

# CCN Decertification and Strategies for Water Utilities

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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

# History of Decertification Statutes

## 1980s – Early Decertification Statutes

§ 13.255 - Primarily to address problems with colonias in South Texas that could not be served by nearby municipal providers due to CCNs.

1. Permitted single certification for municipalities after annexation and notice to CCN holder
2. Required just compensation for property rendered useless or valueless
3. Only applied to water supply corporations - expanded to include special utility districts and private utilities wholly within a municipality of 1.7 million or more



# History of Decertification Statutes

1990s – Expansion of decertification for “bad actors”

§ 13.254(a) Set up decertification and compensation process applicable to all CCN holders.

Availability: notice and hearing required

§ 13.254(a)(1) Decertification Criteria:

- CCN holder has never provided, is no longer providing, is incapable of providing, or has failed to provide continuous and adequate service

Compensation: lost future revenue

Result: very few decertifications

# History of Decertification Statutes

## 2005 – Three Significant Changes

### 1. CCNs made harder to obtain

- Landowners provided notice of new CCN and given opportunity to “opt-out”

### 2. Compensation portions of both § 13.254 and § 13.255 were revised

- Lost future revenues not recoverable

### 3. Expedited release process added – § 13.254(a-1)

# § 13.254(a-1) Expedited Decertification

Limited right for landowners to release property from existing CCN

- At least 50 acres
- Not in a platted subdivision receiving water or sewer service

Criteria:

- CCN holder refuses to provide service
- CCN holder is not capable of providing service within the timeframe, at the level, or in the manner reasonably requested
- CCN holder conditions the provision of service on payment of costs not properly allocable to the service request

# § 13.254(a-1) Expedited Decertification

Decertification available only if there was an alternative service provider:

- Capable of providing continuous and adequate service
- Within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected demands in the area



# History of Decertification Statutes

## 2011 - Two significant changes

1. Expanded Availability for expedited decertification under § 13.254(a-1).
2. Enacted “Streamlined Expedited Release” under § 13.254(a-5) providing for even easier decertification of property.

# Expansion of § 13.254(a-1) Criteria

Cost is a basis for decertification

- CCN holder is not capable of providing service at the approximate cost that the alternate provider can for comparable service.

Fire flow is a basis for decertification

- CCN holder must meet the flow and pressure requirements for the level of fire protection requested.

# “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)

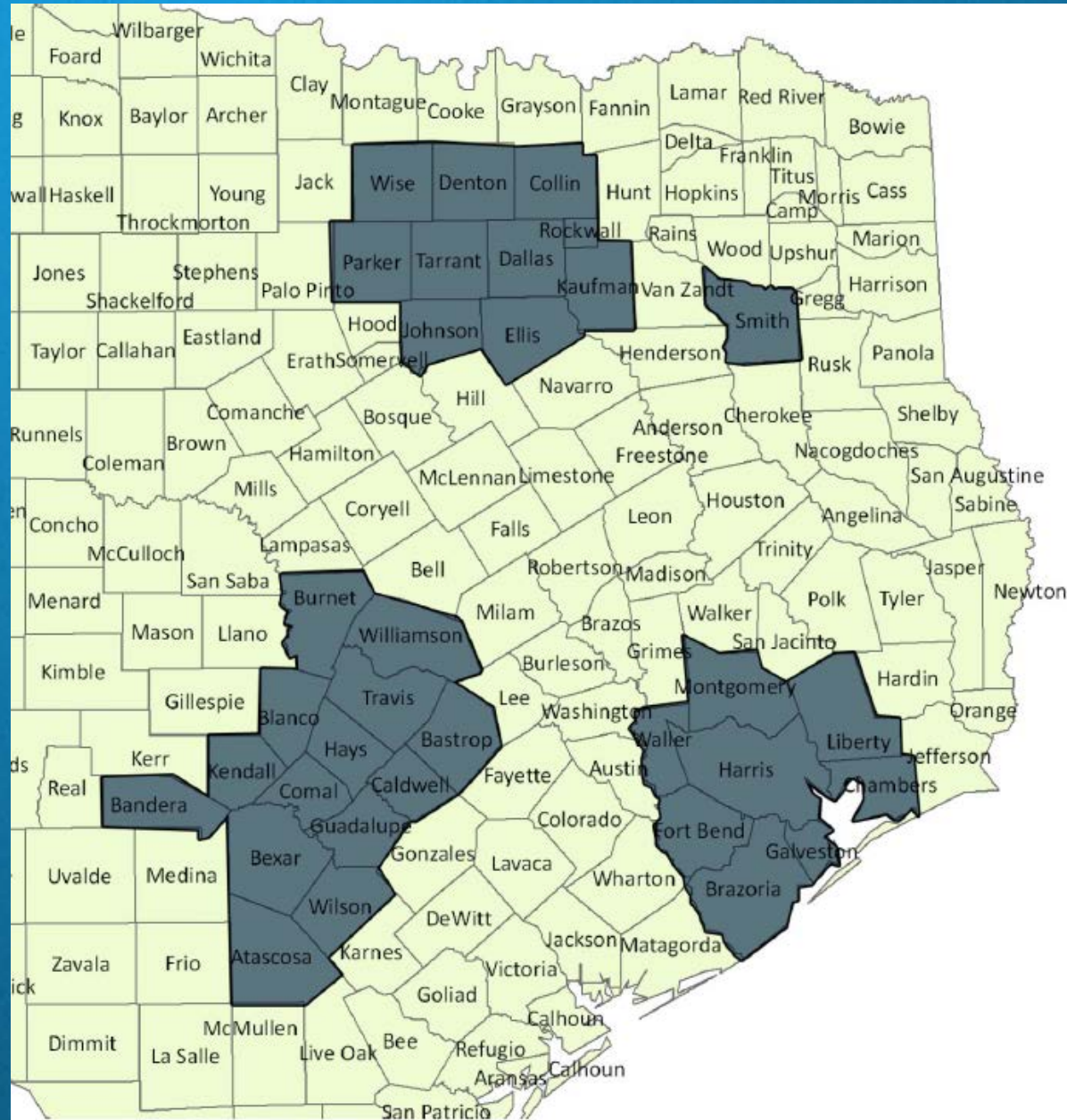
## Decertification

### Availability:

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



# 33 Affected Texas 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 about 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!**

zipmeme

# 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)

Curtailment 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 (5<sup>th</sup> 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.

# Conflict between State Law and Federal Law: When is Service Available?

- *North Alamo*, 910 F.3d at 919
  - 5<sup>th</sup> Circuit found that a WSC meets the “made service available” requirement because of its legal obligation to serve every consumer under state law.
- *Creedmoor-Maha Water Supply Corp. v. Tex. Comm’n on Envtl. Quality*, 307 S.W.3d 505 (Tex. App. — Austin 2010, no pet.)
  - State Third Court of Appeals found that possession of a CCN is not enough
  - § 1926(b) protection limited to areas where the utility is:
    - Already providing service or
    - Presently has physical means to serve

# 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.

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

- City of Cibolo appealed to the U.S. Supreme Court.
- After briefing, the Supreme Court called for the views of the U.S. Solicitor General.
- Solicitor General filed brief in December recommending denial.
- Supreme Court denied certiorari on January 4, 2019.



# *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.*, 316 F. Supp. 3d 965 (W.D. Tex. 2018)

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.

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

## Magistrate's Report and Recommendation

- Rejected PUC's argument that the PUC was required to grant an (a-5) petition even if (a-6) is invalidated because § 1926(b) is "an extrastatutory factor."
- "The Constitution begs to differ."
- Supremacy clause requires PUC to consider applicable federal law.

## Recommended Declarations

- PUC Final Order is void.
- TWC § 13.254(a-6) is preempted and void.
- TWC § 13.254(a-5) preempted and void to the extent it directs PUC to grant decertification regardless of § 1926(b).

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

## Magistrate's Report and Recommendation

### Recommended Injunctive Relief

- PUC is permanently enjoined from enforcing its Final Order decertifying Crystal Clear SUD's CCN.
- Declined to enjoin developer because Crystal Clear SUD's rights will be protected by declaratory and injunctive relief against PUC officials.



# *Green Valley Special Utility District v. DeAnn Walker et al.*

On November 28, 2018, Federal Judge Sam Sparks issued an order and final judgment that:

1. Green Valley's rights under § 1926(b) were violated by PUC's § 13.255 single certification order.
2. Green Valley's rights under § 1926(b) were violated by PUC's § 13.254(a-5) decertification order.
3. Invalidated PUC's order decertifying Green Valley's service area.
4. Invalidated PUC's order awarding Green Valley's CCN service area to Schertz and Cibolo.

# *Green Valley Special Utility District v. DeAnn Walker et al.*

5. Enjoined Schertz from providing wastewater service to the disputed area without Green Valley's consent.
6. Enjoined GVDC from receiving wastewater service at the GVDC tract without Green Valley's consent.

Interestingly, despite finding that the PUC's orders violated § 1926(b), Judge Sparks said that it was theoretically possible to comply with both state and federal law, so he did not find preemption of TWC § 13.254(a-6).

# 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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