KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 4, 2020

The Honorable Brian Birdwell
Chair, Senate Committee on Natural Resource and Economic Development
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0340

Re: Whether a home-rule municipality may enter into a contract with a special utility district that prohibits the city from petitioning for decertification of all or part of the special utility district's certificate of convenience and necessity in the future (RQ-0354-KP)

Dear Senator Birdwell:

You ask whether a home-rule municipality may agree by contract not to petition to decertify all or part of a special utility district's certificate of convenience and necessity in the future.[1] In particular, you ask whether certain self-rule provisions applicable to home-rule municipalities supply authority to do so. Request Letter at 1. We have no other information or context for your question. Accordingly, our response is necessarily limited to general legal principles that may be applicable.

We presume you to refer to certificates of convenience and necessity ("CCNs") for water and sewer service as governed by subchapter G in chapter 13 of the Water Code. *See generally* TEX. WATER CODE §§ 13.241–.258. The purpose of chapter 13 "is 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." *Id.* § 13.001(c). A CCN under subchapter G gives a retail public utility[2] the exclusive right to provide retail water and sewer utility service to an identified geographic area. *See id.* § 13.242(a); *see also id.* § 13.241 (outlining the criteria for granting a certificate). Generally, once an area is covered by a CCN, another "retail public utility may not furnish, make available, render, or extend retail water or utility service" without formally modifying the already-existing CCN

[1] *See* Letter from Honorable Brian Birdwell, Chair, Senate Comm. on Nat. Res. & Econ. Dev., to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (May 14, 2020), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0354KP.pdf ("Request Letter").

[2] A "retail public utility" is "any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling . . . facilities for providing potable water service or sewer service, or both, for compensation," and thus could include a home-rule municipality or a special utility district, among other entities. TEX. WATER CODE § 13.002(19).

service area. *See id.* § 13.242(a). This can be done either through obtaining its own CCN over that area or through other means. *Id.* "The general purpose of certification is to provide for a rational distribution of public utility services within defined geographical areas so that, within a specified area, the provider of utility service is unhampered by competitive forces." *City of Carrollton v. Tex. Comm'n on Envtl. Quality*, 170 S.W.3d 204, 209 (Tex. App.—Austin 2005, no pet.) (quotation marks omitted) (describing the effect of certification as granting the certificate holder "a monopoly within its service area").

Subchapter G of chapter 13 includes various methods for altering an existing CCN service area, depending on the circumstances. One such method, to which you allude in your letter, is to petition the Public Utility Commission (the "Commission") for decertification. *See* Request Letter at 1. The process to revoke or amend a CCN through decertification requires the Commission to make certain findings regarding the provision of continuous or adequate service, the cost of such service, or the provision of service by another retail public utility. *See generally* TEX. WATER CODE § 13.254(a). Other methods for altering an existing CCN service area through Commission action include: (1) an expedited release petition by certain landowners who wish to receive service from another retail public utility; (2) a streamlined expedited release petition by certain landowners whose properties meet particular geographic and population requirements; (3) an application for single or dual certification by a municipality that has incorporated or annexed land already in another CCN; and (4) alteration through mutual agreement, among others. *See, e.g.*, *id*. §§ 13.248, .254(a-1), .2541(b), .255(a).

You reference a contract between a home-rule municipality and a special utility district, both of which could qualify as "retail public utilities" under chapter 13. Request Letter at 1. Two provisions specifically address written agreements between retail public utilities concerning CCNs. First, section 13.248 provides generally that "[c]ontracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the utility commission . . . are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity."[3] TEX. WATER CODE § 13.248. At least one court in an unpublished opinion addressed a contract between a special utility district and a home-rule municipality in which the parties designated dually certified areas and agreed that neither one would attempt to formally change, alter, or amend the boundaries between their CCNs or the arrangement for their dually certified areas in the future. *See Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n*, No. 03-16-00796-CV, 2017 WL 5078034, at *5–6 (Tex. App.—Austin Nov. 2, 2017, pet. denied) (mem. op.). Noting that the Commission's predecessor approved only the portions of the agreement designating the areas to be served by each entity, consistent with what section 13.248 provides, the court concluded that the provision prohibiting seeking changes to the CCN in the future did "not itself constitute a designation of a service area" and thus the contractual prohibition had not been incorporated into the CCN.[4] *Id.* at *7; *see also* TEX. WATER CODE § 13.248.

[3]The "utility commission" refers to the Public Utility Commission of Texas. *Id.* § 13.002(22-a).

[4]The court in *Mountain Peak Special Utility District*, however, expressed no opinion on the merits of the special utility district's assertion that the municipality's petition for decertification breached their contract. *See Mountain Peak Special Util. Dist.*, 2017 WL 5078034, at *5 n.5.

Second, subsection 13.255(a) provides that if an area that receives water or sewer service from a retail public utility pursuant to a CCN "is incorporated or annexed by a municipality . . . the municipality and [the] retail public utility . . . may agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility." TEX. WATER CODE § 13.255(a). "The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, *and for any such other or additional terms that the parties may agree on.*" *Id.* (emphasis added). However, this provision, while broad regarding contemplated terms, applies only in the context of municipal incorporation or annexation.

You ask whether sections 51.072 and 51.078 of the Local Government Code, along with article XI, section 5 of the Texas Constitution, supply the authority for a home-rule municipality to contract away its ability to petition to decertify a special utility district's CCN in the future. *See* Request Letter at 1. Article XI, section 5 of the Texas Constitution, known as the "home-rule amendment," authorizes municipalities with more than 5,000 inhabitants to adopt a charter "subject to such limitations as may be prescribed by the Legislature." TEX. CONST. art. XI, § 5 (providing also that home-rule municipal ordinances must not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"). Section 51.072(a) provides that a home-rule municipality "has full power of local self-government," which the Texas Supreme Court has found means that home-rule municipalities "look to the Legislature not for grants of authority, but only for limitations on their authority."[5] *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016); TEX. LOC. GOV'T CODE § 51.072(a). Any limitations the Legislature imposes on local authority "must appear with unmistakable clarity." *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) (quotation marks omitted).

Briefing received by this office argues that Water Code chapter 13 reflects no clear and unmistakable legislative intent to prohibit a home-rule municipality from entering into an agreement that would negotiate away its ability to decertify territory from a neighboring utility's CCN.[6] No provision in chapter 13 or elsewhere in the Water Code addresses whether a municipality may waive its right to petition for decertification. But a municipality that has adopted home-rule status nonetheless remains a political subdivision of the State, having "no greater rights, immunities, or exemptions than does the State of Texas from which exclusively it derives its rights and powers." *Faulk v. City of Tyler*, 389 S.W.2d 706, 707 (Tex. App.—Tyler 1965, writ ref'd n.r.e.). And a political subdivision may "not, by contract or otherwise, bind itself in such a way as to restrict its free exercise of governmental powers, nor [can] it abdicate its governmental functions, even for a reasonable time." *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, 549

[5]Section 51.078 of the Local Government Code, which your letter also mentions, is a transition provision meant simply to preserve the powers conferred upon cities by general or special laws until a new charter pursuant to the home-rule amendment can be adopted and made effective. *See* TEX. LOC. GOV'T CODE § 51.078 ("Powers granted before July 1, 1913, to a municipality by general law or special law continue to be powers of the municipality after it adopts a home-rule charter if the powers are made a part of the charter."); *see also Bd. of Equalization v. McDonald,* 129 S.W.2d 1135, 1141 (Tex. [Comm'n Op.] 1939) (explaining the purpose of section 51.078's predecessor statute); Request Letter at 1.

[6]*See* Brief from Trent Hightower, Asst. Gen. Counsel, Tex. Rural Water Ass'n at 2–3 (June 12, 2020) (on file with the Op. Comm.).

S.W.2d 385, 391 (Tex. 1977). Under this common-law reserved powers doctrine, "[c]ertain powers are conferred on government entities for public purposes, and can neither be delegated nor bartered away." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 843 (Tex. 2010) (quotation marks omitted).

In particular, the reserved powers doctrine may limit a city's authority to waive decertification petitioning rights because water and sewer service constitute a municipal governmental function. *See* TEX. CONST. art. XI, § 13(a) (authorizing the Legislature "by law [to] define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary"); *see also* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(32) (designating "water and sewer service" as a governmental function for purposes of tort liability); *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 147–48 (Tex. 2018) (explaining that the distinction between governmental and proprietary functions specified in the Tort Claims Act also applies in the context of a contract claim). Depending on such factors as the purpose for seeking decertification and the posture of the municipality (for example, as a competing retail public utility or as a landowner), instances may exist in which a municipality's governmental power cannot be exercised without the decertification process, making that process ineligible to be bargained away under the reserved powers doctrine. *See Wasson Interests, Ltd.*, 559 S.W.3d at 153 (stating that "governmental functions encompass activities that are closely related to or necessary for performance of the governmental activities designated by statute"). Thus, even if chapter 13 of the Water Code does not reflect a clear and unmistakable legislative intent to prohibit a home-rule municipality from entering into the type of contractual provision you describe, the municipality's contracting authority may nonetheless be limited. Accordingly, we cannot conclude as a matter of law that in all circumstances a home-rule municipality may agree by contract not to petition to decertify a special utility district's CCN in the future. Instead, such questions must be decided on a case-by-case basis.

S U M M A R Y

Chapter 13 of the Water Code governs certificates of convenience and necessity for the provision of water and sewer service. No provision in chapter 13 addresses whether a home-rule municipality may enter into a contract with a special utility district that prohibits the city from petitioning for decertification of all or part of the special utility district's certificate of convenience and necessity in the future. However, the common-law reserved powers doctrine could limit a municipality's contracting authority in some circumstances, despite the existence of home-rule power. Accordingly, we cannot conclude as a matter of law that in all circumstances a home-rule municipality may agree by contract not to petition to decertify a special utility district's certificate of convenience and necessity in the future. Instead, such questions must be decided on a case-by-case basis.

Very truly yours,

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