

SUBJECT: Grants and opt-outs for certificates of convenience for water services

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 6 ayes — Ritter, Beck, Creighton, Larson, D. Miller, Price

2 nays — T. King, Lucio

3 absent — Hopson, Keffer, Martinez Fischer

WITNESSES: For — Joe B. Allen, Allen Boone Humphries Robinson, LLP; Curtis Hawk, City of Burleson; Kerry Kelton, MSEC Enterprises, Inc.; James Morrison, Texas Rural Water Association; (*Registered, but did not testify*: Scott Adams, Fort Davis Water Supply Corporation)

Against — Sherilyn Dahlberg, Sharyland Water Supply Corporation; Steven Sanchez, North Alamo Water Supply Corporation; (*Registered, but did not testify*: Terry Franks, Aqua Texas)

On — Bart Jennings, City of Austin, Austin Water Utility

BACKGROUND: Water Code, ch. 13, subch. G governs certificates of convenience and necessity (CCNs) for water and sewer service providers. Sec. 13.242 prohibits a water utility or supplier from rendering service to the public without first obtaining from the Texas Commission on Environmental Quality (TCEQ) a certificate that public convenience and necessity require it. A retail public utility cannot serve any area to which service is being provided by another utility without first having obtained a CCN.

Under sec. 13.2451, if a municipality extends its extraterritorial jurisdiction (ETJ) to include an area certificated to a retail public utility, the utility may continue and extend service in its CCN area. A municipality wishing to extend a CCN beyond its ETJ must ensure that the municipality meets established requirements for the area covered by the portion of the CCN extending beyond its ETJ.

TCEQ, after providing notice to the municipality and an opportunity for a hearing, may decertify an area outside a municipality's ETJ if the municipality does not provide service to the area within five years of the

date the CCN was granted for the area. The TCEQ cannot grant a retail public utility a CCN for a service area within the boundaries or ETJ of a municipality without consent of the municipality.

DIGEST:

Under CSHB 3668, if a municipality had not consented to a CCN of a retail public utility for a service area within the boundaries or ETJ of the municipality within 180 days of a landowner or retail public utility submitting a formal request for service, TCEQ could grant the CCN without consent of the municipality if:

- the municipality was not able to provide service or had failed to make a good-faith effort to provide service on reasonable terms and conditions;
- the municipality had not entered into a binding commitment to serve the area subject to the application within 180 days after the formal request for service was made; and
- the landowner or retail public utility that submitted the request had not unreasonably refused to comply with the municipality's service extension and development process or entered into a contract for water or sewer services with the municipality.

If a municipality refused to provide service in the proposed service area, TCEQ could grant the CCN to the retail public utility. TCEQ would have to include as a condition in the CCN that all water and sewer facilities be designed and constructed in accordance with the municipality's standards.

TCEQ also could not extend a municipality's CCN beyond its ETJ if an owner of land located wholly or partly outside the ETJ elected to exclude some or all of the landowner's property within a proposed service area. This would not apply to a transfer of a CCN. An applicant for a CCN that had land removed from the proposed service area because of landowner election would not be required to provide service to the removed land. The bill also would repeal the provision that a municipality seeking to extend its CCN beyond its ETJ would have to meet certain requirements.

CSHB 3668 would prohibit TCEQ from denying an expedited-release petition based on the fact that a CCN holder was a borrower under a federal loan program. The bill also would require that TCEQ, when evaluating an expedited decertification request by a landowner of 50 acres or more, to require the petitioner to demonstrate that a written request for service had been submitted to the CCN-holder identifying:

- the approximate cost for the alternative service provider to provide the service at the same level and manner requested from the certificate holder; and
- the flow and pressure requirements and specific infrastructure needs, including line size and system capacity, for the required level of fire protection requested.

The petitioner also would have to demonstrate that the alternate retail public utility from which the petitioner would be requesting service possessed the financial, managerial, and technical capability to provide continuous and adequate service in the service area. The bill would reduce from 90 to 60 days the timeframe in which TCEQ would have to make a determination on a petition for expedited release of a CCN.

If the CCN holder had never made service available through planning, design, construction of facilities, or contractual obligations to serve the area a petitioner was seeking to have released, TCEQ would not be required to determine that the proposed provider was capable of providing better service than the current CCN holder, but that the alternate provider was capable of providing the requested service.

CSHB 3668 would apply only to a retail public utility's application for a CCN for a service area in the ETJ of a municipality that was made on or after September 1, 2011; an extension of a municipality's CCN for a service area in the ETJ of the municipality on or after September 1, 2011; and a petition to release an area from a CCN that was made on or after September 1, 2011.

The bill would take effect September 1, 2011.

**SUPPORTERS  
SAY:**

CSHB 3668 would provide clearer guidelines for landowners who were within a public CCN area for water and wastewater services and were not receiving adequate service to more easily opt out of the exclusive CCN and receive service from an alternate service provider. Since a utility with a CCN for a certain area has the exclusive right to provide service in that area, transparency is needed to ensure that landowners are protected and municipalities who hold a CCN do not unfairly hold a landowner captive.

CSHB 3668 would build upon prior reforms in this area by amending the decertification process, established in 2005, that allows a landowner under a CCN to petition TCEQ to seek service with an alternate provider. Since

this process went into effect, there have been very few expedited decertification applications to TCEQ, indicating that the process is too cumbersome. The bill would amend the decertification process to clarify that TCEQ could not bar a decertification request if the CCN-holder was a borrower under a federal loan program, a factor well beyond the individual landowner's control.

The bill also would require that TCEQ consider, when evaluating an expedited decertification request by a landowner of 50 acres or more, the approximate cost for the alternative service provider at a comparable level to the incumbent CCN-holder, as well as the flow and pressure requirements for firefighting services. Additionally, the bill would reduce the timeframe in which TCEQ would issue its determination on a petition from 90 days to 60 days, a more reasonable and responsive timeframe.

These changes to the expedited decertification request process would help level the playing field between landowners who want to have their property decertified and the CCN-holders. In particular, this would provide landowners with greater latitude to make the case before TCEQ to have their property decertified if they were capable of finding cheaper service.

OPPONENTS  
SAY:

While CSHB 3668 would set standards for when a landowner could opt out of a CCN, it also would provide an easier way for this to occur than currently is allowed, thereby potentially penalizing smaller municipalities. Smaller communities and rural areas often do not have the means that large cities have to annex other areas to increase their tax base. As such, they would likely not be able to make up the lost revenue from their diminished CCN.

Further, this bill would make it easier for an investor-owned utility to lose its service area. If an investor-owned utility lost its service area, it would cloud its investment, making it more difficult to attract the capital necessary to make infrastructure improvements such as pipes, water treatment plants, and wells.