291.29. Interim Rates.

(a) The commission or judge may on a motion by the executive director or by the appellant under the Texas Water Code, §13.043 (a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.

(b) At any time after the filing of a statement of intent to change rates under the Texas Water Code, §13.187, as amended, the executive director may petition the commission or judge to set interim rates to remain in effect until further commission action or a final rate determination is made. After a hearing is convened, any party may petition the judge or commission to set interim rates.

(c) Interim rates may be established by the commission or judge in those cases under the commission's original or appellate jurisdiction where the proposed increase in rates could result in an

unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.

(d) In making a determination under subsection (c) of this section:

(1) The commission or judge may limit its consideration of the matter to oral arguments of the affected parties and may:

(A) set interim rates not lower than the authorized rates prior to the proposed increase nor higher than the requested rates;

(B) deny interim rate relief;

(C) require that all or part of the requested rate increase be deposited in an escrow account in accordance with rules set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase); or

(2) The commission may remand the request for interim rates to SOAH for an evidentiary hearing on interim rates. The presiding judge will issue a non-appealable interlocutory ruling setting interim rates to remain in effect until a final rate determination is made by the commission.

(e) The establishment of interim rates does not preclude the commission from establishing, as a final rate, a different rate from the interim rate.

(f) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall refund or credit against future bills all sums collected in excess of the rate finally ordered plus interest as determined by the commission in a reasonable number of monthly installments.

(g) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall be authorized by the commission to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

(h) The retail public utility must provide a notice to its customers including the interim rates set by the commission or judge with the first billing at the interim rates with the following wording: "The Texas Natural Resource Conservation Commission (or judge) has established the following interim rates to be in effect until the final decision on the requested rate change (appeal) or until another interim rate is established."

(i) If the commission or judge establishes interim rates or an escrow account in a proceeding under Texas Water Code, §13.187, the commission must make a final determination on the rates within 335 days after the effective date of the interim rates or escrowed rates or the rates are automatically approved as requested by the utility in its application.

§291.31. Cost of Service.

(a) (No change.)

(b) Allowable expenses. Only those expenses which are reasonable and necessary to provide service to the ratepayers shall be included in allowable expenses. In computing a utility's allowable expenses, only the utility's historical test year expenses as adjusted for known and measurable changes will be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense shall not be allowed as an expense for cost of service except as provided in the Texas Water Code, §13.185(e));

(B) - (F) (No change.)

(2) (No change.)

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) (No change.)

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property and equipment used by and useful to the utility in providing service:

(i) - (iv) (No change.)

(B) (No change.)

(3) Items not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

(A) - (B) (No change.)

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale , merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers

of the acquiring utility's other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources which achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired which is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the executive director and were conducted at arm's length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and, the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is

followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the executive director in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997, and the effective date of these rules is exempt from the requirement for executive director notification at the time of the approval of the initial sale, but must provide such notification within 60 days of the effective date of these rules; and

(G) the rates charged by the acquiring utility to its preacquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority, shall be amortized using a straight line method over a period equal to the weighted average remaining useful life of the acquired plant, property, and equipment, at an interest rate equal to the rate of return determined under subsection (c) of this section. The acquisition adjustment may be treated as a surcharge and may be recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in rates as a part of a rate change application.

§291.32. Rate Design.

(a) General. In fixing the rates of a utility, the commission shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public, over and above its reasonable and necessary operating expenses (unless an alternative rate method is used as set forth in §291.34 of this title (relating to Alternative Rate Methods), and preserve the financial integrity of the utility.

(b) Conservation.

(1) In order to encourage the prudent use of water or promote conservation, water and sewer utilities shall not apply rate structures which offer discounts or encourage increased usage within any customer class .

(2) After receiving final authorization from the regulatory authority through a rate change proceeding, a utility may implement a water conservation surcharge using an inclining block rate or other conservation rate structure. A utility may not implement such a rate structure to avoid providing facilities necessary to meet the commission's minimum standards for public drinking water systems. A water conservation rate structure may generate revenues over and above the utility's usual cost of service:

(A) to reduce water usage or promote conservation either on a continuing basis or in specified restricted use periods identified in the utility's tariff in order to:

(i) comply with mandatory reductions directed by a wholesale supplier or underground water district; or

(ii) maintain acceptable pressure or storage during drought periods, or other water rationing conditions authorized by an approved water rationing plan;

(B) to generate additional revenues necessary to provide facilities for maintaining or increasing water supply, treatment, production, or distribution capacity.

(3) All additional revenues over and above the utility's usual cost of service collected under paragraph (2) of this subsection:

(A) must be accounted for separately and reported to the executive director, as requested;

(B) are considered customer contributed capital unless otherwise specified in a commission order; and

(C) may only be used in a manner approved by the executive director for applications not subject to hearing under Texas Water Code, §13.187(b).

(c) Volume charges. Charges for additional usage above the base rate shall be based on metered usage over and above any volume included in the base rate rounded up or down as appropriate to the nearest 1,000 gallons or 100 cubic feet, or the fractional portion of the usage.

(d) Surcharges.

(1) Capital improvements. In a rate proceeding, the commission may authorize collection of additional revenues from the customers to provide funds for capital improvements necessary to provide facilities capable of providing adequate and continuous utility service, and for the preparation of design and planning documents.

(2) Debt repayments. In a rate proceeding, the commission may authorize collection of additional revenues from customers to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.

§291.34. Alternative Rate Methods.

(a) To ensure that retail customers receive a higher quality or more reliable water or sewer service, to encourage regionalization, or to maintain financially stable and technically sound utilities, the commission may utilize alternate methods of establishing rates. The commission shall assure that rates, operations, and service are just and reasonable to the consumers and to the utilities. The executive director may prescribe modified rate filing packages for these alternate methods of establishing rates.

(b) Single issue rate change. Unless a utility is using the cash needs method, it may request approval to increase rates to reflect a change in any one specific cost component. The following conditions shall apply to this type of request.

(1) The proposed effective date of the single issue rate change request must be within 24 months of the effective date of the last rate change request in which a complete rate change application was filed.

(2) The change in rates is limited to those amounts necessary to recover the increase in the specific cost component and the increase will be allocated to the rate structure in the same manner as in the previous rate change.

(3) The scope of a single issue rate proceeding is limited to the single issue prompting a change in rates. For capital items this includes depreciation and return determined using the rate of return established in the prior rate change proceeding.

(4) The utility shall provide notice as described in §291.22(a)-(e) of this title (relating to Notice of Intent to Change Rates), and the notice shall describe the cost component and reason for the increased cost.

(5) A utility exercising this option is required to submit a complete rate change application within three years following the effective date of the single issue rate change request.

(c) Phased and multi-step rate changes. In a rate proceeding, the commission may authorize a phased, stepped, or multi-year approach to setting and implementing rates to eliminate the requirement that a utility file another rate application.

(1) A utility may request to use the phased or multi-step rate method :

(A) to include the capital cost of installation of utility plant items that are necessary to improve service or achieve compliance with commission regulations in the utility's rate base and operating expenses in the revenue requirement when facilities are placed in service;

(B) to provide additional construction funds after major milestones are met;

(C) to provide assurance to a lender that rates will be immediately increased when facilities are placed in service;

(D) to allow a utility to move to metered rates from unmetered rates as soon as meters can be installed at all service connections;

(E) to phase in increased rates when a utility has been acquired by another utility with higher rates;

(F) to phase in rates when a utility with multiple rate schedules is making the transition to a system-wide rate structure; or

(G) when requested by the utility.

(2) Construction schedules and cost estimates for new facilities which are the basis for the phased or multi-step rate increase must be prepared by a licensed professional engineer.

(3) Unless otherwise specified in the commission order, the next phase or step cannot be implemented without verification of completion of each step by a licensed professional engineer, agency inspector, or agency subcontractor.

(4) At the time each rate step is implemented, the utility must review actual costs of construction versus the estimates upon which the phase-in rates were based. If the revenues received from the phased or multi-step rates are higher than what the actual costs indicate, the excess amount

must be reported to the executive director prior to implementing the next phase or step. Unless otherwise specified in a commission order or directed by the executive director, the utility may:

(A) refund or credit the overage to the customers in a lump sum; or

(B) retain the excess to cover shortages on later phases of the project. Any revenues retained but not needed for later phases must be proportioned and refunded to the customers at the end of the project with interest paid at the rate on deposits.

(5) The original notice to customers must include the proposed phased or multi-step rate change and informational notice must be provided to customers and the executive director 30 days prior to the implementation of each step.

(6) A utility that requests and receives a phased or multi step rate increase cannot apply for another rate increase during the period of the phase-in rate intervals unless:

(A) the utility can prove financial hardship; or

(B) the utility is willing to void the next steps of the phase-in rate structure and undergo a full cost of service analysis.

(d) Cash needs method. The cash needs method of establishing rates allows a utility to recover reasonable and prudently incurred debt service, a reasonable cash reserve account, and other expenses not allowed under standard methods of establishing rates.

(1) A utility may request to use the cash needs method of setting rates if:

(A) the utility is a nonprofit corporation controlled by individuals who are customers and who represent a majority of the customers; or

(B) the utility can demonstrate that use of the cash needs basis:

(i) is necessary to preserve the financial integrity of the utility;

(ii) will enable it to develop the necessary financial, managerial, and technical capacity of the utility; and

(iii) will result in higher quality and more reliable utility service for customers.

(2) Under the cash needs method, the allowable components of cost of service are: allowable operating and maintenance expenses; depreciation expense; reasonable and prudently incurred

debt service costs; recurring capital improvements, replacements, and extensions which are not debt-financed; and a reasonable cash reserve account.

(A) Allowable operating and maintenance expenses: only those expenses which are reasonable and necessary to provide service to the ratepayers shall be included in allowable operations and maintenance expenses and shall be based on the utility's historical test year expenses as adjusted for known and measurable changes and reasonably anticipated, prudent projected expenses.

(B) Depreciation expense: depreciation expense may be included on any used and useful depreciable plant, property, or equipment which was paid for by the utility and which has a positive net book value on the effective date of the rate change.

(C) Debt service costs. Cash outlays to an unaffiliated interest necessary to repay principal and interest on reasonably and prudently incurred loans. If required by the lender, debt service costs may also include amounts placed in a debt service reserve account in escrow or as required by the commission, Texas Water Development Board, or other state or federal agency or other financial institution. Hypothetical debt service costs may be used for:

(i) self-financed major capital asset purchases where the useful life of the asset is ten years or more. Hypothetical debt service costs may include the debt repayments using an amortization schedule with the same term as the estimated service life of the asset using the prime interest rate at the time the application is filed;

(ii) prospective loans to be executed after the new rates are effective. Any pre-commitments, amortization schedules or other documentation from the financial institution pertaining to the prospective loan must be presented for consideration.

(D) Recurring capital improvements, replacements, and extensions which are not debt-financed. Capital assets, repairs, or extensions which are a part of the normal business of the utility may be included as allowable expenses. This does not include routine capital expenses which are specifically debt-financed.

(E) Cash reserve account: a reasonable cash reserve account, up to 10% of annual operation and maintenance expenses, shall be maintained and revenues to fund it may be included as an allowable expense. Funds from this account may be used to pay expenses incurred before revenues from rates are received and for extraordinary repair and maintenance expenses and other capital needs or unanticipated expenses if approved in writing by the executive director. The utility shall account for these funds separately and report to the commission as required by the executive director. Unless the utility requests an exception in writing and the exception is explicitly allowed by the executive director in writing, any funds in excess of 10%, shall be refunded to the customers each year with the January billing either as a credit on the bill or refund accompanied by a written explanation which explains the method used to calculate the amounts to be refunded. Each customer shall receive the same refund amount. These reserves are not for the personal use of the management or ownership of the utility and may not be used to compensate an owner, manager, or individual

employee above the amount approved for that position in the most recent rate change request unless authorized in writing by the executive director.

(3) If the revenues collected exceed the actual cost of service, defined in subsection (d)(2) of this section, during any calendar year, these excess cash revenues must be placed in the cash reserve account described in subsection (d)(2)(D) of this section and become subject to the same restrictions.

(4) If the utility demonstrates to the executive director that it has reduced expenses through its efforts, and has improved its financial, managerial, and technical capability, the executive director may allow the utility to retain 50% of the savings which result for the personal use of the management or ownership of the utility rather than pass on the full amount of the savings through lower rates or refund all of the amounts saved to the customers.

(5) If a utility elects to use the cash needs method, it may not elect to use the utility method for any rate change application initiated within five years after beginning to use the cash needs method. If after the five-year period, the utility does elect to use the utility method, it may not include in rate base, or recover the depreciation expense, for the portion of any capital assets paid for by customers as a result of including debt service costs in rates. It may, however, include in rate base, and recover through rates, the depreciation expense for capital assets which were not paid for by customers as a result of including debt service costs in rates. The net book value of these assets may be recovered over the remaining useful life of the asset.

SUBCHAPTER C : RATEMAKING APPEALS

§291.41

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.41. Appeal of Ratemaking Pursuant to the Texas Water Code, §13.043.

(a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. This subsection does not apply to a municipally-owned utility, but does include privately-owned utilities operating within the corporate limits of a municipality. An appeal under this subsection may be initiated by filing with the commission a petition signed by a responsible official of the party to the rate proceeding or its authorized representative and accompanied by the filing fee as required by the Texas Water Code, §5.235 and by serving a copy of the petition on all parties to the original proceeding. The appeal must be initiated within 90 days after the date of notice of the final decision of the governing body.

(b) An appeal under the Texas Water Code, §13.043(b) must be initiated within 90 days after the effective date of the rate change or, if appealing under §13.043(b)(2) or (5), within 90 days after the

date on which the governing body of the municipality or affected county makes a final decision. An appeal is initiated by filing an original and four copies of a petition for review with the commission and by filing a copy of the petition with the entity providing service and with the governing body whose decision is being appealed if it is not the entity providing service. The petition must be signed by the lesser of 10,000 or 10% of the ratepayers whose rates have been changed and who are eligible to appeal under subsection (c) of this section.

(c) Retail ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water or sewer utility rates to the commission:

(1) a nonprofit water supply or sewer service corporation created and operating under Texas Water Code, Chapter 67;

(2) - (5) (No change.)

(6) in an appeal under this subsection, the retail public utility shall provide written notice of hearing to all affected customers in a form prescribed by the executive director.

(d) - (f) (No change.)

(g) An applicant requesting service from an affected county or a water supply or sewer service corporation may appeal to the commission a decision of the county or water supply or sewer service

corporation affecting the amount to be paid to obtain service other than the regular membership or tap fees. An appeal under Texas Water Code, §13.043(g) must be initiated within 90 days after written notice of the amount to be paid to obtain service is provided to the service applicant or member of the decision of an affected county or water supply or sewer service corporation affecting the amount to be paid to obtain service as requested in the applicant's initial request for that service. The appeal must be accompanied by a $100 filing fee as required by the Texas Water Code, §5.235.

(1) If the commission finds the amount charged to be clearly unreasonable, it shall establish the fee to be paid and shall establish conditions for the applicant to pay any amounts due to the affected county or water supply or sewer service corporation. Unless otherwise ordered, any portion of the charges paid by the applicant which exceed the amount determined in the commission's order shall be repaid to the applicant with interest at a rate determined by the commission within 30 days of the signing of the order.

(2) In an appeal brought under this subsection, the commission shall affirm the decision of the water supply or sewer service corporation if the amount paid by the applicant or demanded by the water supply or sewer service corporation is consistent with the tariff of the water supply or sewer service corporation and is reasonably related to the cost of installing on-site and off-site facilities to provide service to that applicant, in addition to the factors specified under subsection (i) of this section.

(3) A determination made by the commission on an appeal from an applicant for service from a water supply or sewer service corporation under this subsection is binding on all similarly situated applicants for service, and the commission may not consider other appeals on the same issue until the applicable provisions of the tariff of the water supply or sewer service corporation are amended.

(h) The commission may, on a motion by the executive director or by the appellant under subsection (a), (b), or (f) of this section, establish interim rates to be in effect until a final decision is made.

(i) In an appeal under this section, the commission shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers. The commission shall use a methodology that preserves the financial integrity of the retail public utility.

SUBCHAPTER D : RECORDS AND REPORTS

§291.76

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.76. Regulatory Assessment.

(a) - (h) (No change.)

(i) The full amount payable for the 12 calendar months of each year must be remitted to the commission by January 30th of the following year.

(j) The utility service provider shall pursue collection of the assessment from the customer in the same manner and with the same diligence that it pursues collection of other service charges.

(k) If assessments collected in the 12 months prior to January 1 of each year are not received by the commission by January 30th of that year, the utility service provider shall be assessed penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(l) - (n) (No change.)

SUBCHAPTER E : CUSTOMER SERVICE AND PROTECTION

§291.87

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.87 implements Texas Water Code, §13.143.

§291.87. Billing.

(a) - (b) (No change.)

(c) Penalty on delinquent bills for retail service. Unless otherwise provided, a one-time penalty of either $5.00 or 10% for all customers may be made on delinquent bills. If, after receiving a bill including a late fee, a customer pays the bill in full except for the late fee, the bill may be considered delinquent and subject to termination after proper notice under §291.88 of this title (relating to Discontinuance of Service). An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The penalty on delinquent bills may not be applied to any balance to which the penalty was applied in a previous billing. No such penalty may be charged unless a record of the date the utility mails the bills is made at the time of the mailing and maintained at the principal office of the utility. Late fees may not be charged on any payment received by 5:00 p.m. on the due date at the utility's office

or authorized payment agency. The commission may prohibit a utility from collecting late fees for a specified period if it determines that the utility has charged late fees on payments which were not delinquent.

(d) - (p) (No change.)

(q) Voluntary contributions for certain emergency services.

(1) A utility may implement as part of its billing process a program under which the utility collects from its customers a voluntary contribution including a voluntary membership or subscription fee, on behalf of a volunteer fire department or an emergency medical service. A utility that collects contributions under this section shall provide each customer at the time the customer first becomes a customer, and at least annually thereafter, a written statement:

(A) describing the procedure by which the customer may make a contribution with the customer's bill payment;

(B) designating the volunteer fire department or emergency medical service to which the utility will deliver the contribution;

(C) informing the customer that a contribution is voluntary;

(D) if applicable, informing the customer the utility intends to keep a portion of the contributions to cover related expenses; and

(E) describing the deductibility status of the contribution under federal income tax law.

(2) A billing by the utility that includes a voluntary contribution under this section must clearly state that the contribution is voluntary and that it is not required to be paid .

(3) The utility shall promptly deliver contributions that it collects under this section to the designated volunteer fire department or emergency medical service, except that the utility may keep from the contributions an amount equal to the lesser of:

(A) the utility's expenses in administering the contribution program; or

(B) 5.0% of the amount collected as contributions.

(4) Amounts collected under this section are not rates and are not subject to regulatory assessments, late payment penalties, or other utility related fees, are not required to be shown in tariffs filed with the regulatory authority, and non-payment may not be the basis for termination of service.

SUBCHAPTER F : QUALITY OF SERVICE

§291.93

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.93. Adequacy of Water Utility Service.

Sufficiency of service. Each retail public utility which provides water service shall plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.

(1) The water system quantity and quality requirements of the commission shall be the minimum standards for determining the sufficiency of production, treatment, storage, transmission, and distribution facilities of water suppliers and the safety of the water supplied for household usage. Additional capacity shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock.

(2) In cases of extreme drought, periods of abnormally high usage, or extended reduction in ability to supply water due to equipment failure, or to comply with a state agency or court order on conservation, temporary restrictions may be instituted to limit water usage. For utilities, these temporary restrictions must be in accordance with an approved water rationing plan. Unless specifically authorized by the executive director, retail public utilities may not use water rationing in lieu of providing facilities which meet the minimum capacity requirements of the commission's rules in Chapter 290 of this title (relating to Rules and Regulations for Public Water Systems), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment.

(A) An approved water rationing plan must be on file with the utility's approved tariff prior to implementing water rationing unless authorized by the executive director.

(B) Temporary restrictions must be in accordance with the utility's approved water rationing plan on file or specifically authorized by the executive director. The utility shall file a status report every 30 days that rationing continues or as required by the executive director. The executive director may suspend implementation of the restrictions at any time with written notice to the utility.

(C) The utility must provide written notice to each customer prior to implementing the provisions of the rationing plan. Mailed notice is acceptable and rationing may be enforced by the utility if notice is mailed 72 hours prior to the start of rationing. If notice is hand delivered, the utility cannot enforce the provisions of the plan for 24 hours after notice is provided unless authorized by the

executive director. Notice shall be provided to the commission prior to implementing the program and may be by telephone if written notice is provided by mail within ten days. Customer notice must contain:

(i) the date rationing is to begin;

(ii) the expected duration of the rationing program;

(iii) the restrictions or stage of rationing being implemented and the specific restrictions which apply; and

(iv) the penalties for violations of the rationing program.

(3) A retail public utility that possesses a certificate of public convenience and necessity that has reached 85% of its capacity as compared to the most restrictive criteria of the commission's minimum capacity requirements in Chapter 290 of this title (relating to Rules and Regulations for Public Water Systems) shall submit to the executive director a planning report that clearly explains how the retail public utility will provide the expected service demands to the remaining areas within the boundaries of its certificated area. A report is not required if the source of supply available to the utility service provider is reduced to below the 85% level due to a court or agency conservation order unless that order is expected to extend for more than 18 months from the date it is entered in which case a report shall be required.

(A) After any commission field inspection, a retail public utility must analyze the system's capacity to determine if it has reached 85% of its capacity. If the retail public utility has reached 85% of its capacity, it must file this report no later than 90 days after the date of a commission letter detailing the results of the inspection. Capacity is considered to be the overall rated capacity in number of residential connection equivalents based on the most restrictive criteria for production, treatment, storage, or pumping.

(B) The report should be submitted in writing and should contain the following:

(i) a brief description of the overall utility system and service area;

(ii) an analysis of the plant capacity as defined in subparagraph (A) of this paragraph;

(iii) details on how the retail public utility will provide service to the remaining areas within the boundaries of its certificated area. This includes projections of cost and expected design and installation dates for additional facilities.

(C) The executive director may waive or limit the reporting requirements if the retail public utility demonstrates that the projected growth of the area will not require the retail public utility to exceed 100% of its current capacity for the next five years.

(D) Any retail public utility required to file reports under this section of the rules, including those requesting waivers, shall file updated reports within 90 days after the retail public utility receives a copy of each subsequent commission field inspection report until the system demand is below 85% capacity.

(E) Submission of this report shall not relieve the retail public utility from abiding by the requirements of other regulatory agencies as set forth in §291.92 of this title (relating to Requirements by Others).

(4) Each retail public utility which possesses or is required to possess a certificate of convenience and necessity shall furnish safe water which meets the minimum quality criteria for drinking water prescribed by the commission. The supply must meet the requirements of Health and Safety Code, §341.031 and commission rules. A utility or water supply corporation which is authorized to operate without a certificate of convenience and necessity pursuant to Health and Safety Code, §13.242(c) may be required by the executive director to meet the minimum criteria prescribed by the commission if so instructed in writing.

(5) Each retail public utility must promptly take all reasonable actions necessary to protect the health of its customers at all times.

(6) Every retail public utility shall maintain its facilities to protect them from contamination, ensure efficient operation, and promptly repair leaks.

SUBCHAPTER G : CERTIFICATES OF CONVENIENCE AND NECESSITY

§§291.101, 291.102, 291.103, 291.106, 291.107, 291.109, 291.111, 291.113, 291.114

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.101 implements Texas Water Code, §49.215(d). Section 291.102 implements Texas Water Code, §13.241 and §13.246. Section 291.103 implements Texas Water Code, §49.352. Section 291.109 implements Texas Water Code, §13.301. Section 291.111 implements Texas Water Code, §13.302. Section 291.113 implements Texas Water Code, §13.254. Section 291.114 implements Texas Water Code, §13.253.

§291.101. Certificate Required.

(a) - (b) (No change.)

(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.

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

(a) In determining whether to grant 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 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.

(3) 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:

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

(B) 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;

(C) copies of written responses from each of the systems or evidence that they failed to respond;

(D) 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;

(E) 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;

(F) 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.

(b) The commission may approve applications and grant or amend a certificate only after finding that the certificate 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.

(c) 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;

(3) the effect of the granting of a certificate on the recipient of the certificate and on any retail public utility of the same kind already serving the proximate area;

(4) the ability of the applicant to provide adequate service;

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

(6) 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.

(d) The commission may require an applicant utility to provide 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).

(e) 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.

§291.103. Certificates Not Required.

(a) - (c) (No change.)

(d) Utility or Water Supply Corporation With Less Than 15 Potential Connections.

(1) (No change.)

(2) Utilities or water supply corporations with less than 15 potential connections currently operating under a certificate of convenience and necessity may request revocation of the certificate at any time.

(3) - (8) (No change.)

(e) This subsection applies only to a home-rule municipality that is located in a county with a population of more than 1.75 million that is adjacent to a county with a population of more than 1 million, and has within its boundaries a part of a district. If a district does not establish a fire

department under Texas Water Code, §49.352, a municipality that contains a part of the district inside its boundaries may by ordinance or resolution provide that a water system be constructed or extended into the area that is in both the municipality and the district for the delivery of potable water for fire flow that is sufficient to support the placement of fire hydrants and the connection of the water system to fire suppression equipment. For purposes of this subsection, a municipality may obtain single certification in the manner provided by Texas Water Code, §13.255, except that the municipality may file an application with the commission to grant single certification immediately after the municipality provides notice of intent to provide service as required by Texas Water Code, §13.255(b).

§291.106. Notice for Applications for Certificates of Convenience and Necessity.

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

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

(2) - (3) (No change.)

(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 certificate of public convenience and necessity, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within five miles of the requested service area, and any city with an extra-territorial jurisdiction which overlaps the proposed service area.

(2) For applications for an amendment of a certificate of public convenience and necessity, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within two miles of the requested service area, and any city with an extra-territorial jurisdiction which overlaps the proposed service area.

(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.

(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.

(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) - (d) (No change.)

§291.107. Action on Applications.

(a) - (b) (No change.)

(c) The executive director may take action on an application which is uncontested at the end of the 30 day protest period following mailed or published notice or for which all protests are subsequently withdrawn in accordance with Chapter 50 of this title (relating to Action on Applications).

(d) If a hearing is requested, the application will be processed in accordance with Chapter 55 Subchapter B of this title (relating to Hearing Requests, Public Comment).

§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.

(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 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.

§291.111. Purchase of Voting Stock in Another Utility.

(a) A utility may not purchase voting stock in and a person may not acquire a controlling interest in a utility doing business in this state unless the utility or person files a written application with

the commission not later than the 61st day before the date on which the transaction is to occur. A controlling interest is defined as a person or a combination of a person and other family members possessing at least 50% of the voting stock of the utility; or a person that controls at least 30% of the stock and is the largest stockholder.

(b) A person acquiring a controlling interest in a utility may be required to 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 acquiring a controlling interest 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 executive director may request that the commission hold a public hearing on the transaction if the executive director believes that a criterion prescribed by §291.110 of this title (relating to Foreclosure and Bankruptcy) applies.

(e) Unless the executive director requests that a public hearing be held, the purchase or acquisition may be completed as proposed:

(1) at the end of the 60 day period; or

(2) at any time after the executive director notifies the person or utility that a hearing will not be requested.

(f) The utility or person must notify the commission within 30 days after the date that the transaction is completed.

(g) If a hearing is requested by the executive director or if the person or utility fails to make the application to the commission as required, the purchase or acquisition may not be completed unless the commission determines that the proposed transaction serves the public interest. A purchase or acquisition that is not completed in accordance with the provisions of this section is void.

§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 revoke or amend any certificate of public convenience and necessity if it finds that:

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

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

(3) The certificate holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate; or

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

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

(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.

(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.

(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.

(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.

(g) For the purpose of implementing this section, the value of real property shall be determined according to the standards set forth in 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 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 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.

(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.

§291.114. Requirement to Provide Continuous and Adequate Service.

(a) Any retail public utility which possesses or is required by law to possess a certificate of convenience and necessity or a person who possesses facilities used to provide utility service must provide continuous and adequate service to every customer and every qualified applicant for service whose primary point of use is within the certificated area and may not discontinue, reduce or impair utility service except for:

(1) nonpayment of charges for services provided by the certificate holder or a person who possesses facilities used to provide utility service;

(2) nonpayment of charges for sewer service provided by another retail public utility under an agreement between the retail public utility and the certificate holder or a person who possesses facilities used to provide utility service or under a commission order;

(3) nonuse; or

(4) other similar reasons in the usual course of business without conforming to the conditions, restrictions, and limitations prescribed by the commission.

(b) After notice and hearing, the commission may:

(1) order any retail public utility that is required by law to possess a certificate of public convenience and necessity or any retail public utility that possesses a certificate of public convenience and necessity and is located in an affected county as defined in Texas Water Code, §16.341, to:

(A) provide specified improvements in its service in a defined area if:

(i) service in that area is inadequate as set forth in §291.93 and §291.94 of this title (relating to Adequacy of Water Utility Service; and Adequacy of Sewer Service); or

(ii) is substantially inferior to service in a comparable area; and

(iii) it is reasonable to require the retail public utility to provide the improved service; or

(B) develop, implement, and follow financial, managerial, and technical practices that are acceptable to the commission to ensure that continuous and adequate service is provided to any areas currently certificated to the retail public utility if the retail public utility has not provided continuous and adequate service to any of those areas and, for a utility, to provide financial assurance of the retail public utility's ability to operate the system in accordance with applicable laws and rules as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by the commission;

(2) order two or more public utilities or water supply or sewer service corporations to establish specified facilities for interconnecting service;

(3) order a public utility or water supply or sewer service corporation that has not demonstrated that it can provide continuous and adequate service from its drinking water source or

sewer treatment facility to obtain service sufficient to meet its obligation to provide continuous and adequate service on at least a wholesale basis from another consenting utility service provider; or

(4) issue an emergency order, with or without a hearing, under §291.14 of this title (relating to Emergency Orders).

(c) If the commission has reason to believe that improvements and repairs to a water or sewer service system are necessary to enable a retail public utility to provide continuous and adequate service in any portion of its service area and the retail public utility has provided financial assurance under Health and Safety Code, §341.0355, or under this chapter, the commission, after providing to the retail public utility notice and an opportunity to be heard by the commissioners at a commission meeting, may:

(1) immediately order specified improvements and repairs to the water or sewer system, the costs of which may be paid by the financial assurance in an amount determined by the commission not to exceed the amount of the financial assurance. The order requiring the improvements may be an emergency order if it is issued after the retail public utility has had an opportunity to be heard by the commissioners at a commission meeting; and

(2) require a retail public utility to obligate additional money to replace the financial assurance used for the improvements.

SUBCHAPTER I : WHOLESALE WATER OR SEWER SERVICE

§291.138

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.138. Filing of Rate Data.

(a) For purposes of comparing the rates charged in Texas by providers of water or sewer service for resale, the commission may require each provider of water or sewer service for resale to report the retail and wholesale rates it charges to purchasers.

(b) Within 30 days after receiving a written request from the executive director, a provider of water or sewer service for resale shall file a report with the commission. The report must provide the information prescribed in a form prepared by the commission.

SUBCHAPTER J : ENFORCEMENT, SUPERVISION AND RECEIVERSHIP

§291.140, §291.144

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.140 implements Texas Water Code, §13.411.

There are no other rules, codes or statutes that are affected by this rule.

§291.140. Enforcement Action

If the executive director has reason to believe that the failure of the owner or operator of a water utility to properly operate, maintain, or provide adequate facilities presents an imminent threat to human health or safety, the executive director shall immediately:

(1) Notify the utility's representative; and

(2) Initiate enforcement action consistent with:

(A) This subchapter; and

(B) Procedural rules adopted by the commission.

§291.144. Fines and Penalties.

Disposition.

Fines and penalties collected under 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.

SUBCHAPTER K : PROVISIONS REGARDING MUNICIPALITIES

§§291.150-291.153

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state, and under Texas Water Code, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction. Section 291.152 implements Texas Water Code, §13.045. Section 291.153 implements Texas Water Code, §13.086.

§291.150. Jurisdiction of Municipality: Surrender of Jurisdiction.

(a) The governing body of a municipality by ordinance may elect to have the commission exercise exclusive original jurisdiction over the utility rate, operation, and services of utilities, within the incorporated limits of the municipality. The governing body of a municipality that surrenders its jurisdiction to the commission may reinstate its jurisdiction by ordinance at any time after the second anniversary of the date on which the municipality surrendered its jurisdiction to the commission, except that the municipality may not reinstate its jurisdiction during the pendency of a rate proceeding before the commission. The municipality may not surrender its jurisdiction again until the second anniversary of the date on which the municipality reinstates jurisdiction.

(b) The City of Coffee City, a municipality, surrendered its jurisdiction to the commission effective December 4, 1993.

(c) The City of Nolanville, a municipality, surrendered its jurisdiction to the commission effective April 18, 1996.

(d) The City of Aurora, a municipality, surrendered its jurisdiction to the commission effective April 14, 1997.

(e) The City of Arcola, a municipality, surrendered its jurisdiction to the commission effective May 5, 1998.

§291.151. Applicability of Commission Service Rules Within the Corporate Limits of a Municipality.

The commission's rules relating to service and response to requests for service will apply to utilities operating within the corporate limits of a municipality unless the municipality adopts its own rules. These rules include Subchapters E and F of this chapter (relating to Customer Service and Protection and Quality of Service).

§291.152. Notification Regarding Use of Revenue.

At least annually, and before any rate increase, a municipality shall notify in writing each water and sewer retail customer of any service or capital expenditure, not water or sewer related, funded in whole or in part by customer revenue.

§291.153. Fair Wholesale Rates for Wholesale Water Sales to a District.

(a) A municipality that makes a wholesale sale of water to a special district created under §52, Article III, or §59, Article XVI, Texas Constitution, and that operates under Title 4 (General Law Districts), or under Chapter 36 (Groundwater Conservation Districts) shall determine the rates for that sale on the same basis as for other similarly situated wholesale purchasers of the municipality's water.

(b) This section does not apply to a sale of water under a contract executed before September 1, 1997.