

Hot Topics in the Water Utility Industry:
CCN Decertification and Strategies
for Water Utilities

Public Utility Law Section
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Overview

- The Problem: PUC decertification of utility CCNs by cities and developers is easy and rarely results in meaningful compensation
- Response: Protection of service area through 7 U.S.C. § 1926(b) and federal court
- Key Takeaways

The Problem

PUC decertification of water and wastewater utility CCNs by cities and developers is practically *automatic*. . .

And the PUC rarely awards *any* compensation for the lost service area

Overview of Key Decertification Statutes

Certificates of Convenience and Necessity

- What is a CCN?
 - PUC certificate that grants the exclusive right and mandatory duty to provide retail water and wastewater service to a geographic area
- Applicability
 - Required for private utilities (IOUs) and most nonprofit WSCs
 - Discretionary for governmental providers such as special utility districts

Rationale for CCNs

- Certainty of customer base provides incentive to invest in regional infrastructure for future growth.
- Enables utilities to obtain financing for improvements.
- Regulation by PUC is intended to operate as a substitute for competition.
- Allows for economies of scale and efficiency, resulting in lower costs.

Four Basic Types of Decertification

- 13.254 (a) “for cause” decertification
- 13.254 (a-1) “expedited release”
 - requires an alternate service provider that compares favorably (cost, fire flow, etc.)
- 13.254 (a-5) “streamlined expedited release”
 - without cause
- 13.255 “single certification”
 - without cause

“Streamlined Expedited Release” TWC § 13.254(a-5)

Independent basis for decertification
entitles landowner to release of property
from CCN

- Decertification regardless of cost, availability, and capabilities of existing CCN holder
- Typically used by developers

TWC § 13.254(a-5) Decertification

Availability:

- 25 acre tract of land
- “not receiving water or sewer service”
- Property in one of 33 eligible counties
 - Large cities and surrounding counties

TWC § 13.254(a-5) Process

- Notice to CCN holder not required
- No discovery, cross examination of witnesses, hearing, or other ordinary “due process”
- PUC must grant eligible petition within 60 days

TWC § 13.002(21)

“Service” means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter 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.”

PUC Interpretation of TWC § 13.254(a-5)

“Tract of land . . . not receiving water or sewer service”

1. Facilities generally serving CCN area are not enough.
2. Water line running through the property is not enough.
3. PUC de facto requires an active meter for “service” (see, e.g., PUC Docket No. 46866, *In re: Marilee Special Utility District*, Final Order (May 19, 2017); see PUC Docket No. 42801, *In re Markout Water Supply Corporation*, Motion to Overturn (August 27, 2014), Final Order (October 3, 2014) (meters on property, but shut off by property owner request).
4. PUC will even allow the landowner to carve out active meters.

Since September 1, 2011 — when § 13.254(a-5) became effective — PUC (and its predecessor) have received almost 200 SER petitions.

- TCEQ denied one because of improper mapping.
- PUC denied one because it had two active meters.
- All others were granted, without a hearing.
- Cases challenging PUC decertification orders in state court have all failed.

Single Certification by Cities – TWC § 13.255

- Provides for decertification of CCN in areas incorporated or annexed within a municipality
- PUC “shall grant” single certification
- Just compensation—in theory—for the incumbent utility for property rendered “useless or valueless”

Compensation
Provisions
Provide No
Relief

Compensation for TWC § 13.254(a-5) Decertification

1. § 13.254(g) contains factors for valuing property rendered useless or valueless by decertification; bifurcated hearing process
2. Aqua Texas/City of Celina (PUC Docket No. 45848) (TWC § 13.254 Expedited Release Compensation)
 - ALJs' Proposal for Decision – recommended compensation to utility for spent money for planning, permitting, and legal costs
 - PUC Order
 - \$0 result
 - money spent by the utility is not property of the utility even though “expenditures may have been made using money that was formerly the property of the utility. . .”
 - The utility “must show that money was expended to obtain property rather than services.”

Compensation for TWC § 13.255 Single Certification

- Compensation for property rendered useless or valueless by the decertification is the main question for single certification of land to annexing municipality
- Example Cases: Green Valley SUD - City of Cibolo (PUC Docket No. 45702); Green Valley SUD - City of Schertz (PUC Docket No. 45956)
 - Final orders on compensation issues follow *Aqua Texas*
 - over 2,000 acres in high-growth areas decertified
 - no compensation

Results

- Easy—practically automatic—CCN decertification for cities and developers
- No compensation for water and wastewater utilities

YOU'LL GET NOTHING

AND LIKE IT!

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Responsive Strategies for Water and Wastewater Utilities

Protection of service area
through 7 U.S.C. § 1926(b)
and federal court

7 U.S.C. § 1926(b)

Curtailement or limitation of service prohibited

“The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan”

Policy Reasons for § 1926(b)

1. To promote the development of water and wastewater systems for rural residents that is economical and safe.
2. To make sure the federal debt will be repaid.

Requirements for § 1926(b) Protection

1. Retail public utility must be a qualifying association
 - WSCs and SUDs allowed
 - IOUs are not
2. Must have continuing indebtedness to USDA or a USDA loan guarantee
3. Utility must have provided or made service available to the area in dispute.

North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996)

- The service area of a federally indebted utility is “sacrosanct.”
- § 1926(b) should be liberally interpreted to protect rural water utilities from municipal encroachment.
- Mandatory duty of CCN holder to serve every customer is legal equivalent to “making service available.”
- City that expanded into a CCN service area enjoined and required to turn over facilities.

City of Madison v. Bear Creek Water Association, 816 F.2d 1057 (5th Cir. 1987)

- Municipal condemnation of federally indebted utility halted.
- § 1926(b) is designed to prevent cities from “skimming the cream” by taking the most valuable, high density areas from rural utilities.

TWC § 13.254(a-6)

“The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program.”

Can the PUC ignore § 1926(b)?

- § 13.254(a-6) directs the PUC to ignore that a CCN holder is a borrower under a federal loan program.
- PUC has granted numerous expedited release petitions despite the utility holding USDA debt.
- PUC is ignoring § 1926(b), but is that legal?

U.S. Constitution

- The Supremacy Clause of the U.S. Constitution (Article VI, Clause 2) provides that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.”
- State law must not conflict with or frustrate the objective and purpose of federal law.

Recent litigation challenging PUC decertifications of federally-indebted utilities

- Case No. 1:16-cv-00627; *Green Valley Special Utility District v. City of Cibolo, Texas*; in the United States District Court, Western District of Texas, Austin Division
- Case No. 1:17-cv-00819; *Green Valley Special Utility District v. DeAnn T. Walker, et al.*; in the United States District Court, Western District of Texas, Austin Division
- Case No. 5:17-cv-00972; *McCoy Water Supply Corporation v. City of Jourdanton, et al.*; in the United States District Court, Western District of Texas, San Antonio Division
- Case No. 1:17-cv-00254; *Crystal Clear Special Utility District v. DeAnn T. Walker, et al.*; in the United States District Court, Western District of Texas, Austin Division.

Green Valley Special Utility Dist. v. City of Cibolo, 866 F.3d 339(5th Cir. 2017)

- Re-affirmed North Alamo's holding that a CCN holder's duty under Texas law to serve every customer is the equivalent of "making service available" under 1926(b).
- A USDA loan for one service (e.g. water) protects the other service (e.g. wastewater) provided by the borrower.
- City has appealed to the U.S. Supreme Court.

McCoy Water Supply Corporation v. City of Jourdanton

- McCoy WSC filed suit under § 1926(b) to stop decertification proceedings at the PUC.
- Federal Judge Ezra granted a temporary restraining order stopping PUC decertification.
- Case settled as a result of the temporary restraining order.

Crystal Clear Special Utility District v. DeAnn T. Walker, et al

On March 29, 2018, Federal Judge Lee Yeakel granted summary judgment for Crystal Clear finding that:

1. Crystal Clear is federally indebted under § 1926(b).
2. Crystal Clear has “provided or made available” service by virtue of its legal duty to provide service under its CCN.
3. PUC’s Order decertifying property for Crystal Clear’s CCN curtailed Crystal Clear’s rights under § 1926; and,
4. TWC 13.254(a-6) is preempted by § 1926(b) and therefore unconstitutional under the Supremacy Clause.

Potential Remedies Under § 1926(b)

- Injunction to stop city or developer decertification of CCN service area
- Damages for lost revenues
 - 42 U.S.C. § 1983
- Attorneys' fees to enforce the utility's federal rights under § 1926(b)
 - 42 U.S.C. § 1988

Key Takeaways for Water and Wastewater Utilities

1. Get a CCN (if you don't already have one).
2. Get a USDA loan or loan guarantee (if you don't already have one).
3. Diligently pursue your rights at PUC and in State Court to preserve your rights (but don't hold your breath).
4. Sue promptly in federal court under § 1926(b).

Questions?

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