

PROJECT NO. 46151

PROJECT TO AMEND 16 TEX.	§	PUBLIC UTILITY COMMISSION
ADMIN. CODE SECTION 24.113	§	
RELATING TO REVOCATION OR	§	OF TEXAS
AMENDMENT OF A WATER OR	§	
SEWER CERTIFICATE AND	§	
SECTION 24.120 RELATING TO	§	
SINGLE CERTIFICATION IN	§	
INCORPORATED OR ANNEXED	§	
AREAS	§	

**ORDER ADOPTING THE REPEAL OF §24.113 AND §24.120 AND
NEW §24.113 AND §24.120 ADOPTED AT THE MAY 4, 2017 OPEN MEETING**

The Public Utility Commission of Texas (commission) repeals §24.113, relating to revocation or amendment of certificate, and §24.120, relating to single certification in incorporated or annexed areas; and adopts new §24.113, relating to revocation or amendment of a certificate of convenience and necessity, and new §24.120, relating to single certification in incorporated or annexed areas, with changes to the proposed text as published in the December 16, 2016 issue of the *Texas Register* (41 TexReg 9820). The repeals and new sections update provisions and provide more clarity regarding certificate-of-convenience-and-necessity (CCN) cancellations, revocations, and amendments, including amendments by expedited release, streamlined expedited release, and single certification in areas that have been incorporated or annexed by a municipality. These repeals and new sections are adopted under Project Number 46151.

A public hearing on the proposed repeals and new sections was held at commission offices on February 13, 2017 at 1:30 P.M. Representatives from the following entities attended the hearing and provided comments: Aqua Texas, Inc., Aqua Utilities, Inc., and Aqua Development, Inc. d/b/a

Aqua Texas (Aqua), SJWTX, Inc. d/b/a Canyon Lake Water Service Company (CLWSC), and SouthWest Water Company (SWWC) (collectively, the Water IOUs); the Texas Rural Water Association (the TRWA); the Texas Association of Builders (the TAB); Steger & Bizzell Engineering, Inc. (Steger Bizzell); the City of Fort Worth Water Department (Fort Worth); NewGen Strategies & Solutions, LLC (NewGen); and Allen Boone Humphries Robinson LLP (Allen Boone). The TRWA filed a written copy of the comments it provided at the hearing. To the extent that the comments made at the hearing differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed repeals and new sections from the City of Houston (Houston), the Water IOUs, and the TRWA. The commission received reply comments from the Water IOUs; Aqua Water Supply Corporation, the City of Burleson, the City of College Station, the City of Coppell, the City of Fair Oaks Ranch, the City of Garland, the City of Georgetown, the City of Grand Prairie, the City of Lake Worth, Lakeside Water Control & Improvement District (WCID) No. 1, Lakeside WCID No. 2B, Lakeside WCID No. 2C, Lakeside WCID No. 2D, the City of Lewisville, the City of McAllen, Springs Hill Water Supply Corporation, the City of Sweetwater, the City of Waco, the West Travis County Public Utility Agency, Travis County WCID No. 17, the Town of Westlake, and the City of Schertz (collectively, the Cities et al.); Senators Robert Nichols and Brandon Creighton of the Texas Legislature (collectively, the Senators); retired state representative William Callegari, Sr.; and the TAB.

§24.113(b)

The Water IOUs requested that the term *service* be broadly defined in §24.113(b) to match the definition found in Texas Water Code (TWC) §13.002 and 16 TAC §24.3. The Water IOUs remarked that defining *service* broadly would prevent the unjust removal of area from the CCNs of retail public utilities that had properly planned to provide service. The Water IOUs stated that defining *service* only as the presence of active water or sewer connections has led to absurd results, as there are many preliminary steps to providing an active water or sewer connection to a piece of property, and these preliminary steps fall within TWC §13.002's broad definition of *service*.

Commission response

The term *service* is already defined in the general definitions rule, §24.3(62), and general definitions apply to the terms in §24.113 and §24.120 unless the context clearly indicates otherwise. Further, the definition in §24.3(62) closely tracks the statutory definition. There is no need to define the term again.

§24.113(b)(6)

The Water IOUs commented that the term *useless or valueless property* in §24.113(b)(6) should encompass a broad determination of what constitutes *property*. In addition, the Water IOUs commented that compensation should be available for property that is rendered useless or valueless only in part as well as property that is not physically located within the decertified area. Otherwise, the Water IOUs stated, much of the property affected by decertification, such as monetary investment, would not be eligible for compensation, and property that is intended to serve a removed area but is not located in the removed area because of regional service planning might

not be compensated for. The Water IOUs asserted that their recommended changes would mitigate the likelihood that compensation would be determined to be \$0, an amount that the Water IOUs stated could not constitute just and adequate compensation.

The Water IOUs further commented that Article I of the Texas Constitution, which prevents a taking of property without payment of adequate compensation, and TWC §13.254(d) and (g) together indicate that a CCN holder has property rights by virtue of the CCN. The Water IOUs also pointed out that CCN holders make investments to acquire the necessary property and property rights to fulfill their obligation to provide continuous and adequate service to the CCN area. Additionally, according to the Water IOUs, many CCNs were issued before expedited release procedures were added to the TWC, and *property* must therefore be broadly construed to ensure adequate compensation. The Water IOUs stated that compensation should not be limited to physical property.

The Water IOUs therefore recommended the following definition for the term *useless or valueless property* in §24.113(b)(6):

Any species of valuable right or interest in real, personal, tangible, intangible, visible, invisible, corporeal, incorporeal property, including monetary investments or expenditures, that has been rendered useless or valueless to a former CCN holder in whole or in part by revocation or amendment, including by expedited release or streamlined expedited release, under this section.

The TRWA commented that the proposed definition for *useless or valueless property* is circular and should be revised to clarify the terms *useless*, *valueless*, and *property*. The TRWA recommended that *useless or valueless property* be defined as *any tangible and intangible real*

and personal property whose use or value has been diminished as that value is determined in accordance with Texas Water Code § 13.254(g). The TRWA asserted that this definition would allow utility planning and investment in providing service to be factored into the compensation determination. The TRWA commented that the relevant consideration for compensation proceedings is the amount of investment that would have been used to serve decertified property but can no longer be used to serve that property.

The TRWA also noted that if compensation were granted only for property rendered wholly useless or valueless, but not partly, the last landowner requesting decertification for the last portion of land attributable to a facility would have to pay full compensation for the entire facility, even though other landowners who had sought decertification earlier should have paid at least a portion of that compensation. Also, the TRWA stated that existing customers would have to subsidize any property that is rendered less useful or valuable, but not wholly useless or valueless. At the hearing, Steger Bizell agreed with these comments by the TRWA. NewGen also touched on the issue of subsidization at the hearing, emphasizing that utilities issue debt based on anticipated growth and demand and that this debt service would be paid by existing ratepayers after decertification of parts of the service area. Further, NewGen commented that rural, less affluent areas already tend to have higher rates because of a lack of population density, and those rates would only increase if service area was removed from the CCN area after a utility had started planning for growth in the area.

In reply comments, the Cities et al. agreed with the TRWA that the proposed definition for *useless or valueless property* should be revised to provide more certainty as to what property should be

considered. The Cities et al. added that the proposed definition for *useless or valueless property* should likewise be revised for §24.120.

In their reply comments, the Senators stated that the Legislature set a very high bar for compensation with the words *rendered useless or valueless*. Property is not rendered useless or valueless unless it has no remaining use or value and the cost is not, and cannot be, recovered through an existing rate base.

At the hearing, the Water IOUs commented in response to the Senators that imposing a low bar for release and a high bar for compensation results in inadequate compensation to the decertified utility, which is constitutionally prohibited. They also noted that this situation demonstrates a serious problem with the law because having a CCN encourages spending for planning and investment, and intangible plant can be stranded in whole or in part as a result of decertification.

Commission response

The commission agrees that the term *property* is broad and includes both real and personal property, and tangible and intangible property, but the adjectives *useless* and *valueless* restrict the relevant property to that rendered useless or valueless as a result of decertification. As the Senators commented, the Legislature specifically selected the terms *useless* and *valueless*, which by their ordinary meaning set a very high bar for when compensation may be awarded. *Useless* means that the property has no remaining use, and *valueless* means that the property has no remaining value, not that it has a diminished value or use.

Further, the cost of property that has been included in a utility's rate base will be recovered by that utility regardless of whether the property is rendered useless or valueless as a result of decertification. If the property is not rendered useless or valueless, it will remain in the utility's rate base and will continue to be recovered through the utility's rates. If the property is rendered useless or valueless, the utility will ultimately receive compensation from the landowner who sought decertification or from the prospective retail public utility. Of course, when property is rendered useless or valueless and the utility is compensated for the value of that property, it will need to be removed from the utility's rate base and rates. Thus, in either circumstance, the issue is not whether the current CCN holder will recover its investment in utility property being used to serve the public, but rather who will pay for those investments: the current CCN holder's ratepayers through rates or the landowner or prospective retail public utility through a compensation proceeding.

The term *useless or valueless property* is clear and does not require further clarification. Nor is the definition of *useless or valueless property* circular. The term is used within the rule so that the longer phrase *rendered useless or valueless to the former CCN holder as a result of decertification* does not have to be used throughout the rule, thus making the rule easier to read and understand.

§24.113(i)(2) and (l)(5)

The Water IOUs requested the removal of requirements to provide information in response to decertification applications under §24.113(i)(2) and (l)(5) of the proposed rule. The Water IOUs

particularly requested the removal of requirements regarding the provision of notice to lienholders, commenting that these requirements appear to stem from a requirement in §24.120 that typically does not apply to investor-owned utilities and that does not appear to be useful in the context of the types of financing typically used by investor-owned utilities. The Water IOUs commented that the requirements in §24.113(i)(2) and (l)(5) of the proposed rule require unnecessary action within an unreasonably short timeframe and are not in the TWC. The Water IOUs requested that they be exempted from these provisions if these provisions are not removed from the rule.

The TRWA also commented on §24.113(l)(5) and stated that the proposed rule provided insufficient time to provide the required lienholder information to the commission and notice to lienholders.

Commission response

The commission agrees with the Water IOUs that these paragraphs should be removed and deletes proposed §24.113(i)(2) and (l)(5) in their entirety.

§24.113(k)(6)(D)

The TRWA commented that the requirement currently found in §24.113(b)(4) that the alternate retail public utility possess the financial, managerial, and technical capability to provide service be added to proposed §24.113(k)(6)(D), as provided by TWC §13.254(a-1)(4).

Commission response

The commission modifies the rule to clarify that the requirement that the alternate retail public utility possess the necessary financial, managerial, and technical capability remains in the rule.

§24.113(k)(15) and (l)(9)

In their reply comments, the TAB recommended that §24.113(k)(15) and (l)(9) should not require a second petition.

Commission response

The commission agrees with the TAB and deletes §24.113(k)(15) and (l)(9).

§24.113(l)(4)

The TRWA recommended that the current CCN holder be allowed a minimum of 15 calendar days from the date the commission determines the application is administratively complete to file a response to a petition for streamlined expedited release. The TRWA stated that this is the minimum response time needed to provide a reasonable time to file a response and avoid prejudicing the rights of the current CCN holder. The TRWA commented that the proposed rule's failure to set a firm response deadline violates the due process rights of the current CCN holder by failing to provide fair notice of the response deadline and failing to ensure a reasonable amount of time in which to prepare a response. The TRWA therefore recommended that the rule establish a deadline applicable to all respondents rather than allow the presiding officer discretion to set deadlines that could vary from proceeding to proceeding.

Commission response

The commission declines to set a minimum response time in the rule. The commission finds that the benefits of allowing its administrative law judges (ALJs) maximum flexibility to tailor procedural schedules to the facts of each individual case outweigh the benefits of establishing minimum response periods in the rule, especially given the short 60-day statutory timelines applicable to proceedings under §24.113 and TWC §13.254. The commission's ALJs have demonstrated an ability to establish fair response deadlines, provide adequate notice of those deadlines, and otherwise ensure proper protection of the due process rights of all parties. For those reasons, and because of the other modifications made to the rule, the commission also modifies §24.113(k)(8) and §24.113 (l)(4) to give the presiding officer discretion to allow the current CCN holder more than 30 calendar days to file a response to a petition. In addition the removal of §24.113(i)(2) and (l)(5), which is discussed elsewhere in this order, should reduce the response burden on a current CCN holder. The commission is well aware that the short deadline imposes demands not only on the commission, but also on any entity that chooses to participate in a decertification proceeding.

§24.113(l)(5)

The TRWA commented that the timeline established in §24.113(l)(5) is unreasonably short, as it requires the current CCN holder to perform more analysis than the current process under §24.113(q) requires, and it no longer uses the date on which the current CCN holder receives the petition as the start date for the response period. The TRWA stated that the current CCN holder's

response timeline begins when the petition is filed, but that the current CCN holder might not receive a copy of the petition until several days after it is filed. The TRWA asserted that this prejudices the current CCN holder's due process rights and does not allow adequate time for the CCN holder to prepare a response, especially in light of the amount of analysis required under the proposed rule. The TRWA therefore recommended that proposed §24.113(l)(5) be amended to allow the current CCN holder 15 calendar days from the date the application is determined to be administratively complete to comply with the requirements in §24.113(l)(5). The TRWA stated that this change, combined with its proposed change to §24.113(l)(4), would create consistency among agency rules, minimize confusion, provide the current CCN holder enough time to hire the legal counsel and financial experts needed to prepare its response, and allow for greater efficiency by allowing the current CCN holder to include the information required by §24.113(l)(5) in its initial response to the petition for streamlined expedited release.

Commission response

In order to reduce the burden on CCN holders subject to a streamlined expedited release petition, the commission removes proposed subsection (l)(5) from §24.113.

§24.113(l)(8)

In their reply comments, the Senators stated that landowner petitioners, and not any other person or entity, should be required to provide compensation for decertification under TWC §13.254(a-5) and (a-6). The TRWA also commented at the hearing that landowners should pay compensation for land that is decertified under TWC §13.254(a-5). Further, the Senators commented that

compensation should be determined at the time of decertification under TWC §13.254(a-5) and not at a later time, such as when another utility intends to provide service.

Commission response

The statute specifies when compensation is due: TWC §13.254(e) provides that “[t]he 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.” Thus, by statute, compensation is to be determined when another retail public utility seeks to provide service to the removed area. However, the rule allows the current CCN holder and the petitioner to agree on compensation at any time after either of the following occurs: the current CCN holder and the petitioner agree on useless or valueless property, or the Commission makes a determination of useless or valueless property.

Regarding who must provide compensation, TWC §13.254(d) states that a new retail utility may not provide service in a removed area without providing compensation to the former CCN holder, while TWC §13.254(a-6) states that the commission *may* require the landowner that files a petition under (a-5) to provide compensation. The rule maintains the discretion that the statute grants to the commission.

§24.113(n)(2)(B)

The TRWA commented that proposed §24.113(n)(2)(B), which states that a former CCN holder who agreed in writing to revocation or amendment of its CCN is not eligible for compensation, is

unsupported by law. The TRWA stated that agreeing to decertification should not render a CCN holder ineligible for compensation.

Commission response

The commission agrees with the TRWA that the provision should be removed, and the commission revises the proposed rule language accordingly.

§24.113(n)(4)

The TRWA commented that the failure of a CCN holder to intervene does not provide a sufficient basis for a rebuttable presumption that no useless or valueless property exists. The TRWA further stated that this standard does not exist in the TWC and that the Legislature has not granted the commission the authority to create such a standard. According to the TRWA, the adoption of this standard would create a conflict with the information submitted under §24.113(l)(5)(B). The TRWA stated that excluding the information submitted under §24.113(l)(5)(B) from consideration would be unreasonable, arbitrary, and capricious.

The TRWA commented that small retail public utilities might not intervene because decertification is usually granted and compensation has not historically been granted in amounts sufficient to balance the costs of intervention to communities. Small retail public utilities are often at a disadvantage resource-wise compared to the other parties in decertification proceedings.

In its reply comments, the TAB recommended that the permissive language in proposed §24.113(n)(4) be made mandatory, i.e., that the commission must find that no property has been

rendered useless or valueless if a CCN holder fails to timely intervene. At the hearing, Allen Boone agreed with the TAB's position.

Commission response

Proceedings under §24.113 are intended to be expedited. Therefore, the commission has authority, for the sake of administrative efficiency, to introduce a rebuttable presumption that no useless or valueless property exists if a current CCN holder does not intervene. It is typical for the Legislature to leave procedural issues like the consequences of a particular party failing to intervene to an agency's discretion. In the interests of administrative efficiency, the commission retains the presumption and modifies proposed §24.113(n)(3)-(4) and (o)(4) and removes proposed §§24.113(n)(5)-(6), 24.113(o)(3)(C), 24.113(o)(5)-(6), and 24.120(g) to significantly reduce the framework governing the determination that a current CCN holder does not exist and the consequences of a failure to intervene. These modifications will give the presiding officer discretion to address a failure to intervene or late intervention according to the facts of each individual situation. This will provide protection for the due process rights of parties to these proceedings, and should reduce any risk of unduly harsh results. The commission makes similar modifications to §24.120(g) for the same reasons.

Further, a presumption can always be rebutted. With proper evidence, a current CCN holder that failed to timely intervene will be able to overcome a presumption that no useless or valueless property exists. The opportunity to rebut the presumption is given to protect current CCN holders' due-process rights.

§24.113(n)(8)

In its reply comments, the TAB opined that an agreement between the parties under §24.113(n)(8) of the proposed rule regarding compensation should be binding on the parties and the commission. The TAB also requested language explicitly clarifying that a CCN holder and a landowner may agree that no property will be rendered useless or valueless and that therefore no compensation should be awarded. Similarly, at the hearing, Allen Boone recommended that an agreement regarding property rendered useless or valueless or a compensation agreement between the petitioner and the CCN holder be binding on the commission.

Commission response

The commission does not agree that the parties' agreement should be binding on the commission. The commission must evaluate whether a settlement comports with the law and the commission's policies, unless a statute provides otherwise. This is especially true because the amount of compensation could impact the future rates of both of the utilities involved.

§24.113(n)(10)

The Water IOUs recommended that some of the process from eminent domain proceedings should be applied to compensation proceedings under the proposed rule, as the proposed rule places the burden of proof on the former CCN holder, just as an eminent domain proceeding would. Specifically, the Water IOUs recommended that the proposed rule, which already encourages settlement, be modified to require the new provider to make a bona fide offer based on a proper

appraisal. The Water IOUs noted that appraisals of \$0 do not advance the settlement process, while bona fide offers up front could allow the parties to avoid compensation disputes.

Commission response

The compensation proceeding before the commission is not an eminent domain proceeding; it is part of a certificate proceeding. The rules of conduct in 16 TAC §22.3 apply to all proceedings before the commission. The commission declines to create additional standards of conduct in §24.113 and §24.120; however, the commission encourages parties to negotiate in good faith.

The Water IOUs also commented that the former CCN holder should be allowed to open and close hearings related to the compensation process.

Commission response

The order of procedure in evidentiary hearings is governed by 16 TAC §22.203, which provides that the party with the burden of proof is entitled to open and close. Therefore, and because of modifications made to the proposed rules described elsewhere in this order, the commission declines to address the order of procedure in §24.113 and §24.120.

The Water IOUs recommended that the rule require the use of certified independent appraisals from licensed Texas appraisers trained in the use of the *Uniform Standards of Professional Appraisal Practice* for both tangible and intangible property.

In their reply comments, the Cities et al. recommended that a qualified appraiser under §24.113 and §24.120 need not have any specific license or certification. The Cities et al. further recommended that, if the commission does intend to require a specific license or certification, it should do so in a separate, future rulemaking or after new legislation is passed.

At the hearing, NewGen opined that real estate appraisers are not qualified to perform appraisals under §24.113 and §24.120 because such appraisals involve water-utility infrastructure, not just land, residences, or commercial buildings. NewGen pointed to stranded infrastructure and the distinction between fixed and variable costs as items that would require utility-specific expertise to properly evaluate. NewGen stated that qualified appraisers should have at least 5-10 years of experience in water cost-of-service studies.

Commission response

The commission agrees with the recommendation of the Cities et al. and therefore declines to further address the question of appraiser qualifications in the present rulemaking. The commission appreciates the feedback received and may revisit this issue in a future rulemaking proceeding.

§24.113(n) and (o); §24.120(g)

The Water IOUs commented that the multi-hearing SOAH process contemplated in the proposed rule would be expensive and daunting, and they recommended that a different process be implemented. The TRWA stated that the dual hearing structure proposed in §24.113(n) and (o) would be administratively inefficient, unreasonably burdensome and costly for small retail public

utilities, and unsupported by the statutory language and legislative record. The TRWA recommended that, if the commission were to incorporate a hearing process into the compensation determination, only one hearing be required to address all the factors in TWC §13.254(d) and (g). The TRWA asserted that this would protect the rights of all parties, minimize the burden on small retail public utilities, shorten the compensation process, and allow all facts relevant to compensation to be examined in a single venue.

In their reply comments, the Cities et al. did not specifically address the dual-hearing structure but noted generally that all of the procedural timelines and phases set by this rule should be as cost- and time-efficient for the regulated community as possible.

In their reply comments, the TAB agreed with the TRWA and the Water IOUs that a SOAH hearing would prevent the expedited release process from being expeditious and streamlined. The TAB also questioned whether the proposed rules clearly state when and if petitions are referred to SOAH for a useless or valueless determination. They believed that the proposed rules suggested that a SOAH hearing would be mandatory for every proceeding under TWC §13.254(a-1) or (a-5). The TAB highlighted that a notice of intent to serve and a hearing at SOAH would not be needed if, for example, an existing CCN holder fails to timely intervene, a CCN holder no longer exists, or a CCN holder and a petitioner agree on the compensation. The TAB recommended that referral to SOAH be permissive and only when it is absolutely necessary (i.e., when a bona fide dispute exists regarding property rendered useless or valueless).

In their reply comments, the Senators stated that referral to SOAH for a hearing violates both the 90-day compensation timeline established for compensation in TWC §13.254(e) and the spirit of the 60-day decertification timeline in §13.254(a-6).

In his reply comments, retired Representative Callegari commented that TWC §13.254(a-1) and (a-5) were both intended to provide simplified, expeditious processes for landowners to remove their land from a CCN in instances where no retail water or sewer service was being provided. Retired Representative Callegari indicated that the timeframes established in §13.254(a-1) and (a-5) were key components of the process the Legislature designed to accomplish this goal. He expressed concern with the mandatory referral to SOAH proposed in §24.113(n), noting that, in his experience, proceedings at SOAH tend to be time-consuming and expensive for all parties involved, which is the opposite of what the Legislature intended when it added §13.254(a-1) and (a-5) to the TWC. Retired Representative Callegari also recommended that the commission make the determination of property rendered useless or valueless within the timeframes established in §13.254(a-1) and (a-5), without the proposed requirement that an additional petition be submitted to the commission.

At the hearing, the TAB again expressed opposition to referral of decertification proceedings to SOAH. The TAB asserted that fair and effective negotiation between owners and retail public utilities requires an expeditious determination of what property would be rendered useless or valueless. Release from a CCN, particularly under TWC §13.254(a-1) and (a-5), was established by the Legislature to provide an expeditious and streamlined process. According to the TAB, referral of the useless or valueless determination to SOAH would prevent expeditious release. The

TAB noted that delays in release from a CCN can result in costs of thousands of dollars that are ultimately passed on to Texas home owners.

Furthermore, the TAB reiterated that the proposed rules are unclear regarding if and when an application would be referred to SOAH for a determination on useless or valueless property, although the proposed rules seem to require a hearing at SOAH. The TAB stated that referral to SOAH for a useless or valueless determination contravenes legislative intent and would lead to an increase in costs. Therefore, the TAB urged the commission to make the changes to the rules proposed in the TAB's written comments.

At the hearing, the Water IOUs commented that they are not opposed to referral to SOAH, but that multiple proceedings are not needed. They expressed support for determining what property is rendered useless or valueless at SOAH.

At the hearing, Allen Boone agreed generally with other comments made on proposed §24.113 and §24.120 and generally opposed referring to SOAH the determination of what property is rendered useless or valueless. Allen Boone expressed concern that such referrals would create additional costs and unduly delay proceedings. Allen Boone agreed with the Senators that determinations of property rendered useless or valueless should be made within the existing statutory proceedings and the associated timeframes.

At the hearing, Allen Boone also commented that the mandatory referral process proposed in §24.113(l)(9) and §24.113(n)(9)(B) is time-consuming and unnecessary, especially when an

inquiry into what property is rendered useless or valueless is not needed. Allen Boone indicated that some of these scenarios are already contemplated elsewhere in the proposed rule, specifically in §24.113(n)(2)(B), §24.113(n)(4), §24.113(n)(5), and §24.113(n)(8). Allen Boone recommended that, to the extent a petitioner can show that no determination of property rendered useless or valueless is necessary, the commission make such a finding and memorialize it in an order at the time the release is granted. Allen Boone further recommended that referrals to SOAH be permissive rather than mandatory and occur only when necessary.

At the hearing, the TRWA commented that bifurcation of the compensation process (one phase pertaining to property rendered useless or valueless and another phrase pertaining to valuation) is inconsistent with TWC §13.254 and creates a clash of state priorities. The TRWA also asserted that such bifurcation abrogates many of the factors listed in §13.254(g). According to the TRWA, all of the factors in subsection (g) should be analyzed in determining property that has been rendered useless or valueless. The TRWA stated that the proposed process does not provide adequate compensation to retail public utilities and therefore puts at risk public investments that have been made to water utilities through loans and grants.

Commission response

The commission recognizes the cost and time involved in SOAH hearings and the benefits provided by expeditiously processing release proceedings under TWC §13.254. The commission therefore revises §24.113 to remove referrals to SOAH from the compensation process. Instead, the commission will determine what property is rendered useless or valueless by decertification within the release proceeding without referring the matter to

SOAH and without requiring the submission of the additional petition originally proposed in §24.113(n). As part of these revisions, the commission revises §24.113(k)(10) and the new §24.113(l)(5) to specify the procedures that will apply to the determination of what property, if any, is useless or valueless property. The commission also revises §24.113(n)(1) and §24.113(p)(4) and removes proposed §24.113(n)(7) to indicate that there will no longer be a separate proceeding or petition for determining useless or valueless property but that §24.113(n) will still govern that determination. The commission modifies proposed §24.113(n)(3) to clarify that the current CCN holder has the right to a determination of property rendered useless or valueless. In addition, the commission revises §24.113(k)(6) to require that petitions submitted under §24.113(k) be verified by notarized affidavit. This change is designed to strengthen the record on which the commission will rely to determine what property, if any, is rendered useless or valueless. Once a retail public utility files a notice of intent to provide service to the removed area, the commission will use the appraisal process to determine what compensation, if any, is owed to the former CCN holder without referring the matter to SOAH.

The commission declines to remove referral to SOAH from §24.120 because TWC §13.255 proceedings, which transfer CCN area to a municipality that has annexed or incorporated that area, are fundamentally different from §13.254 proceedings, which provide landowners and other parties an expeditious method for removing land from a CCN. Proceedings under §13.255 are subject to statutory timelines that are structured differently from the timelines that govern proceedings under §13.254(a-1) and §13.254(a-5). In addition, the process proposed in §24.120 provides for only one SOAH hearing, rather than the multiple hearings

originally proposed in §24.113, and therefore the concerns regarding the multi-hearing process originally proposed in §24.113 do not apply to §24.120.

To further expedite the compensation process, the commission modifies the new §24.113(n)(4) and (n)(6) and inserts a new §24.113(o)(6) to indicate that the determination of property rendered useless or valueless will occur as part of the release rather than after it and that parties can agree on compensation at any time before or during release and compensation proceedings. The commission also clarifies the procedures that will apply to commission evaluations of agreements by parties. The commission further notes that a retail public utility can file a notice of intent to provide service to initiate a compensation proceeding immediately after the release proceeding concludes.

In their reply comments, the Senators stated that the appraiser should be able to determine which property is rendered useless or valueless and thus needs to be compensated for.

The Water IOUs commented that the landowner should provide compensation during the decertification process since sometimes re-certification may never occur.

Commission response

Under TWC §13.254(d), the commission is expressly tasked to determine what property has been rendered useless or valueless as a result of decertification. Further, TWC §13.254(f), (g), and (g-1) limit the role of the appraisers to determining the amount of compensation by valuing the property that the commission has determined is useless or valueless. In light of

these statutory requirements, the commission cannot authorize the appraisers to determine what property would be rendered useless or valueless. In addition, the commission determines that, in order to ensure compliance with §13.254(e), compensation should be made during a separate proceeding rather than during the release proceeding. However, as noted earlier, the rule allows the amount of compensation to be determined by agreement during the release proceeding.

§24.120

In their reply comments, the Cities et al. noted generally that all of the procedural timelines and phases for single-CCN certification applications should be as cost- and time-efficient for the regulated community as possible. They specifically highlighted §24.120(e)(3), (g)(2), (h)(1), and (i)(1).

Commission response

The timelines contained in §24.120 are designed to allow for efficient review and processing of single-certification applications while also preserving parties' due-process rights. The deadline contained in §24.120(e)(3) mirrors the 30-day deadline found in 16 TAC §24.8. The deadline in (g)(2) no longer exists, as the commission removes subsection (g) for reasons discussed elsewhere in this order. The deadlines contained in (h)(1) and (i)(1) are designed to provide adequate time for parties to comply with the requirements of the rule while also ensuring that applications are timely processed, and the commission concludes that these deadlines accomplish that purpose.

§24.120(a)

At the hearing, Fort Worth recommended that the population threshold of 1.7 million contained in proposed §24.120(a)(3)(B) be lowered to 0.7 million.

Commission Response

The population threshold contained in §24.120(a)(3)(B) is established in TWC §13.255(j)(2).

The commission cannot adopt Fort Worth's recommendation.

§24.120(f)

In their reply comments, the Cities et al. expressed concern regarding §24.120(f). They presented a hypothetical situation in which a copy of the application is not sent to the current CCN holder on the same date that it is filed with the commission, and they asked how that procedural defect would be cured. The Cities et al. also asked whether hand-delivery is valid under the proposed rule.

Commission response

It is not feasible to write a rule that encompasses all of the various scenarios in which procedural defects might arise, such as a copy of the application not being sent to the current CCN holder on the same day that an application is submitted to the commission. Therefore, the commission leaves the resolution of such issues to the presiding officer's discretion.

The commission agrees that hand-delivery should be a type of delivery available to the parties in a proceeding under §24.120 and therefore amends §24.120(f) accordingly.

§24.120(m)-(n)

Houston commented that use of net book value as a determinant of compensation under §24.120 would more accurately reflect any losses to the retail public utility than use of fair market value, since net book value represents the original cost of the property less depreciation. Houston also remarked that since ratemaking relies on original cost less depreciation to determine invested capital, the use of a valuation process based on fair market value results in uncertainty regarding how the retail public utilities involved in a transfer of facilities under §24.120 should reflect the facilities on their books for ratemaking purposes.

In reply comments, the Water IOUs disagreed that net book value should be required for compensation determinations under either §24.113 or §24.120. They stated that just as in a condemnation proceeding, a forced sale of assets is involved, and fair market value should be used. The Water IOUs noted that a net-book-value approach would apply only to private utilities, and stated that these rules should apply to all retail public utilities.

Commission response

While the commission agrees that the net book value of a utility's property would accurately capture the unrecovered costs of a utility's property, the statute requires a different valuation mechanism. Factors governing the valuation of property affected by proceedings under §24.113 and §24.120 are governed by TWC §13.254(g) and §13.255(g), respectively. The language originally proposed in §24.113 and §24.120 was designed to implement the requirements of §13.254(g) and §13.255(g), and while the commission appreciates Houston's

comments, the commission agrees with the Water IOUs that the originally proposed language should be retained.

§24.120(v)

At the hearing, Fort Worth recommended that proposed §24.120(v)(3) be modified to allow the municipality to charge any fees the municipal code would normally allow it to charge a ratepayer joining the system, such as impact fees.

Commission response

The language proposed in §24.120(v)(3) is designed to implement TWC §13.2551(d), which does not provide for fees other than the utility's customary rates or interim rates set by the commission. The commission cannot adopt Fort Worth's recommendation.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent. Such clarifying modifications include for example, but are not limited to, moving most of proposed §24.113(n)(2) to new §24.113(o)(1) and modifying new §24.120(n) to clarify processes, when valuations are binding on the commission, and the sharing of costs of appraisers.

These repeals and new sections are adopted under TWC §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §13.2451(c), which permits the commission to

amend the certificated service area of a municipality outside of the municipality's extraterritorial jurisdiction under certain circumstances; TWC §13.254, which allows the commission to revoke or amend a certificate of convenience and necessity under certain circumstances; TWC §13.255, which requires the commission to grant single certification to a municipality or franchised utility under certain circumstances for an area that has been incorporated or annexed; and §13.2551, which grants the commission authority to place certain conditions on a revocation or amendment ordered under TWC §13.254 or §13.255.

Cross Reference to Statutes: TWC §§13.041(b), 13.2451(c) 13.254, 13.255, 13.2551.

§24.113. Revocation or Amendment of Certificate. (REPEALED)**§24.113 Revocation or Amendment of a Certificate of Convenience and Necessity.**

(a) **Applicability.** This section applies to the revocation or amendment of a certificate of convenience and necessity (CCN).

(b) **Definitions.**

- (1) **Alternate retail public utility** -- The retail public utility from which a landowner plans to request service after the landowner obtains expedited release under subsection (k) of this section. An alternate retail public utility is limited to the following:
 - (A) an existing retail public utility; or
 - (B) a district proposed to be created under Article 16, §59 or Article 3, §52 of the Texas Constitution.
- (2) **Current CCN holder** -- An entity that currently holds a CCN to provide service to an area for which revocation or amendment is sought.
- (3) **Former CCN holder** -- An entity that formerly held a CCN to provide service to an area that was removed from the entity's service area by revocation or amendment under this section.
- (4) **Prospective retail public utility** -- A retail public utility seeking to provide service to a requested area or to a removed area.
- (5) **Removed area** -- Area that has been removed under this section from the certificated service area of a former CCN holder.

- (6) **Useless or valueless property** -- Property that has been rendered useless or valueless to a former CCN holder by revocation or amendment, including by expedited release or streamlined expedited release, under this section.
- (c) A CCN or other order of the commission in any proceeding under this section does not create a vested property right.
- (d) An order of the commission issued under this section does not transfer any property, except as provided under subsection (p) of this section.
- (e) A former CCN holder shall not be required to provide service within the removed area.
- (f) If the CCN of any retail public utility is revoked or amended, the commission may by order require one or more other retail public utilities to provide service to the removed area, but only if each retail public utility that is to provide service consents.
- (g) **Cancellation.** Upon written request from the current CCN holder, the commission may cancel the CCN if the current CCN holder is authorized to operate without a CCN under §24.103(c) or (e) of this title relating to Certificate of Convenience and Necessity not Required.
- (h) **Revocation or amendment by consent.** The commission may revoke or amend any CCN with the written consent of the current CCN holder after notice and a hearing.

(i) **Revocation or amendment.**

- (1) At any time after notice and a hearing, the commission may revoke or amend any CCN if the commission finds that any of the circumstances identified in this paragraph exist.
 - (A) The current CCN holder has never provided, is no longer providing, is incapable of providing, or has failed to provide continuous and adequate service in all or part of the certificated service area.
 - (B) The current CCN holder is in an affected county as defined in TWC §16.341, and the cost of providing service by the current CCN holder is so prohibitively expensive as to constitute denial of service. Absent other relevant factors, for commercial developments started after September 1, 1997 or residential developments started after September 1, 1997, the fact that the cost of obtaining service from the current CCN holder makes the development economically unfeasible does not render such cost prohibitively expensive.
 - (C) The current CCN holder has agreed in writing to allow another retail public utility to provide service within its certificated service area, except for an interim period, without amending its CCN.
 - (D) The current CCN holder has failed to file a cease-and-desist action under TWC §13.252 within 180 days of the date that the current CCN holder became aware that another retail public utility was providing service within

the current CCN holder's certificated service area, unless good cause is demonstrated for failure to file the cease-and-desist action within 180 days.

- (2) **Mapping Information.** For petitions submitted under this subsection or under subsection (j) of this section, mapping information is required for the requested area in accordance with §24.119 of this title relating to Mapping Requirements for Certificate of Convenience and Necessity Application.
- (j) After notice to a municipality and an opportunity for a hearing, the commission may remove from the municipality's certificated service area an area that is located outside the municipality's extraterritorial jurisdictional boundary if the municipality has not provided service to the area on or before the fifth anniversary of the date the CCN was granted for the area. This subsection does not apply to an area that was transferred to a municipality's certificated service area by the commission and for which the municipality has spent public funds.
- (k) **Expedited release.**
- (1) This subsection provides an alternative to revocation or amendment under subsections (h) or (i) of this section.
- (2) An owner of a tract of land may petition the commission for expedited release of all or a portion of the tract of land from a current CCN holder's certificated service area if the tract of land is at least 50 acres in size and is not in a platted subdivision actually receiving service.

- (3) The fact that a current CCN holder is a borrower under a federal loan program does not prevent either the granting of a petition under this subsection or an alternate retail public utility from providing service to the removed area.
- (4) A landowner may not submit a petition under this subsection to the commission until at least 90 calendar days after the landowner has submitted the notice required by paragraph (5) of this subsection to the current CCN holder.
- (5) The landowner shall submit to the current CCN holder a written request for service, other than a request for standard residential or commercial service. The written request shall identify the following:
 - (A) the tract of land or portion of the tract of land for which service is sought;
 - (B) the time frame within which service is needed for current and projected service demands in the tract of land;
 - (C) the reasonable level and manner of service needed for current and projected service demands in the area;
 - (D) the approximate cost for the alternate retail public utility to provide service at the same level, and in the same manner, that is requested from the current CCN holder;
 - (E) the flow and pressure requirements and specific infrastructure needs, including line size and system capacity for the required level of fire protection requested, if any; and
 - (F) any additional information requested by the current CCN holder that is reasonably related to determining the capacity or cost of providing service at the level, in the manner, and in the time frame, requested.

- (6) The landowner shall submit a petition that is verified through a notarized affidavit and demonstrates the following information:
- (A) the tract of land is at least 50 acres in size and is not in a platted subdivision actually receiving service;
 - (B) a written request
 - (i) was submitted by the landowner to the current CCN holder at least 90 calendar days before the petition was submitted to the commission, and
 - (ii) complied with paragraph (5) of this subsection;
 - (C) the current CCN holder
 - (i) has refused to provide service;
 - (ii) cannot provide service as identified in the notice provided under paragraph (5)(A)-(D) of this subsection on a continuous and adequate basis; or
 - (iii) conditions the provision of service on the payment of costs not properly allocable directly to the landowner's service request, as determined by the commission;
 - (D) the alternate retail public utility possesses the financial, managerial, and technical capability to provide service as identified in the notice provided under paragraph (5)(A)-(D) of this subsection on a continuous and adequate basis; and

- (E) a copy of the petition has been mailed to the current CCN holder via certified mail on the day that the landowner submits the petition to the commission.
- (7) The landowner shall submit, as part of the petition, the mapping information described in subsection (m) of this section.
- (8) The current CCN holder may submit a response to the petition within a timeframe specified by the presiding officer.
- (9) A presiding officer shall determine whether the petition is administratively complete. When the petition is determined to be administratively complete, the presiding officer shall establish a procedural schedule that is consistent with paragraph (10) of this subsection. The presiding officer may dismiss the petition if the petitioner fails to supplement or amend the petition after the presiding officer has determined that the petition is not administratively complete.
- (10) The commission shall grant the petition within 60 calendar days from the date the petition was found administratively complete unless the commission makes an express finding that the landowner failed to satisfy all of the requirements of this subsection. The commission shall support its express finding with separate findings of fact and conclusions of law for each requirement based solely on the information provided by the landowner and the current CCN holder. The commission may condition the granting or denial of a petition on terms and conditions specifically related to the landowner's service request and all relevant information submitted by the landowner and the current CCN holder. The determination of what property,

if any, is useless or valueless property will be made according to the procedures defined in subsection (n) of this section.

- (11) Chapter 2001 of the Texas Government Code does not apply to any petition filed under this subsection. The commission's decision on the petition is subject to rehearing on the same timeline that applies to other final orders of the commission. The commission's order ruling on the petition may not be appealed.

(12) **Finding regarding never having made service available.**

- (A) The commission is required to find only that the alternate retail public utility can provide the requested service if the current CCN holder has never made service available through planning, design, construction of facilities, or contractual obligations to provide service to the tract of land. In such instance, the commission is not required to find that the alternate retail public utility can provide better service than the current CCN holder.
- (B) This paragraph does not apply to Cameron, Willacy, and Hidalgo Counties or to a county that meets any of the following criteria:
- (i) the county has a population of more than 30,000 and less than 35,000 and borders the Red River;
 - (ii) the county has a population of more than 100,000 and less than 200,000 and borders a county described by clause (i) of this subparagraph;
 - (iii) the county has a population of 130,000 or more and is adjacent to a county with a population of 1.5 million or more that is within 200 miles of an international border; or

- (iv) the county has a population of more than 40,000 and less than 50,000 and contains a portion of the San Antonio River.
 - (C) The commission will maintain on its website a list of counties that are presumed to meet the requirements of subparagraph (B) of this paragraph.
 - (13) If the petitioner is a proposed district, then the commission may condition the release and CCN amendment or revocation on the final and unappealable creation of the district. The duty of the proposed district to provide continuous and adequate service is held in abeyance until this condition is satisfied.
 - (14) The commission may require an award of compensation to the former CCN holder under subsections (n) and (o) of this section.
- (l) **Streamlined expedited release.**
- (1) This subsection provides an alternative to the following:
 - (A) revocation or amendment under subsections (h) or (i) of this section; or
 - (B) revocation or amendment by expedited release under subsection (k) of this section.
 - (2) The owner of a tract of land may petition the commission for streamlined expedited release of all or a portion of the tract of land from the current CCN holder's certificated service area if the following conditions are met:
 - (A) the tract of land is at least 25 acres in size;
 - (B) the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN; and

- (C) at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county.
 - (D) A qualifying county under subparagraph (C) of this paragraph does not have a population of more than 45,000 and less than 47,500 and is a county
 - (i) with a population of at least one million,
 - (ii) adjacent to a county with a population of at least one million, or
 - (iii) with a population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more.
 - (iv) The commission will maintain on its website a list of counties that are presumed to meet the requirements of this subparagraph.
- (3) A landowner seeking streamlined expedited release under this subsection shall submit the information listed in this paragraph with the commission.
- (A) The landowner shall submit a petition that is verified through a notarized affidavit and contains the following information:
 - (i) a statement that the petition is being submitted under TWC §13.254(a-5) and this subsection;
 - (ii) proof that the tract of land is at least 25 acres in size;
 - (iii) proof that at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county;

- (iv) a statement of facts that demonstrate that the tract of land is not currently receiving service;
 - (v) copies of all deeds demonstrating ownership of the tract of land by the landowner; and
 - (vi) proof that a copy of the petition has been mailed to the current CCN holder via certified mail on the day that the landowner submits the petition with the commission; and
- (B) The landowner shall submit the mapping information described in subsection (m) of this section.
- (4) The current CCN holder may submit a response to the petition within a timeframe specified by the presiding officer.
 - (5) The commission shall grant a petition filed under this subsection no later than the 60th calendar day after a presiding officer by order determines that the petition is administratively complete. The determination of what property, if any, is rendered useless or valueless property will be made according to the procedures defined in subsection (n) of this section.
 - (6) The fact that a CCN holder is a borrower under a federal loan program is not a bar to the release of a tract of land under this subsection.
 - (7) The commission may require an award of compensation by the landowner to the former CCN holder.

(m) **Mapping information.**

- (1) For proceedings under subsections (k) or (l) of this section, the following mapping information must be filed:
 - (A) a general-location map identifying the tract of land in reference to the nearest county boundary, city, or town;
 - (B) a detailed map identifying the tract of land in reference to verifiable man-made and natural landmarks, such as roads, rivers, and railroads. If ownership of the tract of land is conveyed by multiple deeds, this map should also identify the location and acreage of land conveyed by each deed; and
 - (C) one of the following for the tract of land:
 - (i) a metes-and-bounds survey sealed or embossed by either a licensed state land surveyor or a registered professional land surveyor;
 - (ii) a recorded plat; or
 - (iii) digital mapping data in a shapefile (SHP) format georeferenced in either NAD 83 Texas State Plane Coordinate System (US feet) or in NAD 83 Texas Statewide Mapping System (meters). The digital mapping data shall include a single, continuous polygon record.
- (2) Commission staff may request additional mapping information.
- (3) All maps shall be filed in accordance with §22.71 and §22.72 of this title.

(n) **Determination of property rendered useless or valueless.**

- (1) **Applicability.** This subsection governs the determination of whether property is rendered useless or valueless in proceedings under subsections (k) and (l) of this section.
- (2) A current CCN holder has a right to intervene in a proceeding under this subsection and a right to a determination of useless or valueless property.
- (3) There is a rebuttable presumption that there is no useless or valueless property if the current CCN holder fails to intervene by the intervention deadline established by the presiding officer.
- (4) The current CCN holder and the petitioner may reach an agreement at any time during the pendency of a proceeding under subsections (k) or (l) of this section regarding what property is useless or valueless property, and if such an agreement is reached, they may also agree on what is the appropriate amount of compensation for such property. If the current CCN holder and the petitioner reach an agreement under this paragraph, the agreement shall be presented to the commission at an open meeting for consideration and action.
- (5) The current CCN holder bears the burden to prove what property is useless or valueless property.
- (6) The commission shall identify in its order granting release under subsections (k) or (l) of this section what property, if any, is useless or valueless property. This order is the commission's final determination of what property, if any, is useless or valueless property, subject to motions for rehearing in accordance with the process provided by commission rules.

- (7) If the commission determines that there is not any useless or valueless property, then no proceeding under subsection (o) of this section is required.
- (o) **Compensation for property rendered useless or valueless.**
- (1) A retail public utility may not provide service directly or indirectly to the public in a removed area until any compensation ordered under this subsection is provided to the former CCN holder. Such compensation shall be for useless or valueless property, as such is determined by the commission under subsection (n) of this section.
- (2) **Notice of intent to provide service.**
- (A) After the commission has issued its order granting release under subsections (k) or (l) of this section, if a prospective retail public utility and a former CCN holder have not agreed on compensation, then the prospective retail public utility shall file a notice of intent to provide service.
- (B) A notice of intent to provide service may be filed only after the commission has issued an order under subsections (k) or (l) of this section. A notice of intent filed before the commission issues its order under subsections (k) or (l) of this section is deemed to be filed on the date the commission's order is signed.
- (C) The notice of intent to provide service shall include all of the information required by this subparagraph.
- (i) The notice of intent shall state that it is a notice of intent to provide service under TWC §13.254(e) and this subsection.

- (ii) If applicable, the notice of intent shall include an agreement between the former CCN holder and the prospective retail public utility regarding compensation for the useless or valueless property. If an agreement is filed, the agreement shall not be evidence in a future rate case.
- (3) After the notice of intent to provide service is filed, a presiding officer shall establish a procedural schedule. The schedule shall ensure that the total compensation for any property identified in the order issued under subsections (k) or (l) of this section will be determined no later than the 90th day after the date the notice of intent is filed.
- (4) Within ten calendar days after the filing of the notice of intent to provide service, the prospective retail public utility shall file one of the following items:
 - (A) a letter identifying the qualified individual or firm serving as the agreed independent appraiser; or
 - (B) a letter stating that the former CCN holder and prospective retail public utility will each engage its own appraiser, at its own expense.
- (5) The former CCN holder has a right to intervene in a proceeding under this subsection.
- (6) The former CCN holder and the prospective retail public utility may reach an agreement at any time during the pendency of a proceeding under this subsection regarding what is the appropriate amount of compensation for the useless or valueless property. If the former CCN holder and the prospective retail public

utility reach an agreement under this paragraph, the agreement shall be presented to the commission at an open meeting for consideration and action.

- (7) If the former CCN holder and the prospective retail public utility agree on a qualified individual or firm to serve as an independent appraiser, then all of the requirements listed in this paragraph apply.
 - (A) The independent appraiser shall be limited to appraising the useless or valueless property.
 - (B) The former CCN holder and the prospective retail public utility shall file the appraisal within 65 calendar days after the filing of the notice of intent to provide service.
 - (C) The prospective retail public utility shall bear the costs of the independent appraiser.
 - (D) The commission is bound by the independent appraiser's valuation of the useless or valueless property. The commission shall review the valuation to ensure compliance with the requirements of this section.
- (8) If the former CCN holder and the prospective retail public utility do not agree on an independent appraiser, each shall engage its own qualified appraiser at its own expense.
 - (A) Each appraiser shall be limited to appraising the useless or valueless property.
 - (B) Each appraiser shall file its appraisal with the commission within 60 calendar days after the filing of the notice of intent to provide service.

- (C) After the two appraisals are filed, the commission shall appoint a qualified individual or firm to serve as a third appraiser who shall make a valuation within 30 calendar days of the date the independent appraisals are filed.
 - (D) The third appraiser's valuation shall be limited to the useless or valueless property and may not be less than the lower appraisal valuation or more than the higher appraisal valuation.
 - (E) The former CCN holder and the prospective retail public utility shall each pay one-half of the cost of the third appraisal. Payment shall be made directly to the third appraiser. Proofs of payment shall be separately filed with the commission by the former CCN holder and the prospective retail public utility.
 - (F) The commission is bound by the third appraiser's valuation of the useless or valueless property. The commission shall review the valuation to ensure compliance with the requirements of this section.
- (9) **Valuation of real property.** The value of real property that the commission identified in the order issued under subsections (k) or (l) of this section as useless or valueless shall be determined according to the standards set forth in chapter 21 of the Texas Property Code governing actions in eminent domain.
- (10) **Valuation of personal property.** The value of personal property that the commission identified in the order issued under subsections (k) or (l) of this section as useless or valueless shall be determined according to this paragraph. To ensure that compensation to a former CCN holder is just and adequate, the following factors shall be used in valuing such personal property:

- (A) the amount of the former CCN holder's debt allocable to service to the removed area;
 - (B) the value of the service facilities belonging to the former CCN holder that are located within the removed area;
 - (C) the amount of any expenditures for planning, design, or construction of the service facilities of the former CCN holder that are allocable to service to the removed area;
 - (D) the amount of the former CCN holder's contractual obligations allocable to the removed area;
 - (E) any demonstrated impairment of service or any increase of cost to consumers of the former CCN holder remaining after a CCN revocation or amendment under this section;
 - (F) the impact on future revenues lost from existing customers;
 - (G) necessary and reasonable legal expenses and professional fees; and
 - (H) any other relevant factors as determined by the commission.
- (11) If the presiding officer determines that all requirements of this subsection have been met, the presiding officer shall issue an order setting the compensation due to the former CCN holder at the valuation established by the appraisal. This order shall be the final act of the commission, subject to motions for rehearing. Alternatively, the presiding officer may issue a proposed order for consideration by the commission.

(p) **Additional conditions.**

- (1) If the current CCN holder did not agree in writing to a revocation or amendment sought under this section, then an affected retail public utility may request that the revocation or amendment be conditioned on the following:
 - (A) ordering the prospective retail public utility to provide service to the entire service area of the current CCN holder; and
 - (B) transferring the entire CCN of the current CCN holder to the prospective retail public utility.
- (2) The commission shall order the prospective retail public utility to provide service to the entire service area of the current CCN holder if the commission finds that the current CCN holder will be unable to provide continuous and adequate service at an affordable cost to the current CCN holder's remaining customers.
 - (A) The commission shall order the prospective retail public utility to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to the prospective retail public utility's other customers and shall establish the terms under which service must be provided.
 - (B) The commission may order any of the following terms:
 - (i) transfer of debt and other contract obligations;
 - (ii) transfer of real and personal property;
 - (iii) establishment of interim rates for affected customers during specified times; and

- (iv) other provisions necessary for the just and reasonable allocation of assets and liabilities.
- (3) The prospective retail public utility shall not charge the affected customers any transfer fee or other fee to obtain service, except for the following:
 - (A) the prospective retail public utility's usual and customary rates for monthly service, or
 - (B) interim rates set by the commission, if applicable.
- (4) If the commission orders the prospective retail public utility to provide service to the entire service area of the current CCN holder, the commission shall not order compensation to the current CCN holder, the commission shall not make a determination of whether property is rendered useless or valueless under subsection (n) of this section, and the prospective retail public utility shall not file a petition under subsection (o) of this section.

§24.120 Single Certification in Incorporated or Annexed Areas. (REPEALED)**§24.120 Single Certification in Incorporated or Annexed Areas.**

- (a) **Applicability.** This section applies to a requested area that also meets the following criteria:
- (1) the requested area has been incorporated or annexed by a municipality;
 - (2) a retail public utility provides service to the requested area under a certificate of convenience and necessity (CCN); and
 - (3) the retail public utility that holds the CCN under which the requested area is currently certificated is one of the following:
 - (A) a water supply or sewer service corporation, a special utility district under chapter 65 of the Texas Water Code, or a fresh water supply district under chapter 53 of the Texas Water Code; or
 - (B) not a water supply or sewer service corporation, and its service area is located entirely within the boundaries of a municipality that has a population of at least 1.7 million according to the most recent federal census.
- (b) **Definitions.** In this section, the following words and terms have the definitions provided by this subsection.
- (1) **Impaired property** -- Property remaining in the ownership of the current CCN holder after single certification that would sustain damages from the transfer of property to the municipality.

- (2) **Franchised utility** -- A retail public utility that has been granted a franchise by a municipality to provide service inside the municipal boundaries.
 - (3) **Current CCN holder** -- The retail public utility that holds a CCN to provide service to the municipality's requested area.
 - (4) **Transferred property** -- Property that the municipality has requested be transferred to it or to a franchised utility from the current CCN holder.
 - (5) **Useless or valueless property** -- Property that would be rendered useless or valueless to the current CCN holder by single certification.
- (c) **Notice of intent to provide service in incorporated or annexed area.** A municipality that intends to provide service itself or through a franchised utility to all or part of an annexed or incorporated area shall notify the current CCN holder in writing of the municipality's intent. The written notice to the current CCN holder shall specify the following information:
- (1) the municipality's requested area;
 - (2) any transferred property;
 - (3) the municipal ordinance or other action that annexed or incorporated the municipality's requested area;
 - (4) what kind of service will be provided;
 - (5) whether a municipally owned utility or franchised utility will provide the service;
- and

- (6) the municipally owned utility's or the franchised utility's identity and contact information.
- (d) **Written agreement regarding service to area.** The municipality and the current CCN holder may agree in writing that all or part of the area incorporated or annexed by the municipality may receive service from a municipally owned utility, a franchised utility, or the current CCN holder, or any combination of those entities.
- (1) If a franchised utility is to provide service to any part of the area, the franchised utility shall also be a party to the agreement.
- (2) The executed agreement may provide for single or dual certification of all or part of the area incorporated or annexed by the municipality, for the purchase of facilities or property, and may contain any other terms agreed to by the parties.
- (3) The executed agreement shall be filed with the commission. The commission shall incorporate the agreement's terms into the respective CCNs of the municipality, current CCN holder, and franchised utility, as appropriate.
- (e) **Application for single certification.** If an agreement is not executed within 180 calendar days after the municipality provides written notice under subsection (c) of this section and the municipality intends to provide service to the municipality's requested area, the municipality shall submit an application to the commission to grant single certification to a municipally owned utility or a franchised utility.

- (1) If a franchised utility will provide service to any part of the municipality's requested area, the franchised utility shall join the application.
- (2) The application shall include all of the information listed in this paragraph.
 - (A) The application shall identify the municipal ordinance or other action that annexed or incorporated the municipality's requested area.
 - (B) The application shall identify the type of service that will be provided to the municipality's requested area.
 - (C) The application shall identify the municipally owned utility or franchised utility that will provide service to the municipality's requested area and, if each will serve part of the area, the area that each will serve.
 - (D) The application shall identify contact information for the current CCN holder.
 - (E) The application shall demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems if the municipality owns a public drinking water system.
 - (F) The application shall demonstrate that at least 180 calendar days have passed since the date that the municipality provided written notice under subsection (c) of this section.
 - (G) The application shall identify with specificity any property that the municipality requests be transferred from the current CCN holder.

- (H) The application shall identify the boundaries of the municipality's incorporated area or extraterritorial jurisdiction by providing digital-mapping data in a shapefile (SHP) format georeferenced in either NAD 83 Texas State Plane Coordinate System (US feet) or in NAD 83 Texas Statewide Mapping System (meters). The digital mapping data shall include a single, continuous polygon record.
- (I) The application shall identify the municipality's requested area by providing mapping information to clearly identify the area the municipality is seeking in accordance with §24.119 of this title relating to Mapping Requirements for Certificate of Convenience and Necessity Application. Commission staff may request additional mapping information after the application is submitted.
- (3) Within 30 calendar days of the filing of the application, commission staff shall file a recommendation regarding whether the application meets the requirements of this subsection.
- (f) **Notices for single-certification application.** The applicant shall send a copy of the application to the current CCN holder by certified mail or hand-delivery on the same day that the applicant submits the application to the commission.
- (g) **Response to single-certification application.** The current CCN holder shall file a response to the application for single certification in conformance with this subsection.

- (1) The response shall be filed within 40 calendar days of the filing of the application.
 - (2) The response shall state the following information:
 - (A) whether the single certification is agreed to; and
 - (B) if there is no agreement for single certification, any conditions that, if met, would cause the current CCN holder to agree to single certification.
 - (3) In its response, the current CCN holder shall identify any useless or valueless property, or impaired property, that would result from certification of the municipality's requested area to the municipality.
 - (4) There is a rebuttable presumption that there is no useless or valueless property or impaired property if the current CCN holder fails to timely respond as required under paragraph (1) of this subsection. Upon motion and proof of service consistent with the requirements of subsection (f) of this section, the presiding officer may issue an order determining that there is no useless or valueless property or impaired property.
- (h) **Referral to SOAH.**
- (1) Within 50 calendar days of the filing of the application, a presiding officer shall determine whether an application for single certification meets the requirements of subsection (e) of this section.
 - (2) If the presiding officer determines that the application meets the requirements of subsection (e) of this section, the application shall be referred to the State Office of Administrative Hearings (SOAH) for a hearing. SOAH shall fix a time and place

for a hearing on the application and shall notify the current CCN holder, municipality, and franchised utility, if any, of the hearing.

- (3) Except as provided under paragraph (4) of this subsection, if the presiding officer determines that the application does not meet the requirements of subsection (e) of this section, the applicant shall supplement its application to correct the identified deficiencies within a timeframe, and under a process, established by the presiding officer.
- (4) The application shall be denied if the municipality fails to demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems. This paragraph does not apply to a municipality that does not own a public drinking water system.

(i) Hearing at SOAH.

- (1) The hearing at SOAH shall be limited to determining what property, if any, is useless or valueless property, impaired property, or transferred property.
- (2) The current CCN holder bears the burden to prove what property is useless or valueless property or impaired property.
- (3) The transferred property shall be limited to the specific property identified in the application.
- (4) The SOAH administrative law judge shall issue a proposal for decision for the commission's consideration.

- (j) **Interim order.** The commission shall issue an interim order identifying what property, if any, is useless or valueless property, impaired property, or transferred property.
- (k) **Administrative Completeness.** Section 24.8 of this title relating to Administrative Completeness does not apply to the determination of administrative completeness under this section. After the commission has issued its interim order under subsection (j) of this section, a presiding officer shall determine that the application for single certification is administratively complete and shall establish a procedural schedule that will allow total compensation for any property identified in the interim order to be determined not later than 90 calendar days after the application is determined to be administratively complete.
- (l) **Valuation of real property.** The value of real property that the commission identified in the interim order issued under subsection (j) of this section shall be determined according to the standards set forth in Texas Property Code, chapter 21, governing actions in eminent domain.
- (m) **Valuation of personal property.** The value of personal property that the commission identified in the interim order issued under subsection (j) of this section shall be determined according to this subsection.
- (1) This subsection is intended to ensure that the compensation to a current CCN holder is just and adequate as provided by these rules.

- (2) The following factors shall be used to value personal property that the commission identified in the interim order issued under subsection (j) of this section:
- (A) the impact on the current CCN holder's existing indebtedness and the current CCN holder's ability to repay that debt;
 - (B) the value of the current CCN holder's service facilities located within the municipality's requested area;
 - (C) the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to service to the municipality's requested area;
 - (D) the amount of the current CCN holder's contractual obligations allocable to the municipality's requested area;
 - (E) any demonstrated impairment of service or increase of cost to the current CCN holder's customers that remain after the single certification;
 - (F) the impact on future revenues lost from existing customers;
 - (G) necessary and reasonable legal expenses and professional fees;
 - (H) factors relevant to maintaining the current financial integrity of the current CCN holder; and
 - (I) other relevant factors as determined by the commission.

(n) **Valuation Process.**

- (1) For an area incorporated by a municipality, the valuation of property that the commission identified in the interim order issued under subsection (j) of this section shall be determined by a qualified individual or firm serving as an independent appraiser. The independent appraiser shall be limited to appraising the property that the commission identified in the interim order issued under subsection (j) of this section. The current CCN holder shall select the independent appraiser by the 21st calendar day after the date of the order determining that the application is administratively complete. The municipality shall pay the independent appraiser's costs. The independent appraiser shall file its appraisal with the commission by the 70th calendar day after the date of the order determining that the application is administratively complete. The valuation of property under this paragraph is binding on the commission.
- (2) For an area annexed by a municipality, the valuation of property that the commission identified in the interim order issued under subsection (j) of this section shall be determined by one or more independent appraisers under the process set forth in this paragraph. All independent appraisers shall be limited to appraising the property that the commission identified in the interim order issued under subsection (j) of this section. All independent appraisers shall be qualified individuals or firms.
 - (A) If the current CCN holder and the municipality can agree on an independent appraiser within ten calendar days after the application is found administratively complete, the agreed-upon independent appraiser shall

make a valuation of the property that the commission identified in the interim order issued under subsection (j) of this section.

(i) The agreed-upon independent appraiser shall file its appraisal with the commission by the 70th calendar day after the date of the order determining that the application is administratively complete.

(ii) A valuation of property under this subparagraph is binding on the commission.

(B) If the current CCN holder and the municipality cannot agree on an independent appraiser within ten calendar days after the application is found administratively complete, the municipality shall notify the serving CCN holder in writing of the failure to agree.

(i) If the parties still cannot agree within 11 calendar days of the written notification, on the 11th day, the current CCN holder and the municipality shall each file with the commission a letter appointing a qualified individual or firm to serve as an independent appraiser.

(I) Within 10 business days of their appointment, the independent appraisers shall meet to reach an agreed valuation of property that the commission identified in the interim order issued under subsection (j) of this section.

(II) If the independent appraisers reach an agreed valuation of property, the agreed valuation under this subclause is binding on the commission.

- (ii) If the appraisers cannot agree on a valuation before the 16th business day after the date of their first meeting under this subsection, then both parties shall file separate appraisals by that date, and either the current CCN holder or the municipality shall petition the commission to appoint a third appraiser to reconcile the two appraisals.
 - (I) The commission may delegate authority to appoint the third appraiser.
 - (II) The third appraiser shall file an appraisal that reconciles the two other appraisals by the 80th calendar day after the application is found administratively complete.
 - (III) The third appraiser's valuation may not be less than the lower or more than the higher of the two original appraisals filed under subparagraph (B)(ii) of this paragraph.
 - (IV) A valuation of property under this clause is binding on the commission.
- (C) The current CCN holder and the municipality shall each pay one-half of the costs of all of the appraisers appointed under this paragraph. Payment shall be made directly to the appraisers, and proofs of payment shall be separately filed by the current CCN holder and the prospective retail public utility within 30 calendar days of the date of the invoice.

(o) **Action after receipt of appraisals.**

- (1) An order incorporating the valuation determined under subsection (n) of this section shall be issued by the 90th calendar day after the application is found administratively complete.
- (2) The commission shall deny the application if the municipality fails to demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems. This paragraph does not apply to a municipality that does not own a public drinking water system.
- (3) If the commission does not deny the application, the commission shall do the following:
 - (A) determine what property, if any, is useless or valueless property, impaired property, or transferred property;
 - (B) determine the monetary amount that is adequate and just to compensate the current CCN holder for any such useless or valueless property, impaired property, and transferred property; and
 - (C) grant single certification to the municipality or franchised utility.
- (4) The granting of single certification shall be effective on the date that
 - (A) the municipality or franchised utility pays adequate and just compensation under a court order;

- (B) the municipality or franchised utility pays an amount into the registry of the court or to the current CCN holder under TWC §13.255(f); or
 - (C) the Travis County district court's judgment becomes final, if the court's judgment provides that the current CCN holder is not entitled to any compensation.
- (5) The commission's order does not transfer any property, except as provided under subsection (u) of this section. Any other transfer of property under this section shall be obtained only by a court judgment rendered under TWC §13.255(d) or (e).
- (6) A presiding officer may issue an order under this section. Any such order shall be the final act of the commission subject to motions for rehearing under the commission's rules.
- (p) **Appeal to district court, district court judgment, and transfer of property.**
- (1) Under TWC §13.255(e), any party that is aggrieved by a final order of the commission under this section may file an appeal with the district court of Travis County within 30 days after the order becomes final.
 - (2) Under TWC §13.255(d), if the commission's final order is not appealed within 30 days, the municipality may request the Travis County district court to enter a judgment consistent with the commission's order.

- (q) **Withdrawal of application for single certification.** A municipality or a franchised utility may withdraw an application for single certification without prejudice at any time before a court judgment becomes final, provided that the municipality or the franchised utility has not taken physical possession of property owned by the current CCN holder or made payment for the right to take physical possession under TWC § 13.255(f).
- (r) **Additional requirements regarding certain current CCN holders.** The following subsection applies to proceedings under this section in which the current CCN holder meets the criteria of subsection (a)(3)(B) of this section.
- (1) The commission or a court, as appropriate, must determine that the service provided by the current CCN holder is substandard or its rates are unreasonable in view of the current CCN holder's reasonable expenses.
 - (2) If the municipality abandons its application, the commission is authorized to award to the current CCN holder its reasonable expenses incurred to participate in the proceeding addressing the municipality's application, including attorney's fees.
 - (3) Unless the current CCN holder otherwise agrees, the municipality shall take all of the current CCN holder's personal and real property that is used and useful to provide service or is eligible to be deemed so in a future rate case.
- (s) **Notice of single certification.** Within 60 days of a transfer of property under a court judgment, the municipality or franchised utility shall provide written notice to each customer within the service area that is now singly certificated. The written notice shall

provide the following information: the identity of the municipality or franchised utility, the reason for the transfer, the rates to be charged by the municipality or franchised utility, and the effective date of those rates.

(t) **Provision of service.**

(1) A municipally owned utility or a franchised utility may provide service to all or a portion of an incorporated or annexed area on one of the following dates:

(A) the date that the commission incorporates the terms of an executed agreement filed with the commission under subsection (d)(3) of this section into the CCNs of the municipality, current CCN holder, and franchised utility, if applicable; or

(B) the date that the municipality or franchised utility

(i) pays adequate and just compensation under court order, or

(ii) pays an amount into the registry of the court or to the current CCN holder under TWC §13.255(f).

(2) If the court judgment provides that the current CCN holder is not entitled to any compensation, the grant of single certification shall go into effect when the court judgment becomes final.

(u) **Additional conditions.**

- (1) If the current CCN holder did not agree in writing to a revocation or amendment sought under this section, then an affected retail public utility may request that the revocation or amendment be conditioned on the following:
 - (A) ordering the municipality or franchised utility, as applicable, to provide service to the entire service area of the current CCN holder; and
 - (B) transferring the entire CCN of the current CCN holder to the municipality or franchised utility, as applicable.
- (2) The commission shall order the municipality or franchised utility, as applicable, to provide service to the entire service area of the current CCN holder if the commission finds that the current CCN holder will be unable to provide continuous and adequate service at an affordable cost to the current CCN holder's remaining customers.
 - (A) The commission shall order the municipality or franchised utility, as applicable, to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to the municipality's or franchised utility's other customers and shall establish the terms under which service must be provided.
 - (B) The commission may order the following terms:
 - (i) transfer of debt and other contract obligations;
 - (ii) transfer of real and personal property;
 - (iii) establishment of interim service rates for affected customers during specified times; and

- (iv) other provisions necessary for the just and reasonable allocation of assets and liabilities.
- (3) The municipality or franchised utility, as applicable, shall not charge the affected customers any transfer fee or other fee to obtain service, except
 - (A) the municipality's or franchised utility's usual and customary rates for monthly service, or
 - (B) interim rates set by the commission, if applicable.
- (4) If the commission orders the municipality or franchised utility, as applicable, to provide service to the entire service area of the current CCN holder, the proceeding shall not be referred to SOAH for a hearing to determine the useless or valueless property, impaired property, or transferred property, and the commission shall not order compensation to the current CCN holder.

This agency hereby certifies that the repeals and adoptions have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §24.113, relating to revocation or amendment of certificate, and §24.120, relating to single certification in incorporated or annexed areas, are hereby repealed; and it is further ordered that new §24.113, relating to revocation or amendment of a certificate of convenience and necessity, and new §24.120, relating to single certification in incorporated or annexed areas, are hereby adopted with changes to the text as proposed.

Signed at Austin, Texas the _____ day of May 2017.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER