

**I THINK WE SHOULD TALK: WHY TEXAS
PROPERTY OWNERS WANT TO BREAK UP WITH
THEIR WATER AND WASTEWATER UTILITY
PROVIDER AND THE FIGHT FOR FAIR WATER
UTILITY RATES ACROSS THE STATE**

Comment

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I. INTRODUCTION

“If Texans cannot change the weather, they can at least, through sound, farsighted planning, conserve and develop water resources to supply their needs.”¹

Imagine going to your mailbox—as “Alan Hooks, the mayor of Blue Mound,” Texas, did a few years back—to collect your mail and coming across your monthly water bill—a bill that usually runs around \$60 per month.² Except that this month it has tripled in price, but you notice that you have used the same amount of water as in previous months.³ Why have the water rates suddenly increased drastically, with no warning? Is this a mistake? Should you pay this bill? Why have the water rates for the neighborhood across the street, which is connected to city water, not gone up in price? To whom do you talk for answers to these questions?

This Comment seeks to address the growing problem across Texas of arbitrary water and wastewater rate increases from private water utility companies and asks what can be done to ensure individual and small commercial water consumers have a voice against these rate increases. This Comment also explores the related history of the water regionalization model and the development of Certificates of Convenience and Necessity (CCNs) for water and wastewater utilities in Texas. In particular, this Comment analyzes recent legislative efforts to give property owners of large-sized tracts of land more autonomy in determining which water and wastewater utilities they want to purchase in order to develop their properties. Additionally, this Comment proposes that the oversight and setting of rates for water and wastewater utilities be transferred from the Texas Commission on Environmental Quality (TCEQ) to the Texas Public Utility Commission (PUC) to help facilitate greater consumer representation. Given the increasing number of private companies that have been invited into the state to take over the management, operation, and ownership of public water systems, this shift in agency oversight of retail rate setting for water and wastewater utilities will likely provide greater representation for consumers who are concerned about the rate increases that are becoming more common across the state.⁴ Part II of this Comment provides

1. Edward J. Vaughan et al., *Water for Texas 2012 State Water Plan*, TEX. WATER DEV. BOARD 1 (Jan. 2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/00.pdf (quoting John J. Vandertulip, *A Plan for Meeting the 1980 Water Requirements of Texas, 1961*, TEX. BOARD OF WATER ENGINEERS 5 (1961), available at https://www.twdb.state.tx.us/publications/State_Water_Plan/1961/1961.pdf) (internal quotation marks omitted).

2. See Kate Galbraith, *Texas Rural Water Rate Hikes Draw Scrutiny*, TEX. TRIB. (Nov. 28, 2012), <http://www.texastribune.org/texas-environmental-news/water-supply/texas-rural-water-rate-hikes-bring-scrutiny/> (“Alan Hooks, the mayor of Blue Mound, said that his bill last month was \$180 for 10,000 gallons of water, whereas eight years ago, when the private company Monarch (a SouthWest subsidiary) took over the water supplies for the town, it was \$58.”).

3. See *id.*

4. See generally Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki & Rachel Reyes, *The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Fresh Water*, PAC. INST. FOR

a history of state water management and planning, and of the development of CCNs.⁵ Part III discusses the legal issues inherent in water utility CCNs and critically examines whether the current system is best from a consumer's standpoint.⁶ Part IV outlines the recommendation to transfer oversight of water and wastewater utilities from the TCEQ back to the PUC.⁷ This Comment concludes in Part V that transferring oversight to the PUC, while not the only reform needed to solve the problem, would provide much-needed increased protection for ratepayers from unreasonable or unexpected rate increases.⁸

II. HISTORY OF TEXAS WATER PLANNING AND DEVELOPMENT OF CERTIFICATES OF CONVENIENCE AND NECESSITY

A. *Water Planning in Texas: Regionalization and Planning Groups*

There is an old joke in Texas about a new settler arriving to West Texas for the first time who stops to admire the grasslands and comments, “This would be a fine country if it only had water.” A grizzled farmer packing up his things to leave his bankrupt land replies, “So would Hell.”⁹

Texas became serious about water policy and water planning immediately following the historic drought of the 1950s.¹⁰ Spanning seven long years, from 1950 to 1957, Texas endured the most devastating drought in the state's recorded history.¹¹ This drought was so severe that in 1952, the City of Lubbock did not record a single drop of rain for the entire year, and total rainfall statewide was off by more than 40%.¹² In response to these dire conditions, the Texas Legislature created, by a legislative act and a constitutional amendment, the Texas Water Development Board (TWDB) in 1957.¹³ The TWDB is a state agency charged with statewide water planning and the administration of various water supply and water quality programs.¹⁴ This early water legislation “authorized the TWDB to issue \$200 million in State of Texas General Obligation Water Development Bonds for the conservation and development of Texas's water resources through loans to

STUD. IN DEV., ENV'T & SECURITY (Feb. 2002), http://www.pacinst.org/reports/new_economy_of_water/new_economy_of_water_ES.pdf (discussing the fact that efforts to privatize water require higher levels of scrutiny).

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part V.

9. TO LOVE THE BEAUTIFUL: THE STORY OF TEXAS STATE PARKS, TEX. ST. LIBR. & ARCHIVES COMM'N, <http://www.tsl.state.tx.us/about/index.asp> (last modified Aug. 29, 2011).

10. *See id.*

11. *See id.*

12. *See id.*

13. *See About Texas Water Development Board*, TEX. WATER DEV. BOARD, <http://www.twdb.state.tx.us/about/index.asp> (last visited Sept. 3, 2013).

14. *See id.*

political subdivisions.”¹⁵ Today, the TWDB continues to provide financial assistance for various water improvement projects; its mission is “[t]o provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas.”¹⁶

The foundation of a sound water management system is water planning.¹⁷ As part of its goal of providing “long-range planning and water project financing,” the TWDB compiles a state water plan every five years.¹⁸ This plan primarily recommends various conservation and water management strategies that the state must employ in order to meet the needs of every city, rural community, farm, ranch, and business in Texas during drought conditions.¹⁹ The state water plan is comprised of sixteen different regional water-planning groups: one group for each of the sixteen planning areas in the state.²⁰ Within each planning group are representatives for various state interests, including agricultural interests, municipalities, business and industry interests, utilities, power generation, water districts, environmental interests, and the twenty-three Texas river authorities.²¹ At each stage of planning, the public has an opportunity to comment on the proposed conservation and water use mandates through both open meetings and through a notice and comment period.²² Public involvement in the water-planning initiative plays a critical role in determining which particular water management strategies the planning group recommends for each region, and also results in greater public education and awareness regarding the importance of water conservation.²³

In addition to the regionalization of the water-planning groups, Texas also encourages the regionalization of physical water and wastewater systems in order to ensure “a long-term supply of safe water at affordable rates” and to maintain the state’s water quality.²⁴ Regionalization of the physical water and wastewater systems essentially means that only those providers that are capable of supplying “good quality drinking water in sufficient quantities and basic sanitation service[s]” are permitted to deliver these services to consumers.²⁵

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See* Vaughan et al., *supra* note 1, at 1.

20. *See* TEX. WATER CODE ANN. § 16.053(a) (West 2008).

21. *See id.* § 16.053(c); Vaughan et al., *supra* note 1, at 1; *see also* Introduction, THE LOWER NECHES VALLEY AUTH., <http://www.lnva.dst.tx.us/about/intro.htm> (last visited Sept. 25, 2012) (discussing the purpose behind the Texas river authorities).

22. *See* Regional Water Planning, TEX. WATER DEV. BOARD, http://www.twdb.texas.gov/water_planning/rwp/ (last visited Sept. 25, 2012).

23. *See id.*

24. *See* *The Feasibility of Regionalizing Water and Wastewater Utilities: A TCEQ Policy Statement*, TEX. COMM’N ON ENVTL. QUALITY 1, 3–4 (Jan. 2003), www.tceq.gov/publications/rg/rg-357.html (follow “rg-357.pdf” hyperlink) [hereinafter *TCEQ Policy Statement*].

25. *See id.* at 4.

This regionalization policy ensures that Texans are being served by systems that are capable of providing continuous and adequate water service.²⁶

In addition to the TWDB, the TCEQ is another key player in enforcing water regionalization policies and planning.²⁷ The TCEQ is the environmental agency for the State of Texas, with a history rooted primarily in natural resource protection programs that were established in Texas in the early twentieth century.²⁸ These early resource protection programs were motivated primarily “by concerns over the [prudent] management of water resources and water rights.”²⁹ Over time, the protection and regulation of air and both hazardous and non-hazardous waste generation joined the water management programs in falling under the auspices of the TCEQ.³⁰ Today, the TCEQ is the sole agency responsible for both evaluating and approving the operating plans of all proposed water systems in the state, while the TWDB assists developing areas with water resource planning.³¹ In reviewing the operating and design plans for new water systems, the TCEQ considers whether “the consolidation of the operations, physical systems, or both of two or more existing or proposed water or domestic wastewater systems . . . is a viable option for the proposed new system.”³² This consolidation of operations and physical systems is what the TCEQ means by ensuring a policy goal of water regionalization.³³

Continued water conservation research, planning, and a strong regionalization policy are all integral to creating and maintaining a robust, sound water management system that is capable of meeting the competing demands for water—demands stemming from sprawling urban and suburban areas, to vast rural agricultural areas, to expansive industrial complexes, and to unique water-dependent habitats for fish and wildlife.³⁴

B. The Economic Side of Water Planning

Although it is important for Texas water consumers to be knowledgeable about the various conservation methods and mandated water management strategies advanced by the TWDB and the TCEQ, it is also necessary for consumers to understand how they may be affected by the market side of water supply and treatment.³⁵ Conversely, there is inherent value in being a provider

26. *See id.* at 1.

27. *See TCEQ History*, TEX. COMM’N ON ENVTL. QUALITY, <http://www.tceq.texas.gov/about/tceq/history.html> (last visited Oct. 25, 2012).

28. *See id.*

29. *See id.*

30. *See id.*

31. *See TCEQ Policy Statement*, *supra* note 24, at 1.

32. *See id.* at 1–2.

33. *See id.*

34. *See generally* WATER POLICY IN TEXAS: RESPONDING TO THE RISE OF SCARCITY 1–3, 8–13 (Ronald C. Griffin ed., 2011) (discussing the problem of water scarcity in Texas).

35. *See* John Rapier, *Is Consumer Choice for Retail Water Service in Our Future?*, 38 TEX. TECH L. REV. 1053, 1055–56 (2006).

of retail water services to Texas consumers—the interplay between the retail providers and the consumers is, thus, a vital aspect of water management and planning.³⁶

In Texas, retail water providers operate with very little, if any, competition from other providers.³⁷ To deliver water supply and treatment services to Texas consumers, the retail water provider must meet certain statutory standards and must hold a Certificate of Convenience and Necessity (CCN) from the State.³⁸ The CCN is a permit that essentially grants its holder a State-sponsored monopoly on providing water supply and wastewater treatment services to consumers whose land falls within the geographic boundary of the CCN.³⁹ The practice of permitting water utilities to operate in a monopolistic fashion has traditionally been considered the state’s most efficient economic practice.⁴⁰ “As monopolies, utilities avoid[] the expense of constructing duplicate lines, generating plants, and other costly equipment.”⁴¹ In exchange for the absolute right to provide water services to certain consumers, the government “protect[s] consumers by setting utility rates” and requires retail providers to contribute effectively to the overall operation of the water and wastewater systems by complying with stringent quality standards set forth in Chapter 13 of the Texas Water Code.⁴² These and other statutory standards ensure that the retail public utility provider is capable of complying with both state and federal requirements for safe drinking water and adequately treated wastewater.⁴³

C. Important Terminology in Understanding How CCNs Operate

To appreciate how a CCN operates, and to understand the different policy arguments for and against CCNs, it is helpful to clarify some key terminology regarding water utilities and systems.⁴⁴ There are three basic types of water and wastewater service providers.⁴⁵ The first type of service provider is the “retail public utility,” which is “any city, county, district, utility . . . or water supply corporation that charges a fee to directly provide water or sewer service to consumers.”⁴⁶ The second type of service provider is the “utility,” which is “a

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See The Future of the Public Utility Commission in Texas*, WINDOW ON ST. GOV'T, http://www.window.state.tx.us/tpr/puc/puc_bg.html (last visited Oct. 4, 2012) (discussing the background of the Public Utility Regulatory Act of 1975).

41. *Id.*

42. *See TCEQ Policy Statement*, *supra* note 24, at 1; *The Future of the Public Utility Commission in Texas*, *supra* note 40.

43. *See TCEQ Policy Statement*, *supra* note 24, at 1.

44. *Id.* at 2.

45. *Id.*

46. *See* TEX. WATER CODE ANN. § 13.002(19) (West 2008); *TCEQ Policy Statement*, *supra* note 24, at 2.

person, partnership, corporation, or ‘affected county’ that charges a fee to directly provide water or sewer service to consumers.”⁴⁷ A utility is also frequently called an “investor-owned utility,” a “water or sewer utility, or [a] public utility.”⁴⁸ While “utility” may seem to be a broader term than “retail public utility,” the legal definition of “retail public utility” actually includes “utility.”⁴⁹ Hence, “[a]ll utilities are retail public utilities, [but] not all retail public utilities meet the law’s narrower definition of [a] utility.”⁵⁰ The third type of water and wastewater service provider is a “water supply corporation,” which is “a nonprofit corporation organized under state law . . . to provide water or sewer service.”⁵¹ Three or more individuals who are state citizens may form a water supply corporation if they apply “to the secretary of state in the same manner as provided by law for an application for a private corporation.”⁵² The purpose of the nonprofit water supply corporation is to “provide: (1) water supply, sewer service, or both for a municipality, a private corporation, an individual, or a military camp or base; and (2) flood control and a drainage system for a political subdivision, private corporation, or another person.”⁵³

Finally, a water and wastewater system—which is what property owners within areas controlled by CCNs are concerned with—is “a physical plant plus the lines that connect [the water] to the customer.”⁵⁴ A public water system (PWS) is, therefore, “any drinking water system that has the potential to serve at least 15 connections or that does serve at least 25 people for at least 60 days out of one year.”⁵⁵ A wastewater system is comprised of “sewer lines that collect the wastewater from the customer and carry it to the wastewater treatment facility as well as the treatment facility itself.”⁵⁶ A successful water or wastewater system must comply with all state and federal requirements to ensure that drinking water is potable and that wastewater is sufficiently treated.⁵⁷ Thus, requiring all retail public utilities and private utilities to obtain a CCN prior to providing service to a region ensures that the design and operation plans of all proposed water systems in Texas are “capable of operating efficiently and effectively for the long term.”⁵⁸

47. *TCEQ Policy Statement*, *supra* note 24, at 2.

48. *Id.* (internal quotation marks omitted).

49. *Id.*

50. *Id.* (internal quotation marks omitted).

51. *See* WATER § 67.001 (West 2008); *TCEQ Policy Statement*, *supra* note 24, at 3.

52. WATER § 67.003 (West 2008).

53. WATER § 67.002 (West 2008).

54. *TCEQ Policy Statement*, *supra* note 24, at 3.

55. *Id.*

56. *Id.*

57. *Id.* at 1.

58. *See id.*

D. Why Is a CCN a Necessity?

On September 1, 1975, the Texas Legislature created the PUC and adopted the Public Utility Regulatory Act “to regulate telephone, electric, water, and sewer utilities.”⁵⁹ Prior to this date, water providers in Texas were not required to obtain a permit to provide water and wastewater services to consumers.⁶⁰ The passage of the Act specifically “required all investor-owned water providers, including member-owned water supply corporations, to obtain a CCN from the [PUC].”⁶¹ The only entities exempt from this legislation were municipalities and other political subdivisions that provided water and wastewater services from a centralized water supply system within their political boundaries.⁶² Most municipalities, however, obtained a CCN for their urban and suburban fringe areas—the adjacent, non-incorporated land known as the municipality’s Extra Territorial Jurisdiction (ETJ)—so as to give the municipality the right as the CCN holder to provide retail water services to these areas of possible future expansion.⁶³ Today, many municipalities hold CCNs that permit them to be the sole water utility providers for areas that may not even be within the municipalities’ jurisdictions.⁶⁴ Therefore, as the CCN holders, these municipalities are required by law to provide water supply and treatment services to the property owners within their CCN boundaries.⁶⁵

At the time the Public Utility Regulatory Act was passed in 1975, there was an actual need for CCNs.⁶⁶ This necessity stemmed from an increasing number of rural property owners who needed “the efficiencies of a municipal water and sewer utility in the absence of a municipality.”⁶⁷ The Act, therefore, regionalized water services and permitted private water service providers to act like public utilities.⁶⁸ Thus, areas previously lacking water utility services were able to connect their property to a water utility at a more cost-effective rate.⁶⁹

59. H. COMM. ON NAT. RES., INTERIM REPORT TO THE 82ND TEXAS LEGISLATURE 56 (Dec. 2010) [hereinafter INTERIM REPORT], available at www.house.state.tx.us/_media/pdf/committees/reports/81interim/House-Committee-on-Natural-Resources-Interim-Report-2010.pdf; see TEX. UTIL. CODE ANN. § 11.002 (West 2007).

60. Rapiér, *supra* note 35, at 1056–57.

61. *Id.* at 1056.

62. *Id.*; see INTERIM REPORT, *supra* note 59, at 56.

63. See Rapiér, *supra* note 35, at 1056; see also *City of Fort Worth: Commercial Development Guide*, FORTWORTHTEXAS.GOV (2009), [http://www.fortworthtexas.gov/uploadedFiles/Planning_and_Development/Development_\(template\)/CFW%20Development%20Guide.pdf](http://www.fortworthtexas.gov/uploadedFiles/Planning_and_Development/Development_(template)/CFW%20Development%20Guide.pdf) (defining extraterritorial jurisdiction as “the unincorporated area contiguous to the municipality’s corporate boundaries . . . based on the municipality’s population”).

64. Rapiér, *supra* note 35, at 1056.

65. See *id.*

66. See Susan Combs, *Ag Commissioner Decries CCN Abuse*, TEX. H2O 3 (Mar. 2005).

67. *Id.* at 3, 10.

68. See *id.* at 10.

69. See *id.*

Today, authority over water and wastewater regulation is within the jurisdiction of the TCEQ.⁷⁰ In 1985, when the Texas Legislature adopted Chapter 13 of the Texas Water Code, it transferred jurisdiction over water and wastewater regulation from the PUC to the TCEQ.⁷¹ In adopting Chapter 13, the Texas Legislature chose to protect the public's interest in both fair rates and services for water and wastewater utilities by permitting retail public utilities to act as virtual monopolies in the geographic areas they serve.⁷²

In determining that regulation of these utilities would operate as a substitute for free-market competition, the legislature intended Chapter 13 of the Texas Water Code “to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities.”⁷³ As a means of enforcing the regulatory scheme for water and wastewater utility services laid out by Chapter 13, the legislature chose to require all retail public utilities to obtain a CCN from the TCEQ.⁷⁴ “[T]he TCEQ must ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service” in order to grant a CCN.⁷⁵ While the CCN applicant does not need to own the facilities, the applicant must have access to an adequate water supply and must also be capable of providing potable drinking water that meets the requirements of both Chapter 341 of the Texas Health and Safety Code and Chapter 13 of the Texas Water Code.⁷⁶ If the applicant seeks to provide wastewater utility service, then the applicant must be capable of meeting both the TCEQ's “design criteria for sewer treatment plants, and the requirements of” the Texas Water Code.⁷⁷

The applicant's CCN defines the utility service provider's water or wastewater service area and, generally, other utility providers are prohibited from encroaching upon the geographic area defined by the CCN.⁷⁸ Despite the TCEQ's best efforts at creating a regionalized water system, water utilities in Texas are, for the most part, not widely interconnected.⁷⁹ This is in contrast to,

70. Rapiere, *supra* note 35, at 1057.

71. *Id.*; *Texas Water Law Timeline*, LEGIS. REFERENCE LIBR. OF TEX., <http://www.lrl.state.tx.us/legis/watertimeline.cfm> (last visited Jan. 28, 2013) (during the 69th Texas Legislature, Sunset Legislation reorganized the administration, powers, and duties of the PUC, and transferred water and wastewater utility regulation from the PUC to the Texas Water Commission).

72. TEX. WATER CODE ANN. § 13.001 (West 2008).

73. *Id.* § 13.001(c).

74. *See* WATER § 13.241 (West 2008).

75. *Id.* § 13.241(a); 30 TEX. ADMIN. CODE § 291.102(a) (2011) (Tex. Comm'n on Env'tl. Quality, Criteria for Considering and Granting Certificates or Amendments); Leonard H. Dougal & Cassandra Quinn, *Certificates of Convenience and Necessity: The Basics and Recent Developments*, ST. B. OF TEX., 10TH ANNUAL CHANGING FACE OF WATER RIGHTS ADVANCED COURSE 1 (2009), <http://images.jw.com/com/publications/1143.pdf> (describing the basics of obtaining and amending CCNs).

76. TEX. HEALTH & SAFETY CODE ANN. § 341.0315 (West 2010); WATER § 13.241(b).

77. WATER § 13.241(c).

78. *TCEQ Policy Statement*, *supra* note 24, at 3.

79. *Id.*

for example, the state's electrical utilities, which, under the PUC, have attained a high degree of interconnectivity.⁸⁰ Currently, more than 4,000 water utilities are operating in Texas.⁸¹ One reason there are so many different utilities in Texas is that many of these utilities are small, privately-owned utilities that provide services to smaller geographic and rural areas within the state.⁸² Continual expansion of urban developments into rural areas results in private rural water utilities being bought out by larger private water companies.⁸³ These large private water utility companies typically have deep pockets and argue that they are capable of updating and expanding older water utilities in rural areas.⁸⁴

To avoid getting locked into a CCN belonging to a private water utility company, land developers may petition the TCEQ to be released from a private utility's service area in favor of a public utility that may provide enhanced service at a lower cost to its consumers.⁸⁵ Typically, in large cities and developed areas, consumers do not see large water rate increases because the local public water utilities operate the water infrastructure and billing.⁸⁶ In an ideal world, all water and wastewater systems owned and operated in Texas would be capable of "operating efficient[ly] and effectively for the long term."⁸⁷ Thus, the requirement for all new water and wastewater utilities to obtain a CCN can play an important role in creating a safe and efficient water management system in Texas. A growing number of consumers and property owners, however, run the risk of becoming locked into a CCN with an incumbent utility provider that may not be capable of providing the necessary water and wastewater services, or that is capable of providing these services, but at a much higher rate than an alternate utility.⁸⁸

As the State of Texas continues to grow, urban and suburban areas continue to expand, cyclical drought conditions will continue to plague the state

80. See Dougal & Quinn, *Certificates of Convenience and Necessity: The Basics and Recent Developments*, *supra* note 75, at 1.

81. See Leonard H. Dougal & Cassandra Quinn, Expedited Release and Other Methods of CCN Decertification, Presented at the University of Texas School of Law 2009 Texas Water Law Institute (Dec. 10–11, 2009), <http://images.jw.com/com/publications/1300.pdf>; *TCEQ Defends Its Power to Regulate Water Utilities*, 3 AM. WATER INTELLIGENCE, no. 7, July 2012, available at <http://www.americanwaterintel.com/archive/3/7/profile/tceq-defends-its-power-regulate-water-utilities.html>.

82. See Dougal & Quinn, Expedited Release and Other Methods of CCN Decertification, *supra* note 81, at 1.

83. See *id.*; Eric Dexheimer & Jeremy Schwartz, *Growth of Large Private Water Companies Brings Higher Water Rates, Little Recourse for Consumers*, AUSTIN AMERICAN-STATESMAN (Dec. 17, 2011), <http://www.statesman.com/news/news/special-reports/growth-of-large-private-water-companies-brings-h-1/nRh7F/>.

84. See Dexheimer & Schwartz, *supra* note 83.

85. See Dougal & Quinn, Expedited Release and Other Methods of CCN Decertification, *supra* note 81, at 1; Dexheimer & Schwartz, *supra* note 83.

86. Galbraith, *supra* note 2.

87. See TEX. WATER CODE ANN. § 13.241 (West 2008); *TCEQ Policy Statement*, *supra* note 24, at 1.

88. See WATER § 13.241; *TCEQ Policy Statement*, *supra* note 24, at 1.

in the coming years.⁸⁹ Ensuring that the state implements an efficient, reliable, safe, and cost-effective water management system capable of meeting competing demands from various interests, while at the same time conserving water resources, is more important than ever.⁹⁰

III. STEPPING AWAY FROM CCNs: WHY PROPERTY OWNERS WANT THE RIGHT TO BREAK UP WITH THEIR WATER UTILITY PROVIDER

A. Notable Problems with CCNs

Texas is a state in which private property rights are fiercely protected and deeply valued.⁹¹ It is, therefore, no wonder that one of the major disputes over CCNs stems from private landowners whose property is locked up in a CCN with a utility provider that the property owners would not have otherwise selected if given the opportunity to shop around for the best service at the best rate.⁹² In many instances, the incumbent water utility will only permit the property owners access to water and wastewater services at significantly higher rates than if the property owners were permitted to contract with other potential providers.⁹³ There have even been instances in which the incumbent utility is incapable of furnishing its service area with water or wastewater utilities, despite this being one of the requirements of holding a CCN.⁹⁴ Thus, the “convenience and necessity of CCNs is [currently] the subject of fierce debate.”⁹⁵

Private water suppliers, which include investor-owned utilities and private water companies, operate for a profit.⁹⁶ Unlike nonprofit and public water suppliers, these private suppliers generally utilize more costly funding mechanisms and also tend not to be as influenced by public comments and concerns about rates and surcharges.⁹⁷ Although small private water companies have, for many years, provided necessary water and wastewater services to new developments outside of the city limits—and may continue to provide essential services in the future—“when public money is projected to be insufficient to make the billions of dollars in costly upgrades needed in water and sewer systems,” these small private water companies are increasingly being bought

89. Vaughan et al., *supra* note 1, at 1.

90. *Id.*

91. See WATER POLICY IN TEXAS: RESPONDING TO THE RISE OF SCARCITY, *supra* note 34, at 2.

92. See Bill Peacock, *Senate Bill 573: Certificates of Public Convenience and Necessity*, TEX. PUB. POL’Y FOUND. (May 19, 2011, 12:00 AM), <http://www.texaspolicy.com/center/economic-freedom/reports/senate-bill-573-certificates-public-convenience-and-necessity>.

93. *Id.*

94. See Monte Akers, Rural Water Supply Issues, Federal Funding Blackouts, CCNs and More, Presented at the University of Texas School of Law Land Use Conference 1 (Mar. 24–26, 2010).

95. Combs, *supra* note 66, at 10 (internal quotation marks omitted).

96. See *Private Water Suppliers*, TEX. SIERRA CLUB (Oct. 27, 2012), <http://texas.sierraclub.org/press/factssupply3.pdf>.

97. See *id.*

out by large out-of-state water utility companies looking to take advantage of Texas's "booming population and welcoming regulatory environment."⁹⁸ "Today, three out-of-state corporations own about 500 Texas water systems that serve more than 250,000 residents."⁹⁹ In total, Texas supports over 4,000 water utilities; large out-of-state corporations thus control a significant portion of Texas's water utilities.¹⁰⁰ The result of this control has been a dramatic increase in the rates these investor-owned water utilities are charging Texas property owners in rural and suburban areas.¹⁰¹ The investor-owned water utilities argue that these rate increases are justified because these utilities have taken over and invested in the "small, rural water and sewer systems that have gone decades without meaningful improvements in their infrastructure."¹⁰² However, the tremendous rate hikes that have been documented in various rural and suburban areas—rate hikes that have not been seen inside city limits, where public and municipal water providers are established—seem to run contrary to the TCEQ's duty to ensure that the utilities set "just and reasonable water rates" for Texas consumers.¹⁰³

Prior to 2005, water-supply corporations and other utilities could obtain CCNs, even without providing public notice and without the consent of the affected property owners.¹⁰⁴ This meant that the property owner was typically not informed of the CCN because the CCN holder had no duty to notify the property owner that it held the sole right to furnish the property with water and wastewater utility services.¹⁰⁵ Unaware of the impending action, affected private property owners were never afforded an opportunity to express their support or opposition to inclusion in the proposed CCN.¹⁰⁶ Typically, once a privately-owned tract of land was included in a CCN, the chances of getting out of it were nearly impossible unless the property owner was willing to pay a substantial price.¹⁰⁷ Oftentimes, the property owner would be required to pay the CCN holder to remove the land from a CCN in instances in which the CCN

98. Dexheimer & Schwartz, *supra* note 83.

99. *Id.*

100. See Dougal & Quinn, Expedited Release and Other Methods of CCN Decertification, *supra* note 81, at 1; Dexheimer & Schwartz, *supra* note 83.

101. See Dexheimer & Schwartz, *supra* note 83.

102. See *id.*

103. See *id.* (internal quotation marks omitted) (The TCEQ "is charged with setting 'just and reasonable' water rates based on a company's cost of doing business plus a guaranteed profit. In exchange, the companies enjoy a monopoly on their service area."); see also INTERIM REPORT, *supra* note 59, at 57 ("The basic principles of rate regulation are based on the concepts of fairness and equity without unreasonable discrimination.").

104. See Peacock, *supra* note 92.

105. See, e.g., *id.*

106. See, e.g., *id.*

107. Combs, *supra* note 66, at 10 (noting that "[o]ne landowner paid \$3.7 million to 'compensate' a water supply corporation, just to remove his 1,500 acres from the CCN, yet the CCN holder had not spent a dime to serve the landowner's property").

holder had not invested any of its own capital to serve the interest of the property owner's land.¹⁰⁸

Furthermore, some property owners have found that the CCN service area that includes their property is “much larger than the area in which the certificated provider [is] actually furnishing water or sewer service.”¹⁰⁹ This situation results in an inability to connect the property to necessary water and wastewater utilities, and also runs contrary to the requirements that the certified provider be capable of furnishing its service area with water and wastewater utilities.¹¹⁰ Faced with the dilemma of not being able to obtain water services on their property, property owners began demanding a way to extricate their property from their respective CCN service area.¹¹¹ These concerned property owners also began to advocate for the right to choose a water utility provider capable of providing reliable water and wastewater services at a fair and reasonable rate.¹¹²

B. Texas House Bill 2876

In response to the notable problems with CCNs, Texas legislators took action to address these landowners' concerns.¹¹³ In 2005, the 79th Texas Legislature adopted House Bill 2876, which included an expedited release provision that certain qualifying property owners could utilize to decertify the CCN, and thus, remove their land from an incumbent utility provider's CCN.¹¹⁴ House Bill 2876 amended Chapter 13 of the Texas Water Code “to reform the process by which CCNs are created and maintained.”¹¹⁵ As a result of House Bill 2876, incumbent utilities must now pay closer attention to property owners who are concerned about the cost, timing, and reliability of delivering water and wastewater service to their properties.¹¹⁶ Despite strides taken towards promoting consumer choice with regard to property owners choosing their water utility, the TCEQ seems to be shifting away from its policy of regionalizing these utilities.¹¹⁷ This increased participation by property owners in determining their water utility service could result in a greater fragmentation of the existing utility service areas because rather than operating under a system in which new utility services would simply be connected to established utilities,

108. *Id.*

109. Akers, *supra* note 94, at 1.

110. *See id.*

111. *See, e.g.,* Combs, *supra* note 66, at 10.

112. *See, e.g., id.* at 11.

113. *See, e.g., id.*

114. Tex. H.B. 2876, 79th Leg., R.S. (2005); *see* Leonard H. Dougal, Petitions for Expedited Release From CCNs—How Are Incumbent Utilities Responding?, Presented at the University of Texas School of Law 2006 Water Law Institute 1 (Dec. 7–8, 2006), <http://images.jw.com/com/publications/647.pdf>.

115. Senate Research Ctr., Bill Analysis, Tex. H.B. 2876, 79th Leg., R.S. 1 (2005), *available at* <http://www.legis.state.tx.us/tlodocs/79R/analysis/pdf/HB02876E.pdf>.

116. *See* Dougal, *supra* note 114, at 1.

117. *See id.* at 1–2.

the property owner could opt to connect to an alternate water system that may not be established in the area.¹¹⁸

Along the lines of greater consumer choice, perhaps the most notable provision in House Bill 2876 is the expedited release provision.¹¹⁹ This section permits property owners “with at least 50 acres, that is not in a platted subdivision currently receiving water or sewer service, to petition for release of the land from the incumbent utility’s CCN area.”¹²⁰ Prior to filing for release from the CCN, the property owner must perform his own cost-benefit analysis in order to determine whether an alternate service provider is in close proximity to the property and will be able to provide the necessary water utilities at a more reasonable rate than the incumbent utility.¹²¹ The property owner must also “make a formal request for service to the incumbent utility” provider in order to determine whether the incumbent utility will be capable of furnishing the requested water service and whether any capital improvements are necessary.¹²² Furthermore, the property owner will also need “a commitment letter from the alternative utility service provider including detailed information on that provider’s ability to serve” before the property owner may file a petition for expedited release.¹²³ Factors besides cost also come into play when making pre-petition considerations, such as the reliability, quality, and timing of the water service from both the incumbent utility and alternate utility providers.¹²⁴

The process of obtaining an expedited release requires filing a petition with the TCEQ.¹²⁵ The TCEQ follows certain procedures to determine whether it will grant or deny the petition.¹²⁶ The procedural considerations begin with the property owner sending a request for service to the incumbent utility.¹²⁷ This request must be complete and must also include a map and a legal description of the property at issue.¹²⁸ “The incumbent utility then has 90 calendar days to respond to the [property owner’s] request.”¹²⁹ Finally, the property owner may:

[F]ile a petition for expedited release if the utility: 1) has refused to provide service, 2) is not capable of providing adequate service within the time frame, at the level, or in the manner reasonably requested by the landowner, or 3)

118. *See id.*

119. *See id.* at 2.

120. *See* TEX. WATER CODE ANN. § 13.254(a-1) (West 2008); Dougal, *supra* note 114, at 2.

121. *See, e.g.*, Dougal, *supra* note 114, at 2.

122. *See id.*

123. *Id.*

124. *See id.*

125. *See id.* at 4.

126. *See id.*

127. *See id.* at 3.

128. *See id.*

129. *See id.*

conditions the provision of service on a payment of costs not properly allocable to the petitioner's service request.¹³⁰

If the petition is granted, the landowner must obtain an independent appraisal of the CCN's service area and facilities being released so that the TCEQ may determine the compensation that is due to the incumbent utility.¹³¹ If the property owner or the incumbent utility is aggrieved by the TCEQ's final decision, the party may not appeal to the district court, but must seek any desired reconsideration of the agency action within the agency itself.¹³²

Double Diamond, Inc. (DDI), a developer of residential golf communities, filed the very first petition for expedited release in 2006, but the TCEQ denied DDI's petition because DDI failed to provide the incumbent CCN holder with "an accurate timeline for which water service would be needed."¹³³ DDI was looking to construct a residential resort community in North Texas and "sought to decertify a portion of the retail water CCN held by Northwest Grayson County Water Control and Improvement District No. 1."¹³⁴ DDI alleged that Northwest Grayson, as the CCN holder, lacked the ability to "provid[e] continuous and adequate service" within the stipulated time frame.¹³⁵ DDI also complained that the cost estimates for water service that Northwest Grayson provided after DDI submitted its request for service were unacceptable.¹³⁶ The TCEQ essentially found that DDI was unable to meet its burden of proving that Northwest Grayson was unable to meet DDI's needs and that the alternate utility "provider was capable of providing service at the level DDI had requested."¹³⁷

In 2007, Kerala Christian Adult Homes (KCA Homes) filed the first successful petition for expedited release under House Bill 2876.¹³⁸ KCA Homes was looking "to decertify a portion of the retail water CCN held by the BHP Water Supply Corporation" (BHP).¹³⁹ When KCA Homes initially requested water service from BHP for a planned 432-acre residential subdivision, BHP responded that it would first have to invest in certain improvements to its water system.¹⁴⁰ BHP further stipulated that it would need

130. *See id.* at 3–4.

131. *See, e.g., id.*

132. *See, e.g., id.* at 4.

133. Dougal & Quinn, Expedited Release and Other Methods of CCN Decertification, *supra* note 81, at 2–3 (quoting Tex. Comm'n on Env'tl. Quality, Order on Petition from Double Diamond, Inc. for an Expedited Release from Water Certificate of Convenience and Necessity (CCN) No. 12362 of Northwest Grayson County WCID No. 1 in Grayson County, Application No. 35564 (Jul. 25, 2007)) (internal quotation marks omitted).

134. *Id.* at 2.

135. *Id.*

136. *Id.*

137. *Id.* at 3.

138. *Id.*

139. *Id.*

140. *Id.*

to purchase additional capacity from the municipality of Royse City, Texas.¹⁴¹ The TCEQ granted this petition for expedited release because BHP was not capable of furnishing water services at the level the petitioner had requested.¹⁴²

In 2005, House Bill 2876 represented the most significant legislation to affect water and wastewater CCNs since the time CCNs were created.¹⁴³ Despite the small number of landowners who took advantage of the expedited release petitions under the law, House Bill 2876 opened the door to a continual policy debate that is still raging today.¹⁴⁴ In 2011, another piece of legislation was passed: Texas Senate Bill 573, which streamlined the expedited release provision of Chapter 13 of the Texas Water Code.¹⁴⁵

C. Texas Senate Bill 573

In 2011, the 82nd Texas Legislature adopted Senate Bill 573.¹⁴⁶ This streamlined expedited release provision was intended to make it even easier for qualifying property owners to petition the TCEQ to have their property released from a CCN.¹⁴⁷

Senate Bill 573 became effective on September 1, 2011, and amended the existing expedited release process by “creat[ing] a new procedure for CCN decertification that allows landowners with at least 25 acres who are not receiving water or wastewater service, and who are located in one of [the eligible Texas counties] to petition the TCEQ to remove their property from [a] CCN.”¹⁴⁸ The streamlined expedited release process under the amended version of Chapter 13 of the Texas Water Code differs from the previous expedited release process under House Bill 2876 in that the petitioner need only own twenty-five, not fifty, acres of property and is no longer required “to first submit a written request for service to the” incumbent utility.¹⁴⁹ In addition, there is no longer any requirement that the petitioner prove that an alternate utility provider is “capable of providing service to the property.”¹⁵⁰ Thus, the

141. *Id.*

142. *See id.*

143. *See id.* at 2.

144. *See id.*

145. *See* Peacock, *supra* note 92.

146. *See* Press Release, Tex. Senate, Nichols Files Five Bills to Protect Water Customers (Feb. 23, 2011), available at <http://www.nichols.senate.state.tx.us/pr11/p022311a.htm>; Peacock, *supra* note 92. State Senator Robert Nichols filed Senate Bill 573, noting that “[c]urrent law makes it almost impossible for landowners to get out of an exclusive service area, even if the utility fails to provide service This bill removes those hoops, because to me it’s simple: If you are not getting service for . . . necessities like water and wastewater service, you deserve the opportunity to find a provider who will.” Press Release, Tex. Senate, *supra* (quoting State Senator Robert Nichols) (internal quotation marks omitted).

147. *See* Tex. S.B. 573, 82nd Leg., R.S. (2011); Press Release, Tex. Senate, *supra* note 146.

148. Leonard H. Dougal & Cassandra Quinn, SB 573, CCN Decertification, and Water Utility Service Issues, Presented at The Changing Face of Water Rights in Texas 2012, at 3 (Feb. 23–24, 2012), <http://www.jdsupra.com/legalnews/sb-573-ccn-decertification-and-water-u-29716/>.

149. *Id.* at 2, 4.

150. *Id.* at 4.

petitioner need only attest that the property is not receiving any water or wastewater service from the CCN holder at the time of the petition and meet all of the applicable requirements.¹⁵¹ If the petitioner meets all of the requirements, “the TCEQ is required to grant a petition for streamlined expedited release within 60 days.”¹⁵²

Texas Senate Bill 573 and House Bill 2876 permit property owners of large tracts of land outside of platted subdivisions to choose their water utility providers.¹⁵³ On the other hand, property owners of smaller tracts of land—who are not eligible for a streamlined expedited release—located in rural areas where fewer customers exist and where private utility companies are the sole water utility providers, are having an increasingly difficult time fighting large water rate hikes.¹⁵⁴ What recourse, then, does the small, individual property owner in a subdivision connected to a private water utility outside the city limits have to leave his incumbent utility provider in favor of a more cost-effective public or non-profit water utility?¹⁵⁵

IV. SHIFTING OVERSIGHT OF RETAIL RATE SETTING OF WATER AND WASTEWATER UTILITIES FROM THE TCEQ TO THE PUC

A. *Private Water Utilities, Rural Water Rate Hikes, and the Individual Household Water Consumer*

An increasingly large group of Texans in rural areas of the state have come face-to-face with significant rate increases from private water providers.¹⁵⁶ There have been documented rate hikes in some areas of double and triple the original rate.¹⁵⁷ Although the TCEQ does not keep precise numbers, the rate increases in a growing number of suburban areas have been up to 40% to 60%.¹⁵⁸ While a growing number of ratepayers argue that the private utility rates are increasing at an alarmingly fast rate, industry officials have defended these increased rates, arguing that “their rates reflect the true cost of rehabilitating and expanding older water systems, and that without their deep pockets, such systems would languish.”¹⁵⁹

SouthWest Water Company (SouthWest)—perhaps the most disliked private water utility company in Central Texas—is a prime example of a large private utility company that is raising rates and buying up smaller utility

151. *Id.*

152. *Id.*

153. *See id.*

154. *See Galbraith, supra note 2.*

155. *See Dexheimer & Schwartz, supra note 83.*

156. Galbraith, *supra note 2.*

157. *See id.*

158. Dexheimer & Schwartz, *supra note 83* (indicating that Doug Holcomb, who oversees the TCEQ’s water utilities division, specified the rate increases to be in the range of 40%–60%).

159. *Id.*

providers across the state in order to “regionalize” its private water service areas.¹⁶⁰ Prior to its 2010 acquisition by J.P. Morgan for \$430 million, California-based SouthWest acquired Tecon Water Company (Tecon), which served twenty-one thousand water connections in a high-growth area in Central Texas.¹⁶¹ The Tecon acquisition permitted SouthWest not only to become the sole provider of water utility services for a high-growth area, but also to “consolidate various water companies under one entity with a single tariff.”¹⁶² SouthWest’s ability to bypass the state law requirement, which mandates that “water companies have separate rate schedules for each of their water utilities,” served as a basis for SouthWest’s current across-the-board rate-increase proposal that affects nearly forty-six thousand consumers.¹⁶³ Shortly after J.P. Morgan acquired the then-publicly traded SouthWest, SouthWest “applied for permission to merge eight of its Texas water utilities under the [well-known] Monarch Utilities banner,” and then requested “a single rate that would produce bills nearly three times the size of the average water bill for municipal customers in Texas.”¹⁶⁴ SouthWest justified this rate increase by arguing that it was needed to pay for state-mandated updates to an outdated water system and was not the result of the company becoming a private entity.¹⁶⁵ To encourage water system upgrades, which keep water utility systems operating in an efficient and effective manner, “state regulators give private companies rates of return of up to 12 percent on the equity they invest.”¹⁶⁶ However, ratepayers and other critics question the higher, and arguably unreasonable, rates charged by private companies—some speculate that there might be a type of corporate overhead price that the private companies charge that other utilities do not charge.¹⁶⁷ Ratepayers from areas near San Antonio, Fort Worth, Pflugerville, and Kyle have hired attorneys to protest and fight the rates.¹⁶⁸ These residents argue that the currently-proposed rate increases “would deplete family budgets, make homes harder to sell and inhibit commercial development in their neighborhoods.”¹⁶⁹

160. See *TCEQ Defends its Power to Regulate Water Utilities*, *supra* note 81; Dexheimer & Schwartz, *supra* note 83.

161. Dexheimer & Schwartz, *supra* note 83. Specifically, Tecon served areas surrounding Pflugerville, a small city outside of Austin. *Id.*

162. *Id.* Although “[s]tate law requires water companies to have separate rate schedules for each of their water utilities—unless they can prove the utilities are ‘substantially similar,’” Tecon had a special legislative exemption that permitted the company to bypass state law. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

SouthWest also provides wholesale water to a low-income Travis County subdivision where the rate hikes have garnered much attention in the media.¹⁷⁰ The significant rate hikes to this area resulted in an investigation by the Texas Attorney General's Office following a report detailing the unexplained water rate increases by the Austin American-Statesman in August of 2010.¹⁷¹ The State filed suit in district court for violation of the Texas Deceptive Trade Practices Consumer Protection Act after the water bills for residents in this area reached amounts as high as \$325 per month.¹⁷² During the rate hikes, some consumers in this area were forced to disable their water connections because they simply could not afford the sudden and dramatic increase in rates.¹⁷³ Eventually, the State reached a settlement with SouthWest, which resulted in SouthWest agreeing to credit the subdivision's utility \$77,000 in restitution and cut the \$325 water rates to less than half that amount.¹⁷⁴ Also, Southwest must now follow certain guidelines when and if it increases rates in the future.¹⁷⁵ Specifically, the private water supply corporation must:

- Fully document operating expenses with invoices and receipts.
- Use consumers' water and sewer payments to pay the corporation's water, wastewater, and electric bills.
- Establish a system of accounts and checks and balances.
- Maintain current and accurate financial records.
- Prepare or approve an annual financial report for the preceding year.
- Comply with Texas open meeting laws, the state water code and other laws.¹⁷⁶

There is a notable problem with determining what an affordable water rate means because it is different for each consumer and, depending upon the economic and demographic makeup of the community, it can vary from community to community.¹⁷⁷ Aside from engaging in a David-and-Goliath type

170. *Id.*; Suzannah Gonzales, *Attorney General Accuses Former Water Supply President of Defrauding Customers*, AUSTIN AMERICAN-STATESMAN (Jan. 18, 2011), <http://www.statesman.com/news/news/local/attorney-general-accuses-former-water-supply-pre-1/nRWsH/>.

171. Dexheimer & Schwartz, *supra* note 83; Gonzales, *supra* note 170.

172. *Bill Comparisons for Selected U.S. Cities*, CITY OF AUSTIN, TEX.: AUSTIN WATER UTIL. (2012), available at http://alt.coxnewsweb.com/statesman/politifact/02292012_austinwaterutilitybenchmarkwater-rate-comparison.pdf. (As a point of comparison, the average monthly water bill for both water and wastewater service for a residential consumer living in the City of Austin in the year 2012 was \$72.67.); Gonzales, *supra* note 170.

173. *See* Gonzales, *supra* note 170.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Molly Peterson, *Recap! A Price On Water: Privatization of the Top Liquid Asset*, UNOFFICIAL CONF. BLOG OF THE SOC'Y OF ENV'T'L JOURNALISTS (Oct. 22, 2012, 3:31 PM), <http://conf.sej.org/2012/10/recap-a-price-on-water-privatization-of-the-top-liquid-asset.html>. Affordable water is not the cheapest source of water available because the cheapest sources of water have been depleted, and water utilities and

struggle with a private utility company that has statutorily-granted monopoly status and deep corporate pockets at its disposal for litigation and other purposes, the only recourse for rural property owners who do not qualify to petition the TCEQ for a streamlined expedited release from their property's CCN is water rate reform from the Texas Legislature.¹⁷⁸

B. The Power to Regulate Water Utilities: Looking Out for the Best Interest of the Consumer

Water rate reform is on the radar of most members of the state legislature.¹⁷⁹ Although water industry analysts generally approve of the regulatory environment for investor-owned Texas water utilities, the TCEQ has come under much criticism in recent years from members of the Texas Legislature, individual ratepayers, and public interest ratepayer groups.¹⁸⁰ This criticism stems from concerns, as one Hays County resident put it, “that the [water] rates—prices—will have no limits.”¹⁸¹

One possible solution, advanced by some state representatives, is to move control of retail rates of water and wastewater utilities from the TCEQ to the PUC.¹⁸² Unlike the PUC, the TCEQ does not specialize in determining fair rates for utilities, but instead focuses more on the environmental and natural resources aspects of water quality and water management.¹⁸³ The PUC, on the other hand, focuses “on fair and efficient rate-related regulation” for “investor-owned utilities.”¹⁸⁴ When the Texas Legislature transferred regulatory authority over retail public utilities for water and wastewater services from the PUC to the TCEQ in 1985, the legislature justified this transfer because of the TCEQ’s familiarity with small water and wastewater systems as compared to the PUC’s

consumers now must take water quality and transportation issues into consideration; thus, each community will tend to have a different response to a price increase. *Id.*

178. See Galbraith, *supra* note 2.

179. See *TCEQ Defends Its Power to Regulate Water Utilities*, *supra* note 81.

180. Galbraith, *supra* note 2.

181. *Id.* (quoting David Burghard at a hearing before the Senate Natural Resources Committee) (internal quotation marks omitted).

182. See Robert Nichols, *Texas State Senator Nichols Chairs Meeting on Water Rate Regulation Changes*, VINDICATOR (Dec. 1, 2012), http://www.theindicator.com/news/article_8c3958e4-3bdd-11e2-ab4a-001a4bcf887a.html?mode=story. During a meeting of the Texas Senate Natural Resources Subcommittee in November 2012, chaired by state Senator Robert Nichols, a proposal was made to shift “water and wastewater rate jurisdiction away from the [TCEQ] and hand it over to the [PUC].” Howard Roden, *Nichols Favors Switching Water Systems Under PUC Control*, COURIER OF MONTGOMERY COUNTY (Nov. 29, 2012, 10:58 PM), http://www.yourhoustonnews.com/courier/news/nichols-favors-switching-water-systems-under-puc-control/article_ec43b8f1-9da2-5c78-bc50-49a05ac56e95.html. Effective September 1, 2013, the economic regulation of water and sewer service will be transferred from the TCEQ to the PUC, and the Office of the Public Utility Counsel will regulate rates for water service. See Tex. S.B. 567, 83rd Leg., R.S. (2013). Senate Bill 567 was filed without the Governor’s signature on May 25, 2013. *Id.*

183. See Nichols, *supra* note 182.

184. *Id.*

focus on more “complex ratemaking for large electric and telecommunications utilities.”¹⁸⁵

C. Recommendation to Transfer Oversight of Water Rate Utilities to the PUC

During the recent 83rd (Regular) legislative session, Texas lawmakers considered whether shifting oversight of water and wastewater rates from the TCEQ to the PUC would assist consumers with their concerns regarding water rate increases.¹⁸⁶ Proponents of this transfer argue that it would facilitate a single state entity—the Office of Public Utility Counsel (OPUC)—to better represent the “interests of residential and small commercial consumers in rate and other matters before PUC,” and would likely be a smooth transition because the PUC is already responsible for overseeing the setting of electric and telecommunication utility rate increases throughout the state.¹⁸⁷ The PUC also approves CCNs for other utilities, which, like the water CCNs, define the areas these electrical and telecommunication utilities serve.¹⁸⁸

Lawmakers in support of transitioning rate-setting authority from the TCEQ to the PUC contend that the PUC is better situated to regulate large and complex water and wastewater utilities because of the PUC’s structure and its expertise in ratemaking and managing CCN-related procedures.¹⁸⁹ These areas of expertise, along with the OPUC whose accountants and attorneys routinely advocate on behalf of the individual consumers, would facilitate greater consumer representation.¹⁹⁰ As the number of private water and wastewater utilities increases across the state, consumers who have limited resources—in comparison to these large utilities and private corporations—will increasingly need assistance when it comes to voicing their rate concerns and complaints.¹⁹¹ Currently, the TCEQ’s Office of Public Interest Counsel (OPIC) represents the public interest in their concerns regarding environmental quality and consumer protection.¹⁹² However, unlike the OPUC, the OPIC does not represent the

185. SUNSET ADVISORY COMM’N, STAFF REPORT: PUBLIC UTILITY COMMISSION OF TEXAS 26 (2012) [hereinafter STAFF REPORT], available at http://www.sunset.state.tx.us/83rd/PUC/PUC_SR.pdf.

186. Galbraith, *supra* note 2.

187. STAFF REPORT, *supra* note 185, at 28; Dexheimer & Schwartz, *supra* note 83; Galbraith, *supra* note 2. The Office of Public Utility Counsel functions as a consumer protection board, which represents individual consumers and focuses on utility consumer complaints and outreach. Dexheimer & Schwartz, *supra* note 83. The OPUC also hires outside consultants on their behalf. *Id.* Similarly, the State of Arizona has the taxpayer-funded Residential Utilities Consumer Office, which is a system similar to the OPUC that is in place to represent water ratepayers. *Id.*

188. STAFF REPORT, *supra* note 185, at 28.

189. *Id.*

190. *Id.*; Dexheimer & Schwartz, *supra* note 83.

191. STAFF REPORT, *supra* note 185, at 28.

192. *Id.*; Office of the Public Interest Counsel, TEX. COMM’N ON ENV’T L QUALITY, http://www.tceq.texas.gov/agency/public_interest/index.html (last visited Sept. 7, 2013).

interests of residential and small commercial consumers.¹⁹³ A transfer of the regulation of water and wastewater utilities to the PUC would permit the TCEQ to focus its resources on its overarching environmental mission and would facilitate greater protection for Texas water ratepayers.¹⁹⁴

It can be argued that the TCEQ, the water regulatory authority for Texas, has created a welcoming environment for water companies to come set up shop.¹⁹⁵ While non-municipal private water utility companies must have the approval of the TCEQ prior to implementing a consumer rate change, the process of obtaining the rate increase is arguably much easier and faster through the TCEQ than the PUC or even the Texas Railroad Commission.¹⁹⁶ Because Texas has a “file and use” system, private water companies that wish to implement higher consumer rates may do so as soon as the proposed rate is filed.¹⁹⁷ Contrary to this procedure, when an electric company wants to raise consumer electric rates, the company must submit the rate-increase proposal to OPUC accountants and attorneys who evaluate the applications “and negotiate with the utilities over the proposed rates.”¹⁹⁸ Even the Texas Railroad Commission, a state agency that regulates oil and gas companies, follows the same rate-change procedure as the PUC.¹⁹⁹ The fact that the consumer rate-change procedure for the PUC and the Texas Railroad Commission may take months or years longer than the TCEQ’s rate-change procedure for water utilities ensures that the electric and gas utility rate changes are carefully considered and absolutely justified.²⁰⁰ If water utility consumers want to mount a campaign against a new rate hike, there is no official body in place within the TCEQ to represent them—in other words, they are on their own.²⁰¹ The Texas Water Code requires the TCEQ to ensure that all rates “made, demanded, or received” by all water and wastewater utilities are “just and reasonable.”²⁰² Despite that mandate, the ability of utilities to take advantage of the file and use procedure to propose, file, and implement new and higher rates quickly is an unchecked power favoring the utilities.²⁰³

Along with allowing more time and discretion for the agency’s attorneys and accountants to research and consider individual proposals affecting consumer water rates comes an increased cost to the water companies.²⁰⁴ For this reason, water company representatives argue that a shift of oversight to the

193. STAFF REPORT, *supra* note 185, at 28.

194. *Id.*

195. Dexheimer & Schwartz, *supra* note 83.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. TEX. WATER CODE ANN. § 13.182(a) (West 2008).

203. See Dexheimer & Schwartz, *supra* note 83.

204. See Galbraith, *supra* note 2.

PUC would be more expensive for ratepayers in the long run.²⁰⁵ In addition to the increased funds private water companies have invested in updating water systems, the companies would have the additional cost of the lengthy PUC procedures for altering water rates.²⁰⁶ This procedure would require the water companies to hire their own staff to prepare for the PUC proceedings.²⁰⁷ Critics argue that these increased costs would eventually be shifted to the consumers.²⁰⁸ The TCEQ's rate-setting procedures are arguably much more concise than the PUC's procedures—although this increased efficiency may mean a lack of thoroughness.²⁰⁹ Those in favor of keeping the TCEQ in charge of overseeing the rate-setting of water utilities argue that the TCEQ is capable of regulating water utilities in compliance with the current laws.²¹⁰

While an agency transfer from the TCEQ to the PUC would arguably give consumers a greater array of options when it comes to their involvement in water-rate disputes, it likely would not get to the heart of the issue, which is the alarmingly fast rate at which private water utility companies are buying up smaller utilities, the corresponding water rate increases in certain communities, and the unchanged monopoly status these utilities enjoy.²¹¹ Ratepayers in Texas—whether they own the land or are simply buying utility services—are going to continue to be affected by large private utility corporations taking advantage of the monopoly status Texas water utilities enjoy via CCNs and Texas's flexible water rates based on the file and use system.²¹² While legislative efforts like House Bill 2876 and Senate Bill 573 have, in some ways, made it easier for qualifying property owners and real estate developers to get out from under a particular water utility CCN and contract with the utility of their choice, these efforts have not resulted in increased competition at the retail level.²¹³ Thus, lower water rates and increased consumer choice have not yet become a reality in Texas.²¹⁴ Perhaps more importantly, this most recent legislation has not answered the cries of many Texas consumers who are faced with an ever-increasing water bill each month.²¹⁵ Large private utilities with the most buying power are dictating the prices Texas consumers must pay for this vital resource.²¹⁶ Aside from transferring agency oversight from the TCEQ to the PUC, what is needed now, more than ever, is a strong push from the

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *TCEQ Defends Its Power to Regulate Water Utilities*, *supra* note 81.

211. *See id.*

212. *See Galbraith*, *supra* note 2; *TCEQ Defends Its Power to Regulate Water Utilities*, *supra* note 81.

213. *See Rapiet*, *supra* note 35, at 1057.

214. *See id.*

215. *See Galbraith*, *supra* note 2.

216. *See id.*

Texas Legislature to regulate and limit private control of the state's water systems.²¹⁷

While it has become more common for private entities to control the management and operation of water systems with varying degrees of government oversight, there is a dispute with regard to the overall effectiveness of water privatization.²¹⁸ A report by the Pacific Institute concerning the privatization of water utilities found that, overall, private companies and local governments have not put forth a sufficient effort towards understanding the risks and limitations of water privatization.²¹⁹ As a result, the report suggests that, while there is a place for water privatization in the world today, the rapid rate at which water systems are privatized without attention to a uniform set of guiding social and economic principles presents a danger to the public.²²⁰ Although water policy has almost always had a public component, such as a concern for the environmental, public health, and safety aspects of water regulation, each state has the right to view water resources as either a public or private right.²²¹ For states such as Texas, which are deeply concerned with protecting and preserving property rights, water is viewed more as a private resource or commodity.²²² Conversely, those states that view water as a public right are more concerned with protecting the environmental aspects of water resources.²²³ Perhaps when oversight was transferred from the PUC to the TCEQ in 1985, it was deemed more important to regulate the environmental aspects of water systems than to ensure that water companies charged fair and reasonable rates for clean and safe drinking water.²²⁴

V. CONCLUSION

There is little doubt today, as water and wastewater systems across the state grow and expand to support a booming population, that the process of providing these utilities to consumers at fair and reasonable rates has become more complex.²²⁵ As a result, residential and small commercial consumers'

217. See Craig Anthony (Tony) Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 786 (2009).

218. See Peterson, *supra* note 177.

219. See generally Gleick, Wolff, Chalecki & Reyes, *supra* note 4 (considering the potentially irreversible consequences of privatization).

220. *Id.* at iii. Specifically, the report details high-profile opposition and protests that have occurred in various countries around the world (including Bolivia, Paraguay, South Africa, and the Philippines). *Id.* This "[o]pposition arises from concerns over the economic implications of privatizing water resources, the risks to ecosystems, the power of corporate players, foreign control over a fundamental natural resource, inequities of access to water, and the exclusion of communities from decisions about their own resources." *Id.*

221. See Peterson, *supra* note 177.

222. See *id.*; see generally WATER POLICY IN TEXAS: RESPONDING TO THE RISE OF SCARCITY, *supra* note 34, at 2 (discussing the importance of private relationships in mitigating concerns over property rights).

223. See generally Peterson, *supra* note 177 (discussing the limitations of privatizing water).

224. STAFF REPORT, *supra* note 185, at 26–28.

225. *Id.*

interests in water and wastewater utility matters have become multifaceted.²²⁶ A single, simple answer to the water rate debate may not exist, but it is clear that an increasing number of water ratepayers are in need of more substantial protection from arbitrary rate increases.²²⁷

A shift in oversight from the TCEQ to the PUC with regard to the setting of rates for water and wastewater utilities will likely provide increased protection and representation to residential and small commercial consumers with little cost to the ratepayers themselves.²²⁸ In addition, the procedures in place at the PUC for implementing rate increases will make it more difficult for private water companies to make unreasonable and unjustifiable water and wastewater rate changes.²²⁹ While this recommendation may not be the sole answer to the growing problem of rate hikes and the great disparity in rates among water customers across the state, it is a sound and practical solution to the lack of consumer representation.²³⁰ It would also provide greater transparency to the process of implementing rate increases.²³¹ With greater policy transparency comes heightened consumer awareness and increased individual acceptance of the entire regulatory process.²³² Consumers deserve to know why their water bills have, in some cases, experienced rate increases in the high double digits.²³³

As private water companies are going to continue to do business in the State of Texas, the legislature needs to ensure not only greater consumer representation, but must also prevent these companies from monopolizing consumer rate increases to the point of earning “windfall profits.”²³⁴ With the passage of legislation such as Senate Bill 573 and House Bill 2876, which facilitate qualified property owners in changing their water utility provider and make it easier for some consumers to choose their water utility provider, the Texas Legislature has established a precedent and a demonstrated track record that could ensure the residential and small commercial consumer a voice against arbitrary water rates.²³⁵

Better yet, across the great State of Texas, perhaps it is time we should talk. From the legislative halls of government—including the state’s water regulatory agencies, and public and private utility companies—to the state’s private property owners, down to the individual utility consumers across the state, it is time to reexamine the inducements behind the model that promotes

226. *See id.*

227. *See, e.g., id.* at 26–27.

228. *See, e.g., id.* at 29–30.

229. *See id.* at 27.

230. *See id.* at 28.

231. *See id.*

232. *See id.* at 29.

233. Galbraith, *supra* note 2.

234. *Id.* (quoting Geoff Miller as a representative of the Coalition for Equitable Water Rates) (internal quotation marks omitted).

235. *See supra* Part III.

water utility regionalization and the rewards that flow from its rate structure and regulatory guidelines. In short, the State of Texas cannot afford to hold either its private property owners or its retail utility rate payers hostage in a market in which potable water is projected to become a scarcer and more valuable natural resource in the years to come.