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HAPPY 25TH ANNIVERSARY TO US!

On March 15, 2009, Lloyd Gosselink will celebrate its Twenty-Fifth Anniversary. Not being content to commemorate just one day, we have started our year-long celebration of our Silver Anniversary. We have seen many changes over the years, but have throughout remained steadfast to our dedication to providing exceptional service and maximum value to our clients and business associates. We appreciate beyond measure your support and confidence in us in the past, and look forward to continuing our relationships and associations with you in the future. Over the years, we have expanded our practice areas far beyond the initial areas of environmental and municipal law. In recognition of the Firm's multi-faceted practice, with this issue we are rechristening our quarterly newsletter. As always, we welcome your comments on our newsletter and suggestions for how we might better meet your needs and expectations. Please forward your comments and suggestions to editor@lglawfirm.com. Thank you, and Happy New Year!

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What Does The 81st Legislature Have in Store for Texans? *by Brian L. Sledge and Mindy Martinez*

While the dust has barely settled from last time the Legislature assembled in Austin, the 81st Texas Legislature gaveled-in on January 13 for its 140-day regular session. It is always an exciting time for people inside and outside the Texas Capitol, and this session will be no different. With 1000 bills (and counting) already filed in the House and Senate, you can bet on another busy and high-volume session.

As you may recall, the last session ended much like it began, with a group of House members attempting to replace Speaker of the House Tom Craddick. This session, Speaker Craddick gave up his speaker re-election bid on Sunday, January 4, 2009, after a group of Republican and Democratic representatives disenchanted with his leadership successfully secured the number of votes necessary to replace him. And with that, Joe Straus (R-San Antonio) was elected by acclamation as the new Speaker of the House on opening. Speaker Straus was first elected to the Texas House of Representatives in a special election in February 2005 to represent House District 121, which includes the communities of Alamo Heights, Olmos Park, Terrell Hills, Windcrest, and northeast San Antonio.

So, with a flip-flop of recent historic roles, opening day in the House was somewhat of a love-fest, while tempers and turmoil abounded in the Senate. The source of the

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Get Ready for Changes to the Family and Medical Leave Act *by Sheila Gladstone*

For the first time since the original regulations came out in 1993, the U.S. Department of Labor ("DOL") released revised regulations interpreting the Family and Medical Leave Act ("FMLA"). The DOL also updated the optional forms provided to assist employers. The final regulations, which take effect January 16, 2009, are intended to improve communications between employers, employees, and health care providers, and to clarify the rights and responsibilities under the FMLA.

In part, the new FMLA regulations:

- clarify some definitions of a "serious health condition";
- modify notification requirements;
- allow employer representatives (but not employees' direct supervisors) to contact employees' health care providers, without the use of medical staff;
- allow employers to require employees to present a "fitness-for-duty" certificate when they take intermittent FMLA leave; and
- allow employers to require annual medical recertifications from employees with chronic conditions.

Additionally, the new regulations implement the Military Family Leave provisions in the National Defense Authorization Act ("NDAA"), signed into law in January 2008. Under these provisions, employees may take job-protected leave to care for family members with military-related

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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

Cathleen Slack has joined the Firm as an Associate in the Firm's Transactions Practice Group. Cathleen's primary focus includes representing clients in the acquisition, sale, development, financing and leasing of commercial properties, including shopping centers, office buildings, condominiums, multi-family and mixed-use developments. She has significant experience in the drafting and negotiation of commercial leases as well as general business transactions. She has additional experience in handling eminent domain proceedings on behalf of condemning authorities. Cathleen is a member of the State Bar of Texas and has been admitted to the U.S. District Court for the Eastern District of Texas. Cathleen received her undergraduate degree from the University of Texas and her J.D. from the University of Houston Law Center.

Sara Thornton has joined the Firm as an Associate in the Water Practice Group. Sara practices in the areas of environmental, water and administrative law. She assists clients with various permitting, compliance, and enforcement issues related to water supply and water quality matters. Sara is a member of the State Bar of Texas (Environmental and Natural Resources Law and Administrative Law Sections) and the Austin Bar Association. Sara received her Bachelor of Science and Master of Urban Planning degrees from Texas A&M University and her J.D. from Texas Tech University School of Law.

Stefanie Albright has joined the Firm as an Associate in the Water and Districts Practice Groups. Stefanie's client work focuses primarily on general counsel services to water utilities, including the organization and operation of water districts and water supply corporations. Stefanie is a member of the State Bar of Texas. Stefanie was raised in Lake Jackson, Texas. She received her undergraduate degree from Southwestern University and her J.D. from the University of Houston Law Center. Prior to joining the firm, Stefanie served as a lead staff member in the Texas House of Representatives.

Kristen Olson has joined the Firm as an Associate in the Water Practice Group. Kristen represents groundwater conservation districts, municipalities, public and

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The Lone Star Current Interview

Mark Vickery, Executive Director

Texas Commission on Environmental Quality

On June 17, 2008, Mark Vickery was appointed Executive Director of the Texas Commission on Environmental Quality ("TCEQ"). Mark previously served as the Deputy Executive Director of the agency and prior to that he served as deputy director for both the Office of Permitting, Remediation and Registration and the Office of Compliance and Enforcement.

Mark is a native Texan. He received his Bachelor of Science in Geology from, and is a proud graduate of, Texas Tech University. Following college he worked as an exploration geologist in Midland. Mark and his wife Tammy have two children.

The Lone Star Current was fortunate to have the opportunity recently to sit down with Mark, who graciously responded to several questions. Mark is intelligent, friendly, and self-effacing, and he has a genuine interest in and respect for public service. 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 Executive Director of the TCEQ?

MV: Well, maintaining a perspective of the agency's goals is important. I ask myself every day whether the decisions we make deliver an environmental benefit. Do we fulfill our mission of protecting the environment by carrying out our current programs? So, I think it's important that we keep our goals clear. I'd prefer that we do a handful of things that benefit the environment very well, rather than many things just because that's the way we've always done it.

LSC: What do you view as the biggest challenges facing the agency over the next few years?

MV: There are several. One immediate challenge is addressing air quality in non-attainment areas in the state. Air quality is improving in Texas, but we still have work to do. We also need to ensure that Texas has an adequate supply of water. Securing support for the planning, funding, and implementation of the agency's programs is critical. Additionally, Commissioners have approved a legislative appropriations request that is focused on air quality, water quality and quantity, waste, and remediation issues. As we move forward to ensure that sufficient funds are available to manage and protect the state's water resources, we must also make certain that collection of those funds is equitable. Finally, we need to ensure that our employees have the training necessary to effectively carry out the agency's mission.

LSC: You have been employed by the TCEQ or its predecessor agencies for 21 years. What has been your greatest reward working for the agency?

MV: The opportunity this agency gave me to use my degree in an important arena has been very rewarding. I started working here 21 years ago in an entry-level position, and I've been able to use what I learned in school to help contribute in some measure to addressing the agency's goals. I am also very proud of the fact that this agency continues to rise to meet the challenges that confront it. For example, as the agency responded to Hurricane Ike and the destruction it caused along the Gulf Coast, we created partnerships with local officials, cities, and industries to address the aftermath of this catastrophe, and those relationships will hopefully continue. And, working with Commission employees who make a difference every day to Texas is very rewarding.

LSC: What life experiences do you think will serve to influence your actions as Executive Director?

MV: I was born and raised in west Texas, and the things I learned from my parents and the community of people I grew up around continue to influence me. My parents set a good example for me. I try to deal with people in a straightforward fashion, I try to be a gentleman, and the ideal of public service comes naturally to me.

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

MV: I built my home with my own hands. It took me three years, and I had a lot of help, but I did a large measure of the work myself on weekends, holidays and "vacation" days.

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

MV: I don't read for pleasure as much as I would like, but I really enjoyed Lance Armstrong's books, *It's Not About the Bike: My Journey Back to Life* and *Every Second Counts.* They are powerful testaments to hard work and perseverance, and just look at what he has accomplished.

LSC: If you weren't working for the TCEQ, and it was possible to pursue any trade or profession, what would it be?

MV: I might like to try my hand at homebuilding. I like the idea of creating something from nothing, and there is a real art to successfully building homes on time, on budget, and actually ending up making money! I am also something of a naturalist, I guess, and I have enjoyed seeing landscapes restored with native prairie grasses, so I might like to do something in that arena.

MUNICIPAL CORNER

Validity of statutes establishing a civil service system for municipal police and fire departments. The Attorney General was asked to determine the constitutionality of Texas Local Government Code §§ 143.088 and 143.1041. Chapter 143 establishes a civil service system for municipal police and fire departments to secure efficiency in these departments by ensuring that they are composed of capable personnel and free from political influence, with permanent employment as public servants. Section 143.088 accomplishes this by prohibiting the acceptance of money or other gifts in return for retirement or resignation from a civil service position. Section 143.1041 limits applicants who may take exams for beginner positions in civil service police departments to applicants who have been admitted to or enrolled in a police officer training academy. The focus of the opinion was the constitutionality provisions in the statutes making an exception under § 143.088 for cities with a population of 1.5 million or more, and limiting § 143.1041 to only apply to a city with a population of 1.5 million or more. The A.G. opined that these provisions, which currently only apply to or exclude the City of Houston, are constitutional because there is no indication that there was an unreasonable basis in designating this population classification in each statute. Op. Tex. Att'y Gen. No. GA-0670 (2008).

A governmental body may publicly disclose a VIN number not accompanied by identifying personal information. The Attorney General was asked whether a governmental body, such as a city, could release as public information a manufacturer's vehicle identification number ("VIN"). A VIN is a series of letters and numbers assigned by a manufacturer to permanently identify specific vehicles. The A.G. was asked to clarify whether VIN numbers are included in the category of motor vehicle documents that may not be disclosed to the public, such as motor vehicle registration, motor vehicle title, or a driver's license. The A.G. opined that, so long as the VIN number was completely severed and isolated from any other personal and identifying information, the number would not relate to a protected document, and could therefore be publicly disclosed. Op. Tex. Att'y Gen. No. GA-0673 (2008).

Disabled veterans should receive the maximum amount of property tax exemptions allowed by the Texas Constitution under specified ranges of disability ratings. Article VIII, § 2(b) of the Texas Constitution and Texas Tax Code § 11.22(a) authorize property tax exemptions for disabled veterans in amounts based on corresponding ranges of disability ratings. In both the statute and the Constitution, disabled veterans are allocated certain amounts of property tax exemptions on the value of their property based on their percentage of disability. Amendments were made to the Constitution that accounted for federal "rounding off" of disability ratings to match the exemption ratings. These amendments were not reflected in the Tax Code. Due to discrepancies between the constitutional and statutory provisions, in situations where a veteran maintained a rating of 74%, it was unclear whether, when the rating was "rounded down" to an official rating of 70%, the disabled veteran would be eligible for an exemption of up to $10,000 or up to $12,000. The A.G. opined that because the Constitution mandated that the maximum tax exemption should be allowed, a disabled veteran with a disability rating "rounded down" to 70% would be allowed a property tax exemption of up to $12,000 of the property value. Op. Tex. Att'y Gen. No. GA-0676 (2008).

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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private water utilities, and landowners in a general counsel capacity. Her work includes assisting clients with regulatory compliance, water resource and supply planning, and water utility service matters. Kristen is a member of the State Bar of Texas (Environmental and Natural Resources Section), the Texas Water Conservation Association, the Texas Alliance of Groundwater Districts, and the Austin Bar Association. Kristen studied within the Honors Political Science Program at Texas Christian University, where she was a TCU Scholar and received her undergraduate degree with honors. She earned her J.D. from Texas Tech University School of Law, where she received the Buck J. Wynne Memorial Scholarship Award for excellence in environmental law. Kristen also served as a judicial intern for The Honorable Robert A. Junell with the U.S. District Court for the Western District of Texas. Kristen is originally from Wichita Falls, Texas and now resides in Austin.

Susan Starks has joined the Firm's Labor and Employment Law Practice Group as a Paralegal. Susan received a Bachelor of Arts degree in Spanish from the University of Texas at Austin, and has held numerous positions in the public and private sectors with over 21 years of experience in labor and employment law, education and administrative law, and civil litigation.

Lauren Kalisek will be discussing "Water Quality Issues" at the TWCA/TRWA Water Law Seminar on January 22 in Austin.

Jason Hill will be presenting "The Wonderful World of Water: Ethical Dilemmas for Engineers, Geoscientists and Contractors" at the TGWA Annual Convention and Trade Show on January 28 at Moody Gardens in Galveston.

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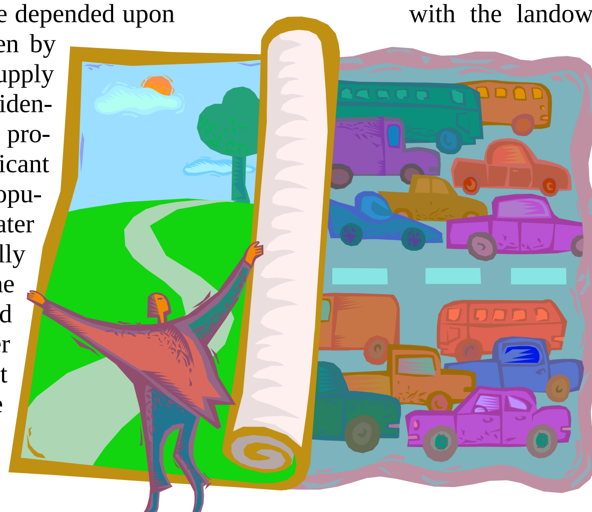
Fire Flow Service: Overcoming Barriers to Development

by Michael A. Gershon and David J. Klein

Growth within urban and suburban areas demands a level of water service that provides sufficient supply and pressure for firefighting ("fire flow"). Even with the recent downturn in the national economy, Texas continues to experience relatively significant growth. Consequently, the retail water utilities serving these growing areas are depended upon to provide the increasing demand for fire flow service. Retail water and fire flow service is typically furnished by a municipality, water district, water supply corporation, or investor-owned utility, and some of these utilities readily deliver fire flow service when requested. Many investor-owned utilities and water supply corporations recognize this demand for an expanded level of service as an opportunity to meet growing demand within their existing service area and enjoy an expanded revenue base.

Other providers have refused to provide fire flow service and are only willing to provide potable water service within their service areas. Some of those providers have gone so far as to paint their existing fire plugs black even though they are capable of providing fire flows, and declare that the plugs cannot be depended upon for fire fighting purposes. This position, taken by some investor-owned utilities and water supply corporations, has impeded the progress of residential, commercial, and industrial development projects, and has created a situation with significant implications statewide, given the projected population projections and related increase in water demand within high-growth areas that typically require fire flows. This article describes the issues that arise for landowner-developers and municipalities when an existing retail water utility will not provide fire flow service but another water provider stands ready to provide that level of service. Before addressing these issues, a brief background of water utility law is provided.



According to Chapter 13 of the Texas Water Code and Title 30, Chapter 291 of the Texas Administrative Code, only retail public utilities, which includes municipalities, districts, water supply corporations, and investor-owned utilities, can provide retail water utility service to the public. Before a water supply corporation or investor-owned utility can render such service to any customers, it must first obtain a certificate of convenience and necessity ("CCN") from the Texas Commission on Environmental Quality ("TCEQ") to serve that specific geographic area. The holder of a CCN owns and enjoys the exclusive, yet revocable, right to provide retail water and/or sewer service to the authorized area, and is required to provide such service on a continuous and adequate basis. Municipalities and water districts are not required by statute to obtain a CCN to render retail water service within their boundaries, though these entities often secure CCNs to guarantee their ability to exclusively provide such service within their respective boundaries.

When fire flow service is desired by a developer or required by municipal ordinance, retail public utilities typically provide that service. However, the definition of "retail water service" under the Texas Water Code and TCEQ regulations does not refer to fire flow service. Specifically, the TCEQ's rules define "retail water service" as potable water service provided by a retail public utility to the ultimate consumer for compensation. Thus, the provision of fire flow service is a separate concept from the provision of potable water service. Some CCN holders point to these sections of the Texas Water Code and TCEQ's rules as the basis for their position that they are not required to provide fire flow service. However, there are other laws that require fire flow service, such as municipal ordinances. Additionally, the Texas Legislature has recently amended the CCN laws to provide relief to landowners owning at least 50 acres. This new law provides these landowners the right to demand a certain level and manner of service, including fire flow service, and is reviewed below in more detail.

The water supply corporations and investor-owned utilities that hold water CCNs and refuse to provide fire flow service to new developments have become a source of significant conflict and frustration with the landowners, developers, and municipalities who demand fire flow service. This refusal to provide fire flow service to an area of new growth burdens developers with additional costs and delays, at a minimum, and in some cases may serve as an obstacle to proceeding with the development. The refusal of a water CCN holder to provide fire flow service becomes additionally problematic for the developer and a city if the area of new development is within the corporate limits or extraterritorial jurisdiction of a municipality that has passed an ordinance requiring the provision of fire flow service for any new development. To make fire flow service available in this situation would require the developer and/or municipality to design and construct an additional and redundant water system capable of furnishing fire flow service, which would be installed alongside the water CCN holder's water distribution system. Thus, two separate supplies of water and two sets of administrative staff to handle the billing and maintenance of the systems would be necessary. To compound the problem, securing and delivering the separate water supply to the area requiring fire flow service can be expensive. Often, the existing utility is not willing to sell water on a wholesale basis because it does not want to be responsible for the level of supply required in a firefighting situation.

Given this regulatory framework, how can a developer and alternate provider capable of providing fire flow service avoid this roadblock? Before moving forward to design and construct a second separate water system, developers and/or municipalities should evaluate their options. Once it is determined that a service agreement or wholesale water supply agreement with the CCN holder refusing to provide fire flow service to the new development cannot be reached, the only other option available to the developer and/or municipality is to seek

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Sorting the Wheat from the Chaff: Make Sure You Are Hiring the Right Fit

by Sheila Gladstone

You are interviewing several individuals to fill an open position, but feel uncertain about your choice. How can you be sure that the candidate you select will be the best fit for your organization? Most employers have a good idea of what they are *not* allowed to ask during an interview, but many are not aware of all the areas of questioning that are "fair game." The way you conduct the interview process, in addition to what you ask, can make the difference between a good hire and a great one.

How Do I Prepare for the Interview? The first step is to know what you are looking for in a "fit" for the position. Know the job's responsibilities and have in mind the requisite skills and qualifications. A written job description, along with a consistent panel of interviewers, helps create an ideal process.

Ask the same basic questions of every applicant, and document responses. You can still pursue probing or follow-up questions, but be consistent in your core line of questioning. Your questions should directly relate to the candidate's ability to meet the written job responsibilities.

Review each job application and resume prior to the interview, so you will know what to follow up on during the interview. Are all of the questions on the application answered? Are there any gaps in employment or education? Is there a pattern of short durations in employment ("job hopping")? Have references been provided? Is the application messy, or does the resume or cover letter contain typos?

These issues are often indicators of problem work habits. Remember – this is the candidate at their very best. Probe these concerns during the interview; this is not the time to be shy or polite. Think of the interview as a 'fact-finding' mission; any omissions provide a road map for interview questions.

What Should I Ask in the Interview? In a nutshell, ask questions that focus on a candidate's qualifications for the job. If you keep the questions focused on learning about professional experience, training, and knowledge, and stay away from personal questions, you should be able to avoid future claims that your hiring decision was based upon anything other than the objective selection of the very best candidate.

Ask skill-related questions to assess the job-specific knowledge and abilities of the candidate. Answers to skill-based questions are hard to "fake," even for the most professional of interviewees. For example:

"Explain what this schematic represents."
"Tell me about some experiences you have had working in the field"
"What would you do if you noticed *xyz* happening?"
"What size pipe would you use in this situation?"
"Come show me how you would operate this piece of equipment."
"Can you lift this tool?"
"Tell me about a typical workday in your current job."

Ask about likes/dislikes and methods of handling disputes, consistent with being a good fit for the position, such as:

"What have you enjoyed about your previous jobs?"
"What is your ideal job?"
"What is your least favorite employment experience?"
"What do you see this job leading to?"
"What are your future goals?"
"How have you settled work disputes with coworkers?"
"Have you ever been really angry with your supervisor? How have you handled that?"

Ask open-ended questions that require a narrative response – stay away from "yes" or "no" questions. The rule of thumb is that the candidate should be speaking 80 percent of the time.

What Questions Should I Avoid During the Interview? Don't ask about race, gender, religion, sexual orientation, marital or family status, age, disabilities, ethnic background, birthplace or national origin, as these questions are not necessary to determine whether someone is qualified to perform a job. If an applicant brings up a disability in response to a job-related question, you can probe what it would take to help the applicant perform the job. Don't ask if the applicant is in the military reserves, but feel free to follow-up on relevant experience gained in the military. If you have concerns about hours flexibility, ask about that; don't phrase it in terms of childcare responsibilities.

Controlling the Interview. Be professional, but not so polite that you miss opportunities to get specifics on vague answers. For example, "What does 'part ways' mean; did you resign or were you asked to leave? Was the resignation voluntary?"

Don't let 'professional interviewers' get you off track; probe buzz words and if a question you asked did not get answered, ask it again. For example, if a candidate says, "I have been successful with collaborative strategic partnerships," ask for examples. If the

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Senate controversy was an attempt by some Senate Republicans to change the Senate's historic "two-thirds rule," which requires a two-thirds majority to agree to consider a bill on the Senate floor, to a "three-fifths" rule on all or certain types of legislation. Such a change could mean that Senate Democrats are unable to block divisive legislation from being debated or voted upon. There are various proposals on the table that are being considered by the Senators behind closed doors as of the date of this writing.

What can Texans expect from the Legislature this year? For starters , there were a few losing efforts during the 80th session, and lawmakers are expected to revisit some of these issues, such as the eminent domain reform bill, efforts to impose market power restrictions and other changes to the deregulated electric market, and the state-wide smoking ban.

The first of this session's eminent domain bills, House Bill 4, has been filed by Rob Orr (R-Burleson). The use of eminent domain authority by governmental entities has been a controversial issue for the past few sessions. While there are not many Texans who would be pleased with the State coming in and taking their land for a public purpose, the need for new roads, water infrastructure, and other essential governmental services that require land acquisition is a growing problem for the state of Texas, as the population expands and the state's infrastructure needs expand accordingly. To add to the controversy, it is one that weighs the needs of the many against the few who lose their property. This will be a divisive issue that will come down more to rural versus urban than Republican versus Democrat. In 2007, House Bill 2006 was filed by Beverly Woolley (R- Houston) to try to address eminent domain issues, but was vetoed by the Governor after Senate amendments were added that would have substantially increased the costs to the public associated with a condemnation proceeding. Legislation similar to the version of HB 2006 as it left the House last session and prior to Senate amendments is expected to be filed in the Senate this session as the starting point for its discussion.

Accompanying eminent domain issues hand-in-hand are the transportation problems facing our ever growing state population. The 81st Legislature is sure to take up transportation issues as the Texas Department of Transportation is up for sunset review. The agency will be under legislative review and could see many changes as a result of well-publicized problems that have plagued the agency in the recent past.

House Bill 5 is a statewide smoking ban bill that would ban smoking in indoor workplaces, including bars and restaurants. The proposed statewide law would not preempt stricter city ordinances. The bill was filed by Myra Crownover (R – Denton), who also filed the same proposal in 2007. Last session, a diluted version of the bill passed the House and went to the Senate, but never made it to the Senate floor.

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medical conditions and for other military-related "qualifying exigencies." The DOL developed new forms to implement the new Military Family Leave amendments, and employers will be required to display a new poster issued by the DOL describing the two types of FMLA leave available to military family members.

What Should Employers Do?

By January 16, 2009, employers with 50 or more employees should familiarize themselves with the new requirements, and update their policies, practices, and forms accordingly. In addition to the FMLA old "General Notice" poster, employers should also post the new DOL supplemental poster describing the new military leave protections under the FMLA. Given that the DOL changed the forms associated with FMLA leave, including the medical certification form and the employer response form, you will want to update your internal process and forms for administering FMLA leave. If you do not have a Family/Medical Leave policy, or if your policy does not address the new regulatory amendments, please contact the Labor and Employment Law Practice Group at the Firm so that we may assist you in bringing your policy and practices into compliance.

Brief Summary of Key Changes:

<u>Serious Health Condition</u>. The new regulations retain the existing definitions of "serious health condition," with these clarifications:

1. Period of Incapacity: One definition of "serious health condition" is three consecutive full days of incapacity requiring two visits to a health care provider. The final rule clarifies that the employee must make an initial visit to a health care provider within seven days of the day on which the incapacity begins. Moreover, the two visits to a health care provider must occur within 30 days of the period of incapacity.

2. Chronic Health Condition: The new regulations specify that in order for a condition to qualify as "chronic," the condition must require at least two or more visits to a health care provider for treatment each year.

<u>Comp Time</u>. Compensatory time accrued by public agency employees under the FLSA may now run concurrently with unpaid FMLA leave.

<u>Employer Notice</u>. Employers must now provide employees with four different types of notices: general notices, eligibility notices, rights and responsibilities notices, and designation notices. The new requirements include:

1. Eligibility Status: The employer must notify the employee whether leave is still available for the applicable 12-month period. If the employee is not eligible or has no leave available, then the notice must indicate why.

2. Designation: The employer must inform the employee of the number of hours, days, or weeks that will be designated as FMLA leave. If unknown, the employer must inform the employee every 30 days how much leave has been designated. There is also a new requirement to notify the employee if leave has been rejected.

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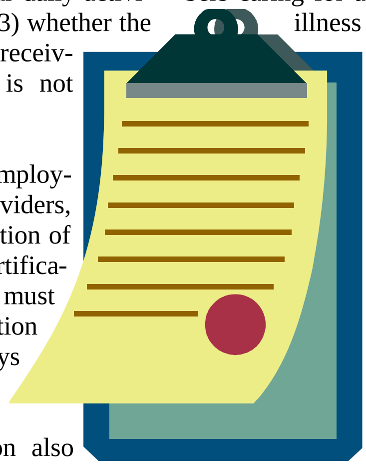
<u>Employee Notice Requirements</u>. The requirement that an employee provide "sufficient information" to make the employer aware of the need for leave has been clarified. The notice must indicate: (1) the employee is unable to perform the functions of the job or that a covered family member is unable to participate in regular daily activities; (2) the anticipated duration of the absence; and (3) whether the employee intends to visit a health care provider or is receiving continuing treatment. Simply calling in sick is not enough.

<u>Medical Certifications</u>. Under the new regulations, employers may now contact the employee's health care providers, but only for the purpose of clarification or authentication of the medical certification. If an employer finds the certification to be incomplete or insufficient, the employer must tell the employee, *in writing*, what additional information is necessary and give the employee at least seven days to correct the certification.



<u>Fitness for Duty Certification</u>. The final regulation also clarifies that employers may require a fitness for duty certification to address an employee's ability to perform essential job functions. However, if the employer does have such a requirement, the employer must provide the employee with a list of those essential job functions no later than the "designation notice" and specify in the designation notice that the fitness for duty certification must address the employee's ability to perform those essential functions.

<u>Military Leave Provisions</u>. Last January's Military Family Leave amendments to the FMLA itself expand protection for family members caring for a covered service member with a serious injury or illness incurred in the line of active duty. These family members may take a one-time leave of up to 26 weeks of leave in a single 12 month period. The definition of "family member" is expanded, for this provision only, to include "next of kin."

Families of active-duty military personnel may now take FMLA-protected leave for "qualifying exigencies." "Qualifying exigencies" include: (1) short-notice deployment; (2) military events; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional agreed-upon activities.

Sheila Gladstone heads the Firm's Labor and 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 <u>sgladstone@lglawfirm.com</u>.

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an administrative remedy from the TCEQ. To this end, there are three primary options available:

(1) a water utility willing to provide water and fire flow service to the development (the "New Utility") could file an application with the TCEQ to become dually certificated with the CCN holder;
(2) the New Utility could try to work out an agreement with the CCN holder to transfer part of the CCN to the New Utility; or
(3) the New Utility or landowner-developer could file an application to involuntarily decertify the CCN holder at the TCEQ.

Options (1) and (2) typically require an agreement with the CCN holder. Consequently, if the CCN holder is also unwilling to work with the alternate water provider, the only remaining option is to try to decertify the CCN holder through the TCEQ.

By amendment of the CCN laws in 2005, there are now two nonexclusive processes available at the TCEQ to involuntarily decertify CCN holders. First, the landowner-developer or alternate water/fire flow service provider could file a traditional CCN decertification application, which typically takes at least two years from the time the application is filed to a final, appealable decision by the Commission. Alternatively or simultaneously, landowners owning at least 50 acres can file a petition under the TCEQ's new expedited release process, which according to TCEQ rules is approximately a nine-month process that is neither subject to a hearing nor appealable. This expedited process requires coordination by the developer and New Utility to file one or more of these petition/application(s) with the TCEQ to decertify the current CCN holder. (If the property has been annexed by a city, then § 13.255 of the Water Code may also provide an option for decertification.) The refusal to provide fire flow service by a CCN holder is a relatively new issue for the TCEQ. Although as of the date of this article the TCEQ has granted two petitions for expedited decertification, the TCEQ has not made a decision regarding whether the refusal to provide fire flow service is a basis for decertifying the CCN holder under either process. However, the stage is set for such a petition to be filed and considered by the TCEQ.

Regardless whether the developer and/or New Utility build a separate fire flow system or are successful in decertifying a water CCN holder that refuses to provide fire flow service, two outcomes are very likely: the new development project will be delayed and there will be additional costs. Clearly, the decision by some water CCN holders to refuse to provide fire flow service is an inhibitor to urban and suburban growth. Thus, prior to making any decision, both the developer and New Utility should conduct independent analyses regarding the costs associated with reaching an agreement with the CCN holder, constructing a new water system, or filing one or more CCN decertification applications at the TCEQ. If the decision is made to attempt a decertification, it is critical that the application be properly filed and pursued; otherwise, the CCN holder will certainly maintain its monopoly over the area in question.

Mike Gershon is a Principal and David Klein is an Associate in the Firm's Water Practice Group. Mike and David practice in the area of water utilities, representing municipalities, districts, and landowners in issues related to water rights. For questions regarding this article or any other information, please contact Mike at (512) 322-5872 or <u>mgershon@lglawfirm.com</u>, or David at (512) 322-5818 or <u>dklein@lglawfirm.com</u>.

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candidate answers a question with a question, firmly redirect the conversation.

Interview Red Flags. If any of the following occur, they should alert you to potential problems should you hire the candidate:

- ⇒ Not courteous to your office staff (your receptionist is a great source of 'fit' information).
- ⇒ Late for interview.
- ⇒ Inappropriate dress/hygiene.
- ⇒ Reveals confidential information about former employer.
- ⇒ Criticizes/angry about former employer.
- ⇒ Knows little about your company/agency.
- ⇒ Avoids questions regarding information provided on the application.
- ⇒ Provides misleading information on application or during interview.
- ⇒ Takes a telephone call during the interview.
- ⇒ Has unusual interest about your leave/vacation policy.

After the Interview. Remember to check references, and document responses to reference checks even if they were not helpful. Failure to conduct reference checks may mean hiring someone without the education or experience to do the job. Or it may mean that you hire an employee with a history of problem performance. At the extreme, it may mean risking legal liability for the organization if you negligently hire someone who then uses their position to commit harmful acts.

Do you intend to conduct a criminal or credit check on the applicant? The Federal Trade Commission ("FTC") regulates such checks, and you will need to obtain the candidate's consent on a separate form. Also, if you decide not to hire a candidate based upon the background check, you must provide specific notification.

Does your organization conduct applicant medical examinations? The Americans with Disabilities Act ("ADA") prohibits employers from asking questions that are likely to reveal disabilities before making a job offer (the pre-offer period), although questions directed to all applicants about the ability to perform the actual duties of the job are always permitted. If during the interview the applicant indicates that accommodation will be needed in order to perform the job they applied for, then the employer may ask only about what accommodation is needed. This prohibition covers written questionnaires and inquiries made during interviews, as well as medical exams. However, such questions and medical examinations are permitted after extending a contingent job offer but before the individual begins work (the post-offer period).

While an employer has the right under the ADA to require a post-offer medical examination, it cannot withdraw the job offer solely because of the discovery of a disability. Instead, the employer must show that the candidate is unable to perform the essential functions of the job (with or without reasonable accommodation), or that he/she poses a significant risk of causing substantial harm to themselves or others.

Bottom Line. It's much easier to reject a candidate before hire than to go through the pain and expense of a termination. Pay attention to your gut feelings during an interview, as it is unlikely that problems you notice at this stage will improve after employment. Be nosy, tough, and fair. Your duty is to do everything you can to save the time, expense, and heartache of a bad hire.

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IN THE COURTS

Barnes v. Kippers, Inc., 534 F.3d 357 (5th Cir. 2008).

The Fifth Circuit held that the statute of limitations in a toxic tort case is governed by state law rather than the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), where the facility was operating at the time of the exposure. In this case, a jury found that the plaintiff's mother died of breast cancer as a result of exposure to environmental contamination from a neighboring wood treatment facility. Mississippi state law requires that such a case be filed within three years of the diagnosis of the cancer. CERCLA's statute of limitations, however, does not begin to run until both the injury and its cause are known. CERCLA also contains a provision that, if the state statute of limitations "provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date." The court decided that the state statute of limitations governed, because CERCLA does not regulate existing sources, but instead provides for the clean-up of historic contamination.

Texas Midstream Gas Services v. City of Grand Prairie, et. al., 2008 WL 5000038 (N.D. Tex. Nov. 25, 2008)

Texas Midstream Gas Services ("TMGS"), a transporter of natural gas by pipeline from underground sources to a compressor station, acquired land within the City of Grand Prairie (the "City") to build a new compressor station. The City proposed a zoning ordinance that would require the builder of a compressor station to acquire a Special Use Permit from the City before building the station. In order to secure this permit, a number of conditions must be met, including: securing a building permit with an approved plat, following minimum setback guidelines, creating a "security fence" around the perimeter made of brick, iron, or stone columns, insulating the facility for sound, and meeting other standards for the construction of the

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project. TMGS responded by filing suit for a permanent injunction in federal court. Specifically, TMGS challenged the ordinance on three grounds: (1) preemption because of the Pipeline Safety Act ("PSA"); (2) interference with TMGS' power of eminent domain; and (3) violating the dormant Commerce Clause of the U.S. Constitution.

The court denied TMGS' claim for permanent injunction. The court determined that TMGS failed to meet the necessary burden for recovery. Regarding the preemption issue, the Court held that the PSA was established solely to regulate the "safety" of pipelines and compression stations and that the City's ordinance regulations were based more on aesthetics and maintenance of property values. Hence, only one provision of the ordinance was preempted, namely the provision regarding the "security fence" around the perimeter, because it related directly to the "safety" of the facility. On the eminent domain issue, the court determined that the ordinance does not sufficiently "zone out" TMGS' power of eminent domain and therefore should not be set aside. Eminent domain power can be limited by zoning ordinances for aesthetics and protection of property values so long as they do not prohibit the intended public use. Finally, the court reviewed the dormant Commerce Clause claim and found that because the ordinance was not facially discriminatory against out of state entities it was subject to the balancing test of *Pike v. Bruce Church*. Under this test, a statute will be upheld if it serves legitimate public interests and the burden on interstate commerce is not clearly excessive in relation to the putative local benefits. TMGS' only burdens were additional costs and construction delays, which did not clearly exceed the benefits of the City's protection of aesthetic quality and property values. Hence, the court concluded that a zoning ordinance of this type, with the exception of a "security gate" provision, can validly regulate the construction of natural gas compressor stations.

Due to the increased demand for natural gas in the United States, the number of natural gas gathering and transmission pipelines and compressor stations being constructed in Texas has risen dramatically. This impact has been most notable in north Texas due to the activity involving the Barnett Shale. Given the pipeline companies' authority to condemn land, these pipelines and compressor stations are not only being built within extraterritorial jurisdictions, but also within corporate limits, without regard to future planning or municipal regulations. If this decision becomes final and non-appealable, it should provide municipalities with confidence that they can indeed regulate compressor stations within their corporate limits to some extent under their zoning authority.

Brownsville Irrigation Dist. v. TCEQ, 264 S.W.3d 458 (Tex. App—Austin 2008, pet. filed for review Oct. 13, 2008).

Presidio Valley Farms ("Presidio") owns surface water rights allowing diversion of water from the Rio Grande to a series of locations for irrigation. In 2003, Presidio entered into an agreement with Maverick County, Laredo, and Eagle Pass ("Maverick") to purchase Presidio's water right. At the time of the sale, these water rights enabled Presidio to divert water from the upper portion of the Rio Grande. As a result of the agreement, Presidio and Maverick filed an application with the Texas Commission on Environmental Quality ("TCEQ") for an amendment to these water rights so that the water could be diverted downstream in the middle and lower portions of the Rio Grande. They also included an application to amend the purpose of use from irrigation purpose to municipal purpose. What made this application unique, however, is that the priority of water rights in the upper Rio Grande is based upon the date the water right was granted (prior appropriation doctrine), and the priority of water right holders in the middle and lower Rio Grande is based upon the purpose of use.

Maverick's application proposed the implementation of a "conversion factor" in accordance with the TCEQ's Rio Grande water rights amendment rule, 30 Tex. Admin. Code § 303.42(4), thereby reducing the amount of water that should be available at the downstream locations in the middle and lower Rio Grande for diversion. This conversion factor took into consideration the evaporative losses that should occur as the water travels down the river, but maintained that the water right should maintain its status as a prior appropriation-based water right. Brownsville Irrigation District and several other water districts questioned whether this "conversion factor" was indeed consistent with the TCEQ's rules. In short, they argued that Maverick's water rights could not maintain their prior appropriation status because the water is physically diverted in the portion of the Rio Grande that utilizes the priority of use-based system, and thus an additional conversion factor of 50% (also in the TCEQ's rules) must be applied to the water right. The TCEQ's decision that Maverick's conversion factor was consistent with its rules was upheld by the district court. On appeal, the court determined that the TCEQ should be given deference by the courts to determine what is an appropriate "conversion factor," and thus TCEQ has the authority to determine if a party has provided an adequate "applicable conversion factor" designed to protect water rights on a case-by-case basis. A petition for review is currently pending before the Texas Supreme Court, and this very unique water rights dispute continues forward for a final resolution.

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

Washington State Governor Proposes Green House Gas Cap-and-Trade Legislation. Washington State became the second state, following California, to consider a cap-and-trade program to reduce green house gases ("GHG") in the state. Both states are part of the

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larger Western Climate Initiative ("WCI") whose members have pledged to reduce GHG emissions, but these are the first states to translate that pledge into proposed legislation that would require reductions. Under the Washington Governor's plan, a cap-and-trade program would be established in Washington in 2012. Large industries would be the first subject to the program and would receive a set number of allowances. Any regulated entity that emits GHGs beyond that amount would be required to purchase offsets or face penalties. Offsets could be purchased from the WCI or another carbon trading market. Every three years, the number of allowances given to each industry would be reduced. The EPA and many federal legislators are watching the various state proposals for addressing GHGs as models for a federal program yet to be designed.

Environmental Protection Agency

New CAFO Clean Water Act Rule. The Environmental Protection Agency implemented new rules on governing waste discharges from concentrated animal feeding operations ("CAFO") under the Clean Water Act ("CWA"). These rules became effective December 22, 2008. The new rules seek to improve and consolidate existing regulations and guidance. The rules address the situations under which CAFOs must apply for a wastewater discharge permit under Section 402 of the CWA and the methods and requirements for doing so. The new rules further provide the procedure for CAFOs to self-certify that they will not discharge waste subject to the CWA and therefore do not need a permit. The rules do not provide CAFOs with any protection from liability in the event a discharge occurs. Additionally, the new rules require Nutrient Management Plans ("NMP") to be submitted by CAFOs with their permit applications, reviewed by permitting authorities and the public, and the NMP terms incorporated into permits.

Fugitive Emissions Addressed. The EPA announced its final New Source Review ("NSR") rule revisions on December 10, 2008. The revisions require that existing facilities undergoing major modifications account for "fugitive emissions" (*i.e.*, emissions not released through a stack, vent, or other confined air stream, such as emissions that escape from equipment leaks). This change only affects those sources that have been designated through previous rulemakings.

Regulation of Nanoparticles. Nanomaterials are materials about 40,000 times smaller than a human hair, and often exhibit properties very different from those of the same chemical that is not nano-sized. On November 5, 2008, the EPA promulgated "Significant New Use Rules" ("SNUR") under the Toxic Substances Control Act ("TSCA") for 56 chemicals. The inclusion of two of the chemicals – siloxane modified silica nanoparticles (generic) and siloxane modified alumina nanoparticles (generic) – marks one of the agency's first attempts to regulate nanotechnology. The SNURs require anyone who intends to manufacture, import, or process any of the listed chemicals for a "significant new use" to notify the EPA.

Air Permit Remanded for BACT Controls for Carbon. The EPA's Environmental Appeals Board ("EAB") remanded a permit that the EPA had granted for a new waste-coal-fired electric generating unit near Bonanza, Utah, because the agency did not include best availability control technology ("BACT") controls for carbon dioxide (CO_2) in the permit. The Sierra Club filed a petition with the EAB, citing language in the Clean Air Act ("CAA") that requires a BACT emissions limit for "each pollutant subject to regulation under [the CAA]." The Sierra Club argued that under the *Massachusetts v. EPA* decision and EPA regulations that require monitoring and reporting of CO_2 emissions, carbon is a pollutant subject to regulation under the CAA. The EPA argued that "subject to regulation under the Act" means pollutants "that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" and not just monitoring and reporting. The EAB remanded the permit to the EPA regional office to either impose a CO_2 BACT limit or to develop an adequate record for its decision to not do so. The EAB does not review permits from states such as Texas that are delegated authority under the CAA, but the decision increases the pressure on EPA to regulate CO_2 emissions under the CAA early in the Obama Administration, rather than to wait for legislation from Congress.

Texas Commission on Environmental Quality

Reclaimed Water Production Facilities Rules. On November 5, 2008, the TCEQ adopted rules designed to streamline the authorization process for reclaimed water production facilities at locations other than a permitted wastewater treatment facility. The rules allow facilities to be constructed closer to reclaimed water users, thereby saving costs related to the transport of reclaimed water. This change promotes the conservation of natural resources and will allow utilities to decrease power and treatment costs to produce potable water when such quality is not needed by the end user. The new rules streamline the process for authorizing the construction of reclaimed water production facilities, while the operation and administrative requirements continue to be regulated pursuant to Title 30, Chapter 210 of the Texas Administrative Code. The rules became effective November 27, 2008.

New Rules for Dams and Reservoirs. On December 10, 2008, TCEQ adopted new rules to update existing rules related to the design and operation of dams and reservoirs. The old rules had not been significantly changed since 1986 and were revised in response to a legislative recommendation to increase oversight of dams within the state. The new rules revise the definition of a "dam" and the associated design criteria. The new rules also require the development and implementation of emergency action plans and security plans for certain critical infrastructure dams. The rules went into effect on January 1, 2009.

New Water Funding Rules Likely. The TCEQ projects an annual shortfall of water program funding of approximately $21 million for the next biennium. To offset this shortfall, TCEQ will likely propose as early as February 2009 new rules to increase water funding. The TCEQ is currently looking at the option of increasing fees received from the Consolidated Water Quality Fee and the Public Health Service Fee. The agency intends to time the rulemaking so as to ensure that funds to support water program activities will be available at the beginning of Fiscal Year 2010 and to provide ample notification to potentially affected fee payers to prepare for changes in Fiscal Year 2010 billings.

Public Utility Commission

PUC Docket No. 36412 – *Application of Electric Reliability Council of Texas, Inc. (ERCOT) for Approval of a Revised Nodal Market*

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Implementation Surcharge. ERCOT filed its Application to revise the nodal market implementation surcharge on November 19, 2008. There is a long history behind the revised nodal market surcharge sought in this docket. In 2004, a nodal market cost/benefit analysis commissioned by the PUC determined that the cost to implement a nodal market in ERCOT would be $76.3 million, and that the nodal market would be operational by the end of 2006. In August 2006, ERCOT asked for a surcharge based upon a preliminary budget of $125 million. ERCOT increased the budget request to $263 million in May 2007 and set the start of the nodal market to be January 2009. Early last year, the budget was revised again, increasing to $319 million. On November 26, ERCOT President and CEO Bob Kahn filed supplemental testimony indicating that the new budget for the nodal market implementation project should be $660 million. In the filing, Mr. Kahn reported that the new "go live" date for the nodal market will be sometime in December of 2010, nearly two years later than the PUC's originally-ordered date.

PUC Docket No. 35717 – *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*. Oncor Electric Delivery Company filed a Statement of Intent to Increase Rates on June 27, 2008. The Company seeks an increase in base rates of $275 million. Some of the major issues include depreciation, rate of return, rate design and cost allocation, affiliate expenses, and consistency with various commitments made by the Company in its settlement with the Steering Committee of Cities Served by Oncor ("Cities"), and the TXU leveraged buyout settlement. On November 26, 2008, 22 intervenor witnesses on behalf of 11 parties filed testimony in response to the Company's application. Cities are the only party to present a comprehensive analysis of the Company's application. Cities are recommending $423 million in adjustments to Oncor's request. If adopted, this would result in a $169 million reduction to the Company's existing rates. The hearing began January 13, 2009.

PUC Docket Nos. 35665/33672 – *Designation of Competitive Renewable Energy Zones ("CREZ") and Selection of Transmission Service Providers*. In the first phase of this project, the Commission identified zones deemed "most suitable" for locating future wind generation. Specifically, the Commission approved five zones located in West Texas and the Panhandle. In the second phase of the project, the Commission reviewed plans to construct transmission capacity necessary to deliver electricity generated in the CREZs to the rest of ERCOT. ERCOT proposed five transmission scenarios associated with different amounts of renewable energy to be exported from the CREZs. At its July 17 Open Meeting, the PUC selected Transmission Scenario 2 to connect CREZs with the rest of the State. Rate experts project that Scenario 2 will add approximately $8 billion to the State's transmission system and will cost an average residential consumer $7 per month. The third phase of this project – to select the transmission providers that will be responsible for building the transmission infrastructure consistent with Scenario 2 – began last summer. The PUC held a four-day hearing at the beginning of December 2008 in which parties presented their cases. The hearing was remarkable for the volume of back-room dealing that occurred. Although numerous settlement talks have taken place and several non-unanimous agreements have been filed, no comprehensive settlement has been reached. The Public Utility Regulatory Act ("PURA") requires that the transmission build-out be done in the most beneficial and cost-effective manner. On December 22, 2008, Texas Industrial Energy Consumers appealed Docket No. 33672 to the district court. It is not clear what effect the appeal will have on the over-all proceeding.

PUC Docket No. 34061 – *Notices of Violation by TXU Corp*. The Staff of the PUC announced an agreement to settle its $171 million Notice of Violation ("NOV") case against Luminant for $15 million. This docket was initiated on March 28, 2007 when Staff filed an enforcement action against Luminant for improper bidding behavior during the summer of 2005, resulting in an estimated $70 million increase in costs to purchasers of balancing energy and $19.6 million in estimated profits for TXU. Staff recommended $140 million in administrative penalties and $70 million in refunds. In September 2007, PUC Staff found an error in the computer model that formed the basis of the NOV, and revised its claim to $171 million in administrative penalties. In the revised NOV, Staff claimed that Luminant raised prices 11.4% for a profit of $18.8 million and a total cost to the market of $57 million. Staff arrived at its revised $171 million number by multiplying the total cost to the market ($57 million) by three. In November 2007, TXU filed a motion to dismiss the case. There was a hearing on the motion in December. On February 8, 2008, the Administrative Law Judge ("ALJ") issued an order denying the motion and allowing the case to proceed. The ALJs did note, however, that they had "serious questions about Staff's requested penalties," suggesting that the law may limit the Staff's claim to either $610,000 or $7.9 million rather than the $171 million sought. Commission Staff appealed the ALJ's decision to the Commissioners. On August 14, 2008, the Commission granted the appeal in order to get more information. The parties then requested a 60-day abeyance to discuss settlement. On November 26, the PUC Staff announced that a settlement had been reached. It is not clear why Staff would agree to drop its NOV against Luminant for an amount less than what Luminant profited by its wrongdoing. As part of the settlement, Staff also indicated that it believes a "Voluntary Mitigation Plan" written by Luminant and approved by the PUC in 2007, but later invalidated by a district court, continues to be a safe harbor for the Company. In essence, so long as Luminant functions within the plan, Staff believes that Luminant is operating in the market appropriately. The Commission approved the settlement at the December 18 Open Meeting.

Railroad Commission of Texas

GUD No. 9732, *Atmos Energy Corp., Mid-Tex Division, Gas Cost Review in Compliance with GUD Nos. 8664 and 9400.* In September 2008, a hearing was held in Atmos Mid-Tex's gas cost review docket, in which the prudence of Atmos' gas purchases in 2003-2006 was reviewed. During the review period, the Company purchased gas at a cost of over $2.7 billion. The Atmos Cities Steering Committee ("ACSC"), joined by the State of Texas, recommended adjustments totaling over $89 million. The City of Dallas recommended adjustments of approximately $58 million. On December 18, 2008, the Commission's Hearing Examiners issued their Proposal for Decision in which they recommended findings that all of Atmos' gas purchases were prudent, and that no adjustments should be made to its gas costs for the review period. Intervenors will be filing exceptions to this recommendation.

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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Although the 80th Legislature passed Senate Bill 3 (the major omnibus water bill), this session is expected to again have numerous water issues on its plate, including groundwater rights and regulation, reservoir development, surface water rights, and development issues related to certificates of convenience and necessity (CCNs).

None of the legislative efforts can be accomplished without the means to pay for them. Balancing a budget against the needs of a growing state will be a major challenge for lawmakers, as they will need to craft a formula that prioritizes spending and limits expenditures -- a difficult task for a growing state during the recent downturn in the economy. In 2007, a state budget of $152.5 billion was approved, which included property tax relief, state employees' raises, increase for teacher salaries, and spending for state parks, and also made room for 128,000 children to be added to the Children's Health Insurance Program.

With the change in House leadership and new committee appointments, there is no telling what will pop up as a major issue this session. Cities and consumers are expecting the recent changes to result in the House being much more receptive to efforts to promote competition in the electric industry and to bring price relief to millions of Texans and Texas businesses who have suffered paying increasingly oppressive electric bills since electric deregulation passed the Legislature a decade ago in 1999. After ten years, none of the lower electric rates promised in 1999 have ever materialized. Efforts over the last several legislative sessions to address the issue have been quashed by the electric industry, which has enjoyed record profits over the same time period. Many Capitol players are hopeful that the new House leadership will tackle this issue and stop favoring one Texas industry at the expense of all others and residential customers.

Stay tuned for more news and updates as the session gets under way.

Legislative Dates of Interest

Friday, March 13, 2009 60th day	Deadline for filing bills and joint resolutions other than local bills, emergency appropriations, and bills that have been declared emergencies by the Governor
Monday, June 1, 2009 140th day	Sine Die- Last day of 81st Regular Session; corrections only in House and Senate
Sunday, June 21, 2009 20th day following final adjournment	Last day Governor can sign or veto bills passed during the regular legislative session
Monday, August 31, 2009 91st day following final adjournment	Date that bills without specific effective dates (that could not be effective immediately) become law.

This article was prepared by Brian Sledge and Mindy Martinez of the Firm's Government Relations Practice Group, which has been recognized by Capitol Insider's Texas Lobby Power Rankings as one of the Top 15 Law Firm Lobby Practices in Texas. Both are registered lobbyists with the Texas Ethics Commission. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Brian at (512) 322-5839 or bsledge@lglawfirm.com, or Mindy at (512) 322-5824 or mmartinez@lglawfirm.com.

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Jason Hill will be speaking on "Complying with Water Quality Laws and Regulations" at the Texas Water Laws and Regulations Seminar on February 18 in Arlington, Texas.

Jason Hill will be discussing the "Interaction of Mineral Development & Water Regulations, and Exempt Use" at the Changing Face of Water Rights Conference on April 2 in Austin.

Sheila Gladstone will be giving an "Employment Law Review" at the Texas Probation Association Annual Conference on April 7 in Austin.

David Klein will be speaking on the "New Challenges in Obtaining and Decertifying Water Certificates of Convenience and Necessity" at Texas Water 2009 on April 16 at Moody Gardens in Galveston.

Jeff Reed will be presenting "Carbon, Carbon, Everywhere - Where are My Credits?" at Texas Water 2009 on April 17 at Moody Gardens in Galveston.

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