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The Lone Star Current

Recent Game Changers in Solid Waste

by Paul Gosselink

The U.S. Supreme Court and the EPA have recently provided the solid waste industry with three "game changers" that will significantly affect the solid waste industry. Two of these "game changers" are Supreme Court decisions that address Superfund liability issues and the interaction of industry with public waste entities. The third involves a battle over the EPA's latest version of the Definition of Solid Waste ("DSW") Rule that removes certain hazardous wastes from the EPA's definition of "solid wastes." All three "game changers" will undoubtedly affect the solid waste industry, its costs, potential liabilities, and compliance with EPA standards.

The first "game changer" is the Supreme Court decision in *Burlington Northern and Santa Fe Railway Co. v. United States*, ("*BNSF*"), that involved litigation over cleanup liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The case involved three private parties -- Brown & Bryant (a private agricultural chemical distribution business), Shell (a party that arranged for delivery of pesticides to Brown & Bryant), and the Railroads, who owned part of the land where Brown & Bryant's storage of hazardous chemicals took place, and the EPA. In the early 1990s, the EPA required the Railroads to clean up the site because of soil and groundwater contamination. In response, the Railroads sued, arguing against their liability. The litigation began in the early 1990s when the Railroads challenged the EPA order, and continued until the 2009 Supreme Court decision.

The two issues in *BNSF* of interest to the industry are the definition of an "arranger" and the ability to apportion liability (rather than attach joint and several liability, meaning any single party could be liable for the entire amount of damage). Under CERCLA, a party may be deemed a Potentially Responsible Party ("PRP") if it is an "owner," an "arranger," or a "transporter." In reversing the Ninth Circuit Court of Appeals, the Supreme Court held that Shell was not an "arranger" under CERCLA. Although the Court did not provide a new explicit test, it effectively cut back on courts' quick willingness to attach "arranger" status to parties that may not have expected or anticipated another party to dispose of a substance in a manner that would cause contamination. While the test is not expressly one of "intent" or "knowledge," the Supreme Court recognized there is a continuum that should apply in determining whether one is an "arranger," based on fact-specific questions. As a result, companies that arrange for others to dispose of certain hazardous wastes may be less likely to be deemed liable if the eventual contamination was not foreseeable at the time of the arrangement.

With respect to the apportionment issue, *BNSF* reaffirmed courts' discretion in apportioning liability in spill cases. The Supreme Court noted that while the defendant still bears the burden of proving that costs should be apportioned to the responsible parties (rather than each party being potentially responsible for the entire costs of the clean-up under joint and several liability), the burden of proof is now lower for those defendants. Accordingly, this ruling may encourage PRPs to coordinate their liability defenses to apportion costs in advance of trial to avoid a joint and several liability determination. Courts are not required to apportion costs after *BNSF*, but they may be more inclined to do so after the decision. The second Supreme Court case of inter-

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The Lone Star Current

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Lloyd Gosselink Rochelle & Townsend, P.C. provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other political subdivisions.

The Lone Star Current reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

To receive an electronic version of *The Lone Star Current* via e-mail, please contact Jeanne Rials at (512) 322-5833 or jrials@lglawfirm.com. You can also access *The Lone Star Current* on the Firm's website at www.lglawfirm.com.

FIRM NEWS

Chris B. Pepper has rejoined the Firm's Air and Waste Practice Group. Chris represents clients with air quality and environmental permitting matters before the U.S. Environmental Protection Agency and the Texas Commission on Environmental Quality. He also advises clients with questions about regulatory programs administered by OSHA, the Comptroller's Office, and the Texas Department of Agriculture. Chris has a track record of working with clients with all aspects of the permitting process, including the Application and Public Notice Phases, Technical Review Process, Public Meetings, Commissioners' Agendas, and SOAH hearings. His technical background and practical experience allow him to bring a uniquely broad-based perspective to client matters, which have included air quality issues at cement kilns, feed mills, steel mills, tank farms, concrete batch plants, biodiesel plants, fertilizer warehouses, automobile shredders, sand and gravel facilities, and limestone quarries. Chris formerly worked as a Staff Attorney in the Air and Water Quality Sections of the Offices of Legal Services at the TCEQ and as a Senior Research Associate with the Institute of Environmental and Human Health in Lubbock, Texas, where he was a member of the Vector-borne Zoonoses Laboratory. Chris is also licensed to practice before the United States Patent and Trademark Office. Chris received his Doctor of Jurisprudence and M.S. in Environmental Toxicology from Texas Tech University, and his Bachelor of Arts from Texas A&M University. Chris grew up in Blanco, Texas and currently lives in Lakeway with his wife and two sons.

Congratulations to our repeat *Texas Rising Stars!* **Brad B. Castleberry** and **Jason T. Hill** were once again selected to Texas Super Lawyers, Rising Stars Edition, 2011 by Thomson Reuters. The list was published in *Texas Monthly*, released on March 17, 2011.

Brian L. Sledge was elected to the Texas Water Conservation Association's Board of Directors at the TWCA Annual Convention, March 1-4, 2011.

Martin C. Rochelle, Chair of the Firm's Water Practice Group, has been appointed Chair of the Texas Water Conservation Association's 2011-2012 Water Laws Committee. The Water Laws Committee serves the Association by keeping the TWCA members apprised of developments in water laws and policies and in managing TWCA's involvement in water-related litigation.

Congratulations to **Jason T. Hill** for being awarded the Texas Water Conservation Association President's Award at the TWCA Annual Convention in March. The award is given to only one Association member annually for outstanding dedication, contributions, and service to the Association.

Lloyd Gosselink is pleased to announce that **Cathleen Slack**, who heads the Firm's Real Estate and Corporate Practice Groups, is Board Certified in Commercial Real Estate by the Texas Board of Legal Specialization.

Paul Gosselink's Solid Waste Update is the lead article in the most recent edition of *Texas Environmental Law Journal* this issue. Paul analyzes the EPA's recently revised Definition of Solid Waste Rule, discusses the changing Superfund case law on arranger liability, and looks at the impacts of the evolving case law on municipal solid waste flow control. A condensed version of Paul's article headlines this issue of *The Lone Star Current*. The full-length article can be found at *Texas Environmental Law Journal* Vol.40, page 1, 2010.

(In the News continued on page 4)

The Lone Star Current Interview

Rep. Wayne Smith, Chair

House Committee on Environmental Regulation

Wayne Smith was elected to House District 128 in 2002. This Session Rep. Smith is serving as the Chairman of the House Environmental Regulation Committee and as a member of the County Affairs Committee. The Environmental Regulation Committee has jurisdiction over all matters pertaining to air, land, and water pollution, including the environmental regulation of industrial development; the regulation of waste disposal; environmental matters that are regulated by the Department of State Health Services or the Texas Commission on Environmental Quality; oversight of the Texas Commission on Environmental Quality as it relates to environmental regulation; and the following state agencies: the Texas Low-Level Radioactive Waste Disposal Compact Commission and the board of the Texas Environmental Education Partnership Fund. Rep. Smith is also a speaker appointee to the Environmental Permitting Review Board, Environmental and Natural Resource Committee of the National Conference of State Legislatures, Texas Environmental Education Partnership Fund, and the Energy Council.

Prior to his election, Rep. Smith was president of Wayne Smith and Associates, Inc., Consulting Engineers. Rep. Smith, a Licensed Professional Engineer and also a Registered Public Land Surveyor, remains active in professional activities. He was Construction Chairman of the Board of Directiors of the Harris Country - Houston Sports Authority and Director of Gulf Coast Waste Disposal Authority and Coastal Water Authority before becoming an elected representative. Rep. Smith also served the U.S. Army in the Republic of Vietnam. Rep. Smith and his wife, Brenda, live in Baytown. He has two children and three grandchildren.

The Lone Star Current recently had the opportunity to interview Chairman Smith, who graciously responded to several questions. We appreciate his willingness to share his unique perspective with our readers.

LSC: What do you think is the most important aspect of your position as Chair of the House Committee on Environmental Regulation?

Smith: The sunset legislation of The Texas Commission on Environmental Quality ("TCEQ") will be heard and considered in the House Committee on Environmental Regulation. The organization of State agencies are periodically reviewed for their effectiveness and subsequent continuation as a State agency. When TCEQ went through sunset in 1999 it was authorized to continue for 12 years.

LSC: What has been your biggest surprise or revelation since becoming Chair of the Committee?

Smith: Normally, the sunset legislation is authored and carried by a legislative member sitting on the Sunset Commission, which is a group composed of legislators and members of the public. The Sunset Commission meets during the interim between sessions to analyze and evaluate the effectiveness of the agency under review. This session, I will be carrying the sunset legislation of TCEQ instead of a Sunset Commission member doing that.

LSC: What do you view as the biggest challenges facing the Legislature over the next five years?

Smith: The budget process will be particularly difficult for the foreseeable future. Texas' population growth has created exceptional pressure on education, health services, and infrastructure.

LSC: What life experiences do you think have influenced your actions as a House member and committee chair?

Smith: Experience as a consulting engineer designing public infrastructure including water, waste water, roads and drainage. Rough-necking in the oil patch when I was young taught me hard work. The U.S. Army and my service time in Vietnam taught me our country has honest and dependable people in our society regardless of their cultural backgrounds. My grandparents and father taught me that without honesty and integrity, one has no character.

LSC: Tell us something that most people would be surprised to know about you?

Smith: I love to scuba dive and, sometimes, successfully grow a garden.

LSC: What was the last great book you read or movie you saw, and why did you like it?

Smith: As for books, it would be the book by Congressman Sam Johnson, "Captive Warriors: A Vietnam POW's Story," given to me by him. How many of us have the courage and character to endure what he and others experienced? As for movies, I like any movie with Clint Eastwood!

LSC: Finally, considering the fact that Texas has a citizen legislature, how has your career as an engineer and engineering consultant assisted you during your time in the Texas House?

Smith: Making decisions that impact the citizens you serve and weighing the emotional and financial cost to the public.

MUNICIPAL CORNER

Metropolitan transit authorities may charge withdrawn municipalities for special transit services provided to disabled residents. The Attorney General was asked whether a metropolitan transit authority ("MTA") could charge a municipality for providing disabled residents transportation services, even if the municipality had previously voted to withdraw from the MTA. The City of Westlake Hills had voted to withdraw from Capital Metropolitan Transit Authority in 1988, and in 1991 the Texas Legislature enacted § 451.610 of the Texas Transportation Code, which required MTAs to continue providing transit services to disabled residents of a withdrawn city. Texas Transportation Code § 451.616 authorized the payment for such service by allowing the Texas Comptroller to deduct these costs from the sales and use taxes collected from the withdrawn municipality. The A.G. opined that these statutory provisions were not retroactive and thus did not violate constitutional provisions, and therefore Capital Metropolitan Transit Authority was permitted to charge the City of Westlake Hills for transportation services provided to the City's disabled residents. Tex. Att'y Gen. Op. No. GA-0833 (2011).

Local governmental bodies subject to the Public Funds Investment Act may invest in money market and other demand accounts. The Attorney General was asked whether local governmental bodies are allowed to invest their funds in money market and other demand accounts under the Texas Public Funds Investment Act (the "Act"). The Act (Chapter 2256 of the Texas Government Code) allows local governmental entities to invest funds according to specific guidelines. A particular type of investment permitted under the Act is "other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States." The A.G. determined that this statutory provision allowed a local governmental entity to invest in money market and other demand accounts, but cautioned that when such investments exceeded the maximum amount insured by federal law, these investments would be governed by the Public Funds Collateral Act, Chapter 2257 of the Texas Government Code. Tex. Att'y Gen. Op. No. GA-0834 (2011).

Qualifications to be considered an official newspaper of a municipality for the purposes of posting notices. The Attorney General was asked by the City of Ingleside whether its designated newspaper complied with Texas Government Code § 2051.011 (a)(3) requirements that a newspaper in which notice is published have a second-class postal permit in the county where published. The City was concerned that the City was located in San Patricio County but the designated newspaper's postal permit was in Aransas County. The A.G. determined that because the newspaper was published in Aransas County, such newspaper complied with the requirements of § 2051.011(a)(3) and thus was properly qualified as the designated newspaper of the City of Ingleside. Tex. Att'y Gen. Op. No. GA-0838 (2011).

Municipal police officers may not use laser vehicle speed control devises that capture the speed of a vehicle while also capturing a photograph of the vehicle or the vehicle's license plate. The Attorney General was asked to clarify whether a municipal police officer could use a laser speed control device that captured the vehicle's speed and other evidence, such as a photograph of the license plate, before the traffic stop. Section 542.2035(a) of the Texas Transportation Code prohibits cities from enforcing posted speed limits with "automated traffic devices." The statute defines these devices as "a photographic device, radar device, laser device, or other electrical or mechanical device designed to record the speed of a motor vehicle and obtain one or more photographs or other recorded images of: (1) the vehicle; (2) the license plate attached to the vehicle; or (3) the operator of the vehicle." The A.G. reasoned that although the word "automated" could be construed to mean that the device is without human control, the statute does not limit the devices to that specific definition. Thus, the Texas Transportation Code does not permit the use of any radar device that records the speed of a motor vehicle and obtains one or more photographs or other recorded images of the vehicle, its license plate or its operator, even if such a device is operated by a municipal police officer. Tex. Att'y Gen. Op. No. GA-0846 (2011).

Municipal Corner is prepared by Stefanie Albright. Stefanie is an Associate in the Firm's Water and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Stefanie at (512) 322-5814 or salbright@lglawfirm.com.

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Brian L. Sledge will be presenting a "Legislative Update" at the TxSWANA Conference on April 20 in Irving.

Kristen O. Fancher will discuss "Water Utility Regulation" at the HalfMoon Texas Water Laws and Regulations Seminar on May 25 in San Antonio.

Sheila Gladstone will be presenting "Social Media & Legal Ethics Update" at the Texas City Attorneys' Association Conference on June 8 at South Padre Island.

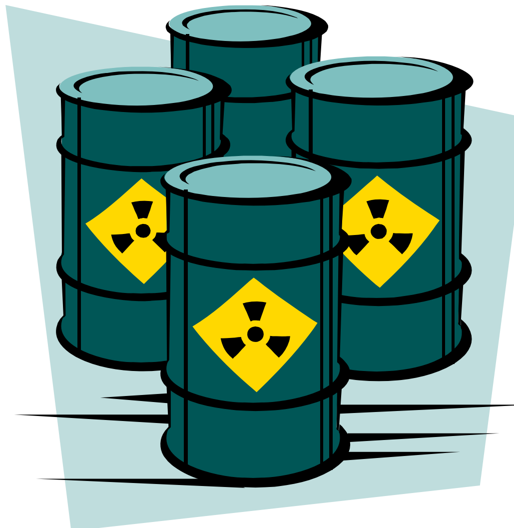
Sheila Gladstone will be discussing "Independent Contractors" at the Texas Statewide Telephone Cooperative on June 9 at South Padre Island.

David J. Klein will present "New Challenges in Obtaining & Decertifying Water/Wastewater CCNs" at the TPWA Annual Conference on June 17 in McAllen.

Mike A. Gershon will discuss "Due Diligence in Securing Water Supply and Utility Service for Land Development" at the Advanced Real Estate Law Course on July 9 in San Antonio.

(Game Changers continued from page 1)

est affects industry's relationships with public waste management entities and involves the so-called "dormant" commerce clause. In *United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Management Authority*, ("*Oneida*"), private haulers of solid wastes challenged public flow control laws that required all solid waste to be channeled to the public Solid Waste Management Authority's facilities. The public facilities charged haulers tipping fees that, the haulers argued, substantially increased their costs and limited their access to a viable and economical interstate market for waste disposal. Although the Second Circuit of Appeals struck down the public flow control law, the Supreme Court reversed the appeals court, reasoning that ordinances that benefit a public facility but treat all private companies exactly the same do not offend the Commerce Clause. The Court's distinction pointed to the unique responsibilities of the public entity to protect the "health, safety, and welfare of its citizens." Accordingly, the haulers failed in their attempt to strike down a law that imposed a limited market for solid waste and resulted in higher operations costs.



The implications of *Oneida* are clearly significant, but for several reasons are not completely known. One is that the "public-private" distinction is not perfectly clear. For example, if a public authority owns a facility but a private entity operates it, the *Oneida* reasoning may not apply. Further, the Court's decision may serve to deter private entities from investing in the construction of new facilities as local flow control ordinances could require all solid waste to be routed to the locality's own public facility. Solid waste businesses will undoubtedly be very interested in observing how the law develops post-*Oneida* for purposes of their long-term planning and investments.

Perhaps the most significant "game changer" is the EPA's amended Definition of Solid Waste ("DSW") Rule to exclude hazardous wastes recycled by reclamation. While many of the particulars of the 2008 rule are detailed and complex, the potential economic benefit for the solid waste industry is fairly straightforward. The new DSW Rule amounts to significant deregulation, as certain hazardous wastes now qualify for an exclusion to the EPA's definition of "solid waste." What this means for industry is that the nearly 5,600 facilities that generate hazardous secondary materials previously regulated under the Resource Conservation and Recovery Act of 1976 ("RCRA") will no longer be subject to many of the regulations governing qualifying "recycled by reclamation" hazardous wastes. As a result, this should eliminate significant compliance costs formerly assumed by hazardous waste facilities, which include reporting and recordkeeping, transportation, and waste manifestation requirements.

Although the EPA issued the final rule in 2008, it has been held up in the courts while the D.C. Circuit Court of Appeals has considered a petition from the Sierra Club in opposition to the rule. While the Sierra Club and its allies usually favor increased recycling efforts, they have opposed the new DSW Rule, arguing that the benefits of the hazardous waste exclusions are negligible, both economically and environmentally, when compared to potential adverse effects on human and environmental health. By contrast, those favoring the DSW Rule (including industry) point to the economic and environmental benefits. The DSW Rule *allows the recycling* of certain hazardous wastes, whereas in the past, the EPA *required their disposal*. Further, industry has pointed out that the requisite thresholds to meet the exclusion are sufficiently stringent, meaning that the EPA does not lose its entire jurisdiction over hazardous wastes.

In September 2010, the Sierra Club entered into a settlement agreement with the EPA in the D.C. Circuit Court that requires the EPA to issue a new Notice of Proposed Rulemaking on or before June 30, 2011, with a final action to be taken on the proposed rulemaking by December 31, 2012. By the terms of the settlement agreement, the forthcoming EPA rulemaking will address the concerns raised by the Sierra Club in its opposition to the new DSW Rule, including allegations that the rule did not provide adequate protections against so-called "sham recyclers," especially since they seemed to be disproportionately located near low-income and minority communities. On March 30, 2011, the EPA sent its revised version of the DSW Rule to the White House for review.

The litigation over the three "game changers" above will impact solid waste practice in the near and distant future. Whether the issue is Superfund cleanup liability, public ordinances restricting disposal options, or the processing of certain hazardous solid wastes, industry should remain attentive to these developments in the courts and administrative agencies.

Paul Gosselink is the head of the Air & Waste Practice Group of the Firm. His presentation at the Environmental Superconference has been reprinted as the lead article in the recent edition of the Texas Environmental Law Journal*, and that article has been presented here in a summary form. If you would like a complete copy of the article, including an extensive analysis of the Definition of Solid Waste (DSW) Rule, or if you would like additional information, you may contact Paul at 512-322-5806 or pgosselink@lglawfirm.com.*

New ADA Design Standards Go Into Effect - Become Mandatory in One Year

by Sheila Gladstone

On March 15, 2011, the U.S. Department of Justice ("DOJ") revised standards for the Americans With Disabilities Act ("ADA") took effect. The standards (known as the "2010 Standards" because they were formally adopted by the U.S. Attorney General in July 2010) include new Standards for Accessible Design ("Design Standards") that apply broadly to local governments and places of public accommodation (including most private businesses and offices). While the new Design Standards are now in effect, they do not become mandatory until March 15, 2012.

The revisions represent the first major ADA accessibility rule changes since 1991. For the first time, the Design Standards include accessibility requirements for certain entertainment and recreation facilities such as public parks, swimming pools, and golf courses. Further, the rules include expanded provisions relating to non-discrimination. The non-discrimination provisions address the use of service animals, wheelchair accessibility, electric/power-based mobility vehicles, and disabled seating at sports/performance arenas.

The new Design Standards are highly technical and written for an audience of architects, engineers, and other design professionals, but the DOJ has provided guidance and interpretation. As before, renovation or new construction must comply with the ADA's Design Standards (either the 1991 or new standards if the construction is conducted before March 15, 2012, and the new standards thereafter).

The applicability of "safe harbors" is also affected by the new rule. The Department of Justice has issued an "element by element" safe harbor document where some of the new 2010 requirements are not mandatory if the 1991 standards are met, but if a business alters an area covered by a 1991 safe harbor, then the 2010 standards will apply *without* the protections of the safe harbor. These questions are often very fact-specific and require precise details about the nature of the particular modification. Accordingly, local governments and businesses should use this one-year transition period to familiarize themselves with new requirements by seeking counsel and reviewing the ADA's recent "Primer for Small Business" (http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm).

It is important to remember that the ADA is a federal civil rights statute and its provisions are strictly and aggressively enforced. Accessibility issues apply to everything from ramps to the height of light switches to accommodation of service animals. Businesses and local governments are wise to seek consultation with respect to the specific issue at hand to determine whether their policies or building plans should be altered to comply with the changes to the ADA.

Sheila Gladstone heads the Firm's Employment Law Practice Group. Sheila is available to help with employee training sessions and any other employment-related matter. For additional information, you may contact Sheila at (512) 322-5863 or sgladstone@lglawfirm.com.

FTC Red Flags Rules Go Into Effect

by Stefanie Albright

In the October 2008 edition of *The Lone Star Current*, we reported on then-new Federal Trade Commission ("FTC") regulations requiring all utilities to adopt identity theft prevention programs ("ITPPs") if these utilities collect personal identification information that could be used in identity theft. Since the original passage of these "Red Flags Rules," the FTC has delayed their implementation several times due to confusion over certain definitions in the rules. In December 2010, the Red Flags Clarification Act was signed into law to resolve this confusion. Most notably, the Clarification Act limited the definition of who is considered a "creditor." However, there is still some ambiguity in the modified definition because the FTC has not yet promulgated its rules under the new act. As a result, all utilities are encouraged to continue to implement their ITPPs. With the passage of the Clarification Act, the Red Flags Rules went into effect on December 31, 2010.

Stefanie Albright is an Associate in the Firm's Water and Districts Practice Groups. If you would like additional information or have questions, please contact Stefanie at (512) 322-5814 or salbright@lglawfirm.com.

Eminent Domain Barred by Governmental Immunity: A Summary of *DART v. Oncor*

by Stefanie Albright

A new case has recently joined the developing body of law on governmental immunity. In *Dallas Area Rapid Transit v. Oncor Electric Delivery Company, LLC,* the Dallas Area Rapid Transit ("DART") and the Fort Worth Transportation Authority (the "Authority") challenged Oncor's ability to condemn an easement for a transmission line over DART and Authority rail lines. The Dallas Court of Appeals held that Oncor could not obtain the easement by condemnation because governmental immunity applies in eminent domain proceedings, and Oncor could not show a clear statutory waiver of this immunity.

In its appeal, Oncor first argued that governmental immunity did not apply to a condemnation proceeding, because such a suit is not one seeking money damages and is more analogous to a declaratory judgment proceeding (which is not barred by governmental immunity). The Court disagreed, stating that although immunity protects the governmental entities from money damages, case law does not support that *only* suits for money damages are barred. The Court determined that an eminent domain proceeding would "divest the state of property with compensation to be declared by a court" and would seek to alter government policy rather than enforce existing policy, and would thus be barred by immunity unless a separate statutory waiver exists.

Oncor urged that the doctrine of paramount importance would weigh in favor of its ability to condemn public property. As discussed most recently by the Texas Supreme Court (2008) in *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority,* the doctrine of paramount importance acknowledges the authority of one entity with condemnation authority to condemn the property of another entity with condemnation authority, and then weighs the two competing public uses to determine whether the condemnation would "practically destroy" the existing public purpose of the property; and, if so, whether the necessity is so great as to make the new enterprise of "paramount importance" to the public, which could not be practically accomplished in any other way. However, the court declined to apply this doctrine, stating that *Canyon Regional Water Authority* did not provide the proper precedential standard to rely upon because the parties in that case had not asserted governmental immunity.

After determining that governmental immunity could be asserted by DART and the Authority, the court next looked to whether Oncor could avail itself of any statutory waiver of immunity that would allow it to bring a condemnation suit against public entities. Oncor argued that it was authorized by Texas Utility Code § 181.004 to "enter on, condemn, and appropriate the land…or other property of any person or corporation," and that the use of the term "person" included both governmental entities and rail districts under the Texas Code Construction Act. The court determined, however, that even though a "person" under the Texas Code Construction Act is defined to include a "governmental entity," such a definition is not an explicit waiver of governmental immunity for the purposes of an eminent domain proceeding. The court held that because Oncor did not show that there was a "clear and unambiguous waiver of governmental immunity" in any statutes related to the ability of electric utilities to condemn property, governmental immunity thus precluded Oncor's ability to obtain the easement by eminent domain.

Under this holding, unless a condemning authority seeking to condemn publicly-held property can show a clear waiver of immunity for governmental entity condemnees in condemnation proceedings, the condemnation action would be precluded without even addressing the doctrine of paramount importance. A petition for review of this case was filed with the Texas Supreme Court on March 11, 2011.

Stefanie Albright is an Associate in the Firm's Water and Districts Practice Groups. If you would like additional information or have questions, please contact Stefanie at (512) 322-5814 or salbright@lglawfirm.com.

Ask Sheila:

Dear Sheila,

Our employment policies prohibit employees from carrying weapons onto company premises, including in their cars parked in the company parking lot. I heard there is a new law being proposed that would prohibit us from enforcing this policy, is this true?

Signed, *Gun-Shy*

Dear Gun-Shy,

Yes, there is a new law being proposed in the Texas Legislature that would prevent employers from enforcing policies that prohibit employees from storing firearms in their locked personal vehicles parked at work (S.B. 321). Note that the proposed law only covers Texas gun owners who *lawfully* possess and store *firearms* (and not any other type of weapon). So, while you will have to change your policy if the law passes, you will only need to take out the parking lot prohibition on firearms. Additionally, this law should, at the very least, help you and other employers avoid liability for gunfights in the parking lot.

Our sources tell us this proposed legislation is very likely to pass and become law, but we won't know for sure until mid-June at the latest. If the law passes, it will have an effective date of September 1, 2011, which gives you the summer to change your policy.

IN THE COURTS

American Electric Company, Inc. v. Connecticut, 131 S.Ct. 813, 178 L. Ed. 2d 530 (2010).

The United States Supreme Court is set to hear oral arguments on April 19 in the first global warming nuisance case to make it to the high court. On appeal from the Second Circuit Court of Appeals, this case revolves around claims by eight states, three nonprofit land trusts, and the City of New York that the defendants (six large power producers) contribute to global warming causing damages, such as loss of property, to the states. The holding of this case will affect several similar cases in other circuits and potentially open the door for many more global warming nuisance lawsuits.

E-L Enterprises, Inc. v. Milwaukee Metro. Sewerage Dist., 131 S.Ct. 798, 178 L. Ed. 2d 531 (2010).

The United States Supreme Court declined to review a decision of the Wisconsin Supreme Court holding that indirectly removing groundwater from underneath a property owner's land does not constitute a "taking" of private property. A Wisconsin sewer district built a series of underground wastewater holding tunnels as a means of preventing water pollution in the 1980s, and the construction resulted in a significant reduction of the groundwater under a landowner's property. This caused the landowner's building to settle many years later, which the landowner claimed caused foundation cracks and other support problems with the building. The lower court upheld the trial court's decision and awarded damages to the landowner, but the decision was reversed by the Wisconsin Supreme Court, which held that the sewer district's action was a "mere consequential damage" and did not constitute a taking of private property.

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S.Ct. 2592 (2010).

The City of Destin and Walton County filed permit applications with the Florida Department of Environmental Protection to restore 6.9 miles of beach eroded by several hurricanes. A coalition of coastal property owners contested the applications and filed suit in Florida state court after the permit applications were granted by the agency. The suit challenged a Florida statute that permanently fixes a historic high-tide line after the state has deposited sand to restore the eroded beaches. The plaintiffs claimed that the permanent high-tide line took away their right to gain new dry land in situations where the beach gradually grows (referred to as "accretions") and that the statute took away their right to have direct access to the ocean. The Florida Supreme Court held that no taking occurred because the state owned the area of the beach that had been restored, or added, and that the right to own property by accretion was a future contingent interest and not a vested property right. The coalition of property owners appealed the decision to the Supreme Court of the United States claiming that the Florida Supreme Court's decision resulted in a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This case is unique because it was the first time the issue of whether a state court committed a "judicial taking" had been before the Supreme Court of the United States. In a unanimous 8-0 decision, the Supreme Court upheld the Florida court's decision that no taking occurred under Florida law.

National Environmental Development Assn's Clean Air Project v. EPA, No. 11-1073 (D.C. Cir., Mar 10, 2011).

The Clean Air Project is the latest of several lawsuits filed against the EPA in the United States Court of Appeals for the D.C. Circuit over new primary national ambient air quality standards for sulfur dioxide. In June, 2010, EPA raised the primary air quality standard for sulfur dioxide to 0.075 from 0.03 parts per million per hour. EPA denied multiple petitions for reconsideration in January. The current challenges to the rule generally claim that EPA had not provided adequate notice that modeling, rather than actual monitoring, was to be used to determine compliance with the new standard. EPA is considering revising the secondary standard in a separate rulemaking.

National Pork Producers Council v. United States Environmental Protection Agency, 2011 WL 871736, (5th Cir. March 15, 2011).

The U.S. Court of Appeals for the 5th Circuit recently struck down the Environmental Protection Agency's (EPA's) rules requiring Concentrated Animal Feeding Operations (CAFOs) to apply for National Pollutant Discharge Elimination System (NPDES) permits. The case involved a challenge to rules adopted by EPA in 2008 that require CAFOs to obtain NPDES permits when they "propose to discharge," even if the CAFOs do not actually discharge into navigable waters of the U.S. The 5th Circuit Court held that these 2008 rules requiring CAFOs to apply for a NPDES permit go beyond EPA's rulemaking authority because there must be an actual discharge into navigable waters to trigger Clean Water Act and corresponding NPDES requirements. The Court opined that the Clean Water Act allows EPA to require CAFOs that are actually discharging into navigable waters to obtain a NPDES permit, but that EPA's regulation of CAFOs that are not discharging into navigable waters exceeds EPA's statutory authority under the Clean Water Act. The Court also struck down the provision in the 2008 rules that imposed penalties for a CAFO's failure to obtain a NPDES permit and for unpermitted discharges, reasoning that these types of penalties exceeded the liability authority set forth in the Clean Water Act.

Del-Ray Battery Co. v. Douglas Battery Co., -- F.3d. --, 10-40515, 2011 WL 855800 (5th Cir. Mar. 14, 2011).

The U.S. Court of Appeals for the Fifth Circuit held that the Texas Superfund law did not adopt an exemption from the federal Super-

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fund law (the Comprehensive Environmental Response, Compensation, and Liability Act, "CERCLA") for certain recycling facilities. In this case, two battery recyclers were being held liable for contribution to a recycling facility that was shut down by the EPA and classified as a Superfund site. The court found that the Texas Superfund law had not adopted the federal exemption, affirming the lower court's ruling that the Superfund Recycling Equity Act (the federal exemption) does not apply to claims brought under state law.

Natural Resources Defense Council, Inc. v. County of Los Angeles, No. 10-56017, 2011 WL 815099 (9th Cir. Mar. 10, 2011).

The U.S. Court of Appeals for the Ninth Circuit held that the Los Angeles County flood control district that discharged stormwater from municipal storm sewer systems contained pollutants at levels above the National Pollutant Discharge Elimination System ("NPDES") permit limits into two rivers in California. The defendants, Los Angeles County and the flood control district, argued that the Clean Water Act does not apply to stormwater permits in the same way that it applies to traditional NPDES permits. The Court stated that "[d]efendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring [MS4 stormwater] operators under the NPDES-permitting system."

State, et al. v. Public Utility Commission of Texas, No. 08-0421 (Tex. Mar. 18, 2011).

The Texas Supreme Court affirmed in part and reversed in part the Public Utility Commission's 2004 decision on various issues litigated as part of CenterPoint Energy Houston Electric's true-up proceeding after Reliant Energy, Inc. separated into three entities as a result of deregulation. The Commission originally determined that CenterPoint was entitled to recover $2.3 billion in stranded costs and other non-stranded costs. Among other issues, the court agreed with Intervenors (including city groups) that the Commission should not have used the extra-statutory method it employed in calculating the market value of CenterPoint's generation assets, finding that the "sale of assets" method should have been used. However, the court found that the Commission did not err in refusing to reduce stranded costs by the portion of excess mitigation credits of $358 million paid to Reliant Energy Retail Services (the retail electric provider formed when the integrated utility separated into three entities). Further, deferring to the Commission, the court upheld the Commission's decision to allow CenterPoint to include construction work in progress without meeting the usual statutory ratemaking requirements, which increased stranded costs by $110 million. Finally, the court reversed the Commission's order denying CenterPoint's recovery of capacity auction true-up. As a result, that $440 million plus interest may be recovered through the remand proceeding.

Severance v. Patterson, No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010), reh'g granted (Mar. 11, 2011).

The Texas Supreme Court granting rehearing in a case decided last November that restricted public access to some Texas beaches. Normally, under the Texas Open Beaches Act, the public has an easement to access beaches from the vegetation line to the mean low-tide line. The ownership of beach property is divided on the mean high-tide line, with the private property owner owning everything on the land side of that line and the state owning everything on the ocean side. The Texas Supreme Court's decision in November was important because it ruled that when a sudden change in the beach lines occurs, the original public easement that was established according to the old beach lines does not carry over to the new lines. In other words, when a hurricane suddenly moves the beach line inland, the public will no longer have an easement to access the new beach because the easement has not been established by prior access or other means. Arguments for the rehearing of this case are set for April 19, 2011.

Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water, No. 08-0497, 2011 WL 836827 (Tex. Mar. 11, 2011).

The Texas Supreme Court recently decided a case involving the Railroad Commission of Texas' interpretation of "public interest," an undefined term used in § 27.051(b)(1) of the Texas Water Code. The issue in the case was whether the Railroad Commission is required to consider possible traffic problems from construction vehicles as part of the "public interest" when making decisions on oil and gas waste injection wells. The court upheld the Railroad Commission's decision to only consider factors explicitly listed in the statute, reasoning that an agency decision should be given deference as long as it is reasonable and does not contradict the plain meaning of the statute.

City of San Antonio v. De Miguel, 311 S.W.3d 22 (Tex. App.—San Antonio 2010, no pet.).

The San Antonio Court of Appeals dismissed a case brought against the City of San Antonio alleging that the City negligently caused the flooding of De Miguel's property, and that the City's actions resulted in an unconstitutional taking of their property. The property is located at the low point of several other streets' storm water runoff drains, and De Miguel claimed the construction of the drains caused the accumulation of water on the property during heavy rainfall. De Miguel originally sued and obtained judgment against the City in 1989 for damage to their property caused by accumulation of water on the property. De Miguel requested another judgment against the City for damages based on the City's failure to correct the problem and provide adequate funding to build new infrastructure after the landowner originally obtained judgment in 1989. The court ruled against the landowner, reasoning that the water accumulation on De Miguel's property was not a nuisance rising to the level of a constitutional taking, and therefore did not result in a waiver of governmental immunity

United States v. Range Production Co., No. 3:11-CV-116F (N.D. Tex., Jan. 18, 2011).

On January 18, 2011, the Environmental Protection Agency ("EPA") sued a Texas natural gas drilling company in federal court for allegedly contaminating nearby water wells in violation of the Safe Water Drinking Act. Ordinarily, this type of enforcement is carried out by the Railroad Commission of Texas, but the EPA

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became involved and claimed that the Railroad Commission failed to adequately protect the health of persons. According to the EPA complaint, Range Production Co. has refused to comply with previous emergency orders, and has refused to submit to EPA's requests for documentation and testing. EPA's complaint requests both injunctive relief and civil penalties of up to $16,500 for each day of each violation of the Safe Drinking Water Act.

Gulf Coast Coalition of Cities v. Railroad Commission of Texas, Cause No. D-1-GN-10-001813.

After the Railroad Commission issued its final order in GUD No. 9902 on February 23, 2010, granting a rate increase to CenterPoint Energy Resources, Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas for its Houston division, the Gulf Coast Coalition of Cities ("GCCC") appealed the order to the Travis County District Court, complaining of several reversible errors. GCCC alleges that the Commission made erroneous findings relating to the removal of storage gas from rate base. Additionally, GCCC alleges the Commission erred in adopting the Examiners' recommendation relating to the factoring of accounts receivable by failing to reduce CenterPoint's base rate revenue to take into account the impact of the new after-hours service charges. Finally, GCCC alleges that the Commission also erred in allowing for municipal franchise fees to be collected on a jurisdiction-specific basis, rather than a division-wide basis. Parties filed their initial briefs on February 25, 2011, and the hearing is scheduled for June 29, 2011.

Cities of Allen, et. al. v. Railroad Commission of Texas, No. 10-0375.

On June 28, 2010, Cities of Allen, *et al.*, CenterPoint Energy Resources Corporation, Texas Gas Service Company, and Atmos Energy Corporation filed petitions for review with the Supreme Court of Texas appealing the Third Court of Appeal's decision regarding utilities' GRIP filings. All parties seek to correct errors in the decision made by the court of appeals regarding the Commission's interpretation of the statutory provisions involving the Gas Reliability Infrastructure Program ("GRIP") and related rules promulgated by the Commission. Both Cities and the utility companies assert that the court of appeals erred in holding that the Commission lacks jurisdiction over appeals of municipalities' denials of utilities' GRIP filings. However, Cities also maintain that municipalities have a right to meaningful participation in an adjudicatory hearing when utilities appeal the denial of GRIP filings. Cities seek a judgment declaring the GRIP rule promulgated by the Commission to be void to the extent that it prohibits an opportunity for a meaningful hearing on contested appeals from municipal GRIP rate ordinances. The parties have filed their briefs on the merits and are awaiting word on whether their petitions will be granted.

In the Courts is prepared by attorneys from the Firm's different practice areas. If you have any questions or need additional information, please contact our Editor at editor@lglawfirm.com.

AGENCY HIGHLIGHTS

Environmental Protection Agency

EPA Issues Extended Deadline for Greenhouse Gas Emissions Reports. Required greenhouse gas emissions reports for 2010 will not be due until September 30, according to a final rule published by the EPA on March 18. EPA extended the deadline to allow for accurate reporting from the roughly 10,000 facilities that are covered by the requirement, but also to permit time to get its electronic data submission system up and running. The agency wants to allow sufficient time for the industry to test and provide comments on the electronic submission system before it actually becomes operational. The previous deadline for these reports was March 31.

EPA Proposes New Emissions Limits for Power Plants for Mercury, Acid Gasses, and Sulfur Dioxide. On March 16, EPA proposed establishing emissions limits from new and existing coal-fired and oil-fired power plants. The proposal would establish National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") on mercury, toxic metals, and acid gases, and would revise the New Source Performance Standards ("NSPS") for sulfur dioxide, nitrogen oxides, and particulate matter under the Clean Air Act. Comments will be accepted on the proposed rules until May 15, 2011.

EPA Defers Tailoring Rule for Biomass and Issues Guidance Regarding Use of Biomass as Best Available Control Technology for Carbon Dioxide Emissions. EPA published a proposed rule on March 21 that would defer for three years greenhouse gas permitting requirements for facilities that use biomass for fuel. EPA plans to use the three years to determine whether to treat carbon dioxide emissions from biomass differently than carbon dioxide emissions from anthropogenic sources. Considerable debate has centered around whether burning of biomass is "carbon-neutral" and should be treated differently than other carbon emissions. Comments on the proposed rule will be open until May 5. In a related action, EPA issued guidance on March 14 that will allow sources subject to greenhouse gas permitting requirements under

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the "Tailoring Rule" to use biomass as fuel in order to meet best available control technology requirements for carbon dioxide emissions.

EPA Plans Reconsideration of Recently Published Boiler and Incinerator Rules. EPA published final boiler and incinerator rules on March 21, establishing National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") for mercury, particulate matter, and nitrogen oxides. The rules also revised New Source Performance Standards ("NSPS") for sewage sludge and solid waste incinerators. EPA was due to issue the rules in February, sought an extension to better consider comments it received from industry, and was denied the extension. As a result, EPA has published the final rules, but concurrently announced that it plans to reconsider portions of the rules.

EPA Final Rule Will Allow Burning of Scrap Tires for Fuel. The EPA finalized a rule on February 23 that characterized the use of scrap tires that are burned for energy as fuel, subject to emission rules for boilers, rather than as solid waste, subject to more stringent rules for incinerators. According to the new rule, scrap tires that are managed under a tire collection program are not discarded, and are therefore not solid waste, since they are handled as a valuable commodity.

EPA Working to Revise Hazardous Solid Waste Definition. EPA is proposing additional changes to the definition of solid waste to better facilitate recycling. Under a court-approved settlement agreement, the agency agreed to propose a rule by June 30, 2011, and to issue a final rule by December 31, 2012. The rule has not been released, but is expected to focus on the exclusion for "hazardous secondary materials" from regulation as hazardous waste if the materials are reclaimed and recycled.

Texas Commission on Environmental Quality

Proposed Rulemaking to Allow District Cost Sharing Participation. The TCEQ has proposed a rulemaking as a follow-up to a petition for rulemaking filed by a group of political subdivisions asking the Commission to consider an amendment to § 293.44 of its rules to facilitate regionalization and cooperative planning among water districts and other local government entities. This would be accomplished by providing a mechanism for allowing the costs incurred by a district to construct or acquire capacity in regional water, wastewater, and/or drainage facilities to be bonded or reimbursed, so long as that cost does not exceed the cost the district would have incurred to construct the facilities required to provide the same service on its own. The proposed amendment will allow a district to fund more than the district's pro rata share of the costs of regional water, wastewater, and/or drainage facilities, as long as it is shown to be more cost-effective than the district pursuing such facilities on its own. A public hearing was held on the proposed rulemaking on March 8, 2011. This rulemaking has a proposed adoption date of June 2011.

Rulemaking to Implement Federal Lead and Copper Regulation Pending Adoption. A TCEQ rulemaking to implement the EPA's Lead and Copper Short Term Regulatory Revisions and Clarification ("LCSTR") rule providing for enhanced public education on the effects of lead and copper is currently pending adoption. This rulemaking also makes minor changes to the current lead and copper rules for public water systems found in 30 TAC Chapter 290 to ensure consistency with EPA rules for enhanced surface water treatment and disinfectant byproducts regulations. The rulemaking will require public water systems that exceed the lead action level to provide expanded public notice, and will allow the smallest public water systems the option of reduced sampling, consistent with federal requirements. Although a previous rule adopted by the TCEQ in 2007 incorporated the major requirements of these federal regulations, the EPA has since identified elements of the federal rules inadvertently omitted from the 2007 rulemaking. This rulemaking proposes to correct those omissions and provide for greater readability and consistency within Chapter 290. A public hearing was held on the rulemaking on January 6, 2011, and the rulemaking is scheduled to be adopted on April 20, 2011.

Commission Approves Environmental Flow Standards for the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay. On April 1, 2011, the TCEQ approved for adoption a rule to implement environmental flow standards legislation from the 80th Regular Session in 2007 (HB 3 and SB 3). The scope of the rule is to implement the directive in §11.1471 of the Texas Water Code for two river basin and bay systems: (1) the Sabine and Neches Rivers and Sabine Lake Bay, and (2) the Trinity and San Jacinto Rivers and Galveston Bay. The rule adopts environmental flow standards and procedures for implementing an adjustment of conditions if included in permits and amended water rights for those river and bay systems. The rule also implements changes to §§5.506 and 11.148, Texas Water Code, by amending 30 Tex. Admin. Code §35.101 to add emergency authority to temporarily make water that has been set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions. The rule is scheduled to be adopted on April 20, 2011.

Revisions Adopted to Clarify Safety Recommendations to the Public in the Event of a Wastewater Spill. The TCEQ has adopted revisions to Tex. Admin. Code §§319.302 and 319.303 to replace the notification form with minimum required spill notice elements and clarify recommended safety actions for the general public. The Field Operations Support and Water Quality Divisions coordinated on revisions to the sections. The amendments clarify instructions to the general public concerning initiation of safety precautions in the event of a wastewater spill. Additionally, the amendments remove the existing spill notification form from the rule and replace it with minimum reporting requirements for the regulated entity in the event of a wastewater spill. The revisions were adopted on March 9, 2011, and became effective on March 31, 2011.

New Rules Adopted to Continue Use of Pesticides Within the Highland Lakes and Edwards Aquifer Recharge, Contributing, and Transition Zones. The TCEQ adopted new subchapters within 30 TAC Chapters 213 and 311 authorizing the application of pesticides within the Highland Lakes and Edwards Aquifer re-

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charge, contributing, and transition zones. Currently, because the discharge of pesticides is not a point source, these chapters allow the application of pesticides. However, a recent decision from the Sixth Circuit Court of Appeals overturned the EPA's rule, which provided that National Pollutant Discharge Elimination System Permits ("NPDES") were not required for pesticide applications into, over, or near waters of the United States. As a result of this court decision, and because Texas is a delegated state, the discharge of pesticides must now be regulated through the Texas Pollutant Discharge Elimination System ("TPDES"). As of April 9, 2011, pesticide application is prohibited within the Highland Lakes and Edwards Aquifer recharge, contributing, and transition zones. However, the new subchapters allow the continued use of pesticides in the Highland Lakes and Edwards Aquifer recharge, contributing, and transition zones after April 9, 2011. This rulemaking was adopted on March 9, 2011, and became effective on March 31, 2011.

Public Utility Commission of Texas

Docket No. 38339 – *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*. The Commissioners discussed some of the major issues in this case at the Open Meetings on January 20, 2011, and February 3, 2011. The Commission largely adopted the Proposal for Decision ("PFD"), making a few adjustments to the recommended rate increase. Notably, the Commissioners voted to affirm the Administrative Law Judges' ("ALJs") decision with respect to the recovery of franchise fee payments in excess of the statutory formula. Importantly for cities, the Commissioners' reversal of their previous position on franchise fee payments allows utilities to recover in rates franchise fee payments to cities in excess of the statutorily-prescribed formula. The Commission's decision will result in an overall $2 million increase, amounting to about a 1% increase for residential customers.

Docket No. 38306 – *Texas-New Mexico Power Company's Request for Approval of Advance Metering System Deployment and AMS Surcharge*. In May 2010, TNMP filed an application for approval of a deployment plan for its proposed Advanced Metering System ("AMS") and a request for a surcharge to fund the plan. Although the case was originally scheduled to require participating cities and other parties to file their direct cases in September 2010 and go to hearing in October 2010, both cities and the PUC Staff pointed out critical problems with TNMP's filing. PUC Staff had issues with the lack of a cyber security audit of the computer systems to handle customers' metering data. Additionally, cities expressed concern over TNMP's proposal to recover certain costs through the AMS surcharge that should be recovered in base rates. Due in part to these issues, TNMP's proposed surcharge of $4.80 per month for residential customers was far in excess of other Texas utilities' advanced metering charges. In order to address these issues, the case has been delayed. The hearing on the merits is now scheduled for May 18-20.

Docket No. 38480 – *Application of Texas-New Mexico Power Company for Authority to Change Rates*. On August 26, 2010, Texas-New Mexico Power Company ("TNMP") filed its application and statement of intent to change its transmission and distribution rates. Initially, TNMP sought a $20.1 million rate increase, which would have increased revenue from the residential rate class by 29.79%. Following lengthy negotiations, the parties agreed to an increase of only $10.25 million. Under the settlement, the fixed monthly customer charge for residential customers will be $5.23 instead of $19.93 as originally proposed by TNMP. Cities were also able to obtain a more favorable rate design structure for residential rates, reducing the impact of the rate increase on those customers. Additionally, the settlement rejected the special rider mechanism proposed by TNMP to recover storm hardening costs, which the cities had strongly opposed. The Commission approved the settlement agreement on January 20, 2011.

Docket No. 38929 – *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*. On January 7, 2011, Oncor Electric Delivery Company, LLC ("Oncor") filed an application to increase rates by $353 million. The Parties have entered into settlement discussions and a hearing is scheduled to take place in early May, with a decision from the Commission expected in July 2011.

Project No. 37897 – *Proceeding Relating to Resource and Reserve Adequacy and Shortage Pricing*. On January 19, 2010, the Commission opened a rulemaking relating to resource and reserve adequacy and shortage pricing. The Commission has recently decided to expand the project to include a more comprehensive set of issues relating to reserve adequacy and reserve margins, as well as the effects these concepts have in extreme weather conditions. Specifically, the Commission plans to examine if the current scarcity pricing mechanism remains effective during periods of extreme cold when the resource owners are unable to get their units online. The project will also consider whether some reliability issues that have been delegated to ERCOT, such as responsive reserves, spinning and non-spinning resources, and Load Acting as a Resource, should be specifically addressed in a Commission rule instead of ERCOT protocols. Further, the Commission will investigate how ERCOT handled the forced outages in January and February, and whether additional responsive reserves should be required in the future. The Steering Committee of Cities Served by Oncor plans to monitor this project and provide comments at the appropriate time if warranted.

Project No. 38257 – *Workshop on Best Practices of Vegetation Management for Utilities*. As part of its ongoing research relating to best practices in vegetation management for utilities, the Commission hosted a workshop on March 10, 2011. The workshop included discussion of topics such as hazard/danger tree programs, measurement methods for assessing the effectiveness of vegetation management practices, public education campaigns, national standards, trimming criteria, and mandated minimum clearance requirements. During the workshop, utilities were invited to give feedback in response to the research being presented. The Commission's consultant will present his final report to the Commission in April.

Update on Competitive Renewable Energy Zone ("CREZ") CCN Dockets. The CREZ CCN dockets are still moving forward

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at an accelerated pace. All 36 applications have been filed and only a few projects are currently still pending. The last remaining application (the STEC/Garland McCamey C to Odessa project) was filed in March. With the exception of that last docket, the CREZ CCN projects should be finally approved in May 2011.

Update on PUC Sunset Proceedings. The Commission is facing Sunset Advisory Commission review this Legislative Session. On March 14, 2011, the House State Affairs Committee heard testimony from interested parties on H.B. 2134. As originally introduced, the bill largely tracked the recommendations handed down by the Sunset Advisory Commission in January. Among the recommendations adopted by the Advisory Commission were stipulations that no member of the PUC could work for ERCOT for at least two years after he or she had stepped down, and fines would quadruple (from a maximum of $25,000 per day to $100,000 per day) for any company found to have manipulated the electric market for its own gain.

Update on Rolling Blackouts. Texas' grid operator, the Electric Reliability Council of Texas ("ERCOT"), has faced increased scrutiny following a series of rolling blackouts across Texas in early February. The blackouts were caused after unseasonably cold weather caused increased demand at the same time that over 100 generation units went off-line after parts froze at generation plants. On February 15, legislators grilled the CEO of ERCOT, Trip Doggett. The blackouts came at a time when ERCOT was already facing inquiries due to its current review by the Sunset Advisory Commission of Texas. Just days after the blackouts, the Texas Coalition for Affordable Power released a report entitled "The Story of ERCOT: The Grid Operator, Power Market &Prices Under Texas Electric Deregulation." Copies of the report are available at http://tcaptx.com/downloads/THE-STORY-OF-ERCOT.pdf. The blackouts continue to be a topic of interest both at ERCOT and at the PUC. The PUC in particular has expressed interest in promulgating rules designed to prevent similar weather-related outages in the future.

Railroad Commission of Texas

GUD 10000 – *Statement of Intent to Change the Rate CGS and Rate PT Rates of Atmos Pipeline – Texas*. Atmos Pipeline – Texas ("APT") filed its rate case on September 17, 2010, requesting an increase of $38.9 million. ACSC participated in the hearing on the merits January 24-28, 2011. The Hearings Examiners issued their Proposal for Decision ("PFD") on March 17. The PFD accepts most of the Company's proposals, including rejection of ACSC's proposed refund of $6,448,994 related to interim Gas Reliability Infrastructure Program ("GRIP") adjustments collected by the Company since its last rate case. The PFD also rejected ACSC's recommended establishment of a competitive transportation class in order to fully recognize the significant impact these non-regulated customers have on the system. The PFD also adopts a modified Tariff Rider REV and awards the Company an 11.80% return on equity. A decision from the Commission is expected in late April.

GUD 10006 – *Appeal of CenterPoint Energy Resources Corp. d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas from the Actions of the Cities of Alvin, et al.* On August 11, 2010, CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint") filed an appeal of the decisions of several Texas cities denying CenterPoint's proposed cost of service adjustment ("COSA"). In the filing, CenterPoint requested a $4.7 million increase, or a monthly increase of $1.50 for each customer. However, the COSA tariff limits the amount of annual adjustment for each class of customers to 5%. On November 18, 2010, the Gulf Coast Coalition of Cities ("GCCC") and CenterPoint filed a stipulation resolving the issues in the proceeding and requesting the docket be severed. Although GCCC's consultant recommended that several adjustments be made, these adjustments did not reduce the requested increase below the 5% cap stipulated in the prior settlement agreement. Therefore, under the agreement, CenterPoint will receive a $2 million increase, amounting to a monthly increase of $0.68 for residential customers.

GUD 10038 – *Statement of Intent of CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas to Increase Rates on a Division Wide Basis in the South Texas Division*. On December 3, 2010, CenterPoint filed an application for a rate increase in each of the cities in its South Texas Division, requesting an increase of $6.5 million, or a 20.7% overall increase in revenue for the Company. Consultants for the Steering Committee of Cities Served by CenterPoint filed testimony discussing their recommended adjustments to reduce CenterPoint's request. Before the hearing, the Cities were able to reach a settlement agreement with the Company that reduced the Company's revenue increase to $4.6 million. Additionally, the agreement provides for a $13.95 customer charge instead of the Company's proposed $19 customer charge.

Update on Sunset Proceedings. The Commission also faces Sunset Advisory Commission review this Legislative Session. On March 11, 2011, Senator Hegar filed S.B. 655, relating to the Sunset review of the Commission. The bill would rename the Commission the "Texas Oil and Gas Commission," would reduce the number of commissioners from three to one (elected for a four-year term), would move contested case hearings to the State Office of Administrative Hearings, and would limit the timeframe for candidates for commissioner to accept campaign contributions.

Agency Highlights is prepared by attorneys from the Firm's different practice areas. If you have any questions or need additional information, please contact our Editor at editor@lglawfirm.com.

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