



The Lone Star Current

What is ERCOT and Why Should You Care?

by Chris Brewster

Record heat and drought in 2011 brought to the attention of average Texans an organization that many had never heard of – the Electric Reliability Council of Texas, or ERCOT. As much of the state suffered through a February freeze and then a historically hot summer, ERCOT worked to keep the state’s electric grid operational. In the second half of 2011, ERCOT began to sound an alarm regarding the ability of

the state to meet its electric needs for the next several years. With the potential for another difficult year on the horizon, ERCOT – and its role in the Texas electricity market – is poised to be in the headlines again in 2012.

What is ERCOT?

ERCOT is a membership-based, § 501(c)(4) corporation based in Austin. While it is not a state agency, it has been certified by the Public Utility Commission (“PUC”) to serve as the “independent organization” that oversees the state’s deregulated electric grid pursuant to the Public Utility Regulatory Act (“PURA”). As independent operator for the region’s grid, ERCOT coordinates the operation of the various utilities’ electric transmission systems so that they work as a single grid, and also maintains the computer systems that dispatch power plants to meet consumers’ demand. Finally, ERCOT plays a key role in facilitating customers’ switches of retail electric providers, and oversees the transport of data between the various segments of the market needed to compute monthly electric bills.

ERCOT has authority over most, but not all, of the state. Several parts of Texas – the El Paso area, the Panhandle, Northeast Texas, and Southeast Texas, are not part of ERCOT but are governed by the equivalent organizations for the neighboring regions. Because ERCOT operates only within the state and the utilities it oversees do likewise, ERCOT is not generally subject to federal jurisdiction, with the exception of reliability issues. For the most part, then, ERCOT answers to the Texas PUC.

What is ERCOT’s stakeholder process – what kind of decisions are made within it?

All of the functions described above are governed by a lengthy and complex set of rules called the ERCOT protocols. Those rules are set – and constantly revised – through a process of stakeholder involvement. For that process, the ERCOT market is divided into seven segments roughly corresponding with the various roles in the market – independent power generator, retail electric provider, consumer, and the like. These segments are represented within a complicated hierarchy of committees and subcommittees, with ERCOT’s Board of Directors sitting at the top of this structure. These bodies generally meet once a month, with some meeting more often. Parties may file requests to change the protocols (known as protocol revision requests, or “PRRs”) that move through this structure of stakeholder bodies. Lengthy debates on the merits of the proposed changes often occur, frequently over months and across the various stakeholder bodies.

Why should you care about ERCOT?

Besides the obvious benefit of having electric lights come on with the flip of a switch, the ability of stakeholders to influence the management of the electric grid benefits all consumers in the state. Changes to the ERCOT protocols can have real impacts on wholesale energy prices (and thus on retail prices) and on the reliability of electric service in the entire ERCOT region. Currently, a large number of the Firm’s client cities and other political

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The Lone Star Current

Published by
Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Phone: (512) 322-5800
Fax: (512) 472-0532
www.lglawfirm.com

Georgia N. Crump
Managing Editor

Jeanne A. Rials
Project Editor

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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



We are pleased to announce that **Jason T. Hill** has been elected to the Firm's Board of Directors as a Principal effective January 1, 2012. Jason's experience addressing water supply challenges in Texas predates his career as a water attorney. Before attending Baylor University School of Law, he served as a legislative advisor to Texas State Senator Robert Duncan on water, environmental, agricultural, and natural resource policy issues. As a native West Texan, Jason developed an appreciation early on in life of the direct connection between the availability of quality water and the opportunities for families, communities, and entire regions to prosper. Today, Jason represents a wide spectrum of client interests across and beyond Texas, including commercial and industrial interests, landowners, municipalities, public water utilities, groundwater conservation districts, and other Texas political subdivisions. His practice is centered on helping his clients address their water resources management, water rights, and other water supply planning issues. He devotes a substantial part of his practice to advocating for his clients before the Texas Commission on Environmental Quality, the Railroad Commission of Texas, the State Office of Administrative Hearings, and other agencies of the State of Texas on a broad range of permitting issues. Jason is a mem-

ber of the Firm's Water Practice Group, a collection of over 15 water attorneys dedicated to tackling some of the most pressing water challenges of our time. Jason received a B.A. in 1997 from Texas Tech University and his Doctorate of Jurisprudence in 2004 from the Baylor University School of Law. Since earning his law degree and beginning work as an associate at Lloyd Gosselink, Jason has twice been selected for inclusion in Texas Super Lawyers - Rising Star® Edition, and was the 2011 recipient of the distinguished Texas Water Conservation Association President's Award for his work on behalf of TWCA. Jason was raised in Shallowater and currently resides in southwestern Travis County with his wife, daughter, and son.



We are pleased to announce that **Cathleen C. Slack** has been elected to the Firm's Board of Directors as a Principal effective January 1, 2012. Cathleen helps businesses with their operations and growth by offering sound advice and attention to detail in contracting matters, corporate formation, governance, and mergers and acquisitions. Cathleen is also Board Certified by the Texas Board of Legal Specialization in Commercial Real Estate and assists clients with real estate transactions such as leasing, purchase and sale, and development. Cathleen's background as a commercial property manager of an office tower in Houston, Texas, as well as her experience as an owner and manager during the start-up of a software development company, provide her with a unique perspective to understand and respond to the needs of her business and real estate clients. Several years spent as an Assistant Attorney General also allows her to successfully represent both landowners and condemners in eminent domain matters. Cathleen

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received her Bachelor of Business Administration in Management from the University of Texas at Austin and her Doctorate of Jurisprudence from the University of Houston. She grew up in Austin, Texas and is pleased to be settled again in Austin with her husband and daughter.



Alex R. McCready has joined the Firm's Business Services and Corporate & Real Estate Practice Groups. His practice focuses primarily on corporate and real estate transactions where he assists businesses in the acquisition, sale, and leasing of real property, as well as business formations, mergers and acquisitions, and various other business transactions. Alex received a joint Bachelor of Arts in International Business and Spanish from St. Edward's University and his Doctor of Jurisprudence from Cleveland-Marshall College of Law. While in law school, he was a judicial intern for The Honorable Sam Sparks of the United States District Court, Western District of Texas, Austin Division, and served as a law clerk in the legal department of IMG World. He is a member of the State Bar of Texas, the Ohio State Bar Association, the Austin Bar Association, and the Austin Young Lawyers Association. Alex is originally from Austin, Texas.



Shauna N. Fitzsimmons has joined the Firm's Water Practice Group. Shauna's practice focuses primarily on groundwater and surface water permitting and management. Shauna represents groundwater conservation districts, municipalities, public and private water utilities, and landowners in matters involving regulation and planning, water rights, water quality, water resource development and transactions, service area disputes, rates, litigation, and board governance. Shauna attended the University of Texas at Austin, where she earned a Bachelor of Science in Corporate Communications. Shauna received her Doctor of Jurisprudence from the Texas Tech School of Law, where she served as Articles Editor for the *Texas Tech Law Review*. She is a member of the State Bar of

Texas (Environmental and Natural Resources Law Section), the Austin Bar Association, and the Austin Young Lawyers Association. Shauna is a native of San Antonio.

The Firm has been listed in the 2011-2012 U.S. News - Best Lawyers "Best Law Firms" Rankings as a First-Tier Firm in the specialty of Energy Law.

The Firm has been named one of the 2011 Top Workplaces of Greater Austin by the *Austin American-Statesman*, placing seventh in the small employer category.

Brad Castleberry has been accepted to serve as an EnviroMentor for the Texas Commission on Environmental Quality. This voluntary assistance program provides resources to small businesses and local governments that cannot afford technical or legal assistance, but are committed to complying with state and federal environmental regulations.

Brad Castleberry will provide "A Regulatory Update on the Current State of Reuse in Texas" at the Central Texas Section of WEAT Conference on January 17 in Austin.

Martin Rochelle and **Cristina Ramage** will be providing a "Legislative and Regulatory Update" at the Texas Municipal Utilities Association's Annual Meeting in Fredericksburg on January 26.

Jason Hill will discuss "Ethics Minefield for Water Professionals" at the Texas Groundwater Association's 65th Annual Convention and Trade Show on January 26 in San Marcos.

Ty Embrey will present "SB 573, CCN Decertification, and Water Utility Service Issues," and **David Klein** will present "Issues Affecting Reuse: Whose Water is it?" at the 13th Annual Changing Face of Water Rights 2012 Conference on February 23 in San Antonio.

Martin Rochelle will present "Federal Issues Affecting Water Supplies" at the Texas Municipal League's conference, "Water in Texas: What Every City Official Needs to Know" on March 2 in Austin.

Martin Rochelle will present a "Caselaw Update" at the Texas Water Conservation Association's Annual Meeting to be held March 7-9 in Dallas.

Brian Sledge will be discussing "Water Rights in Time of Drought: What It Means for the Rio Grande" at the CLE International's Law of the Rio Grande Conference on March 29 in Santa Fe, New Mexico.

Brad Castleberry will be discussing "Legal Issues Associated with Water Rights" at the Austin Engineers and Contractors Association Meeting on April 18 in Austin.

Paul Gosselink will be presenting "Waste to Energy: Legal and Regulatory Issues" at the Air & Waste Management Association National Conference to be held June 19-22 in San Antonio.

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subdivisions are participants in the ERCOT process and are represented in that process by the Firm's Energy and Utility Practice Group.

Chris Brewster is a Principal in the Energy and Utility Practice Group. Chris focuses on the emerging nodal market at the Electric Reliability Council of Texas (ERCOT) and the Public Utility Commission of Texas. If you have questions about ERCOT or the ERCOT process, you may contact Chris Brewster at (512) 322-5831 or cbrewster@lglawfirm.com.



MUNICIPAL CORNER

Certain kinds of electronic communications by the boards of a river authorities and groundwater districts could, depending on the facts, constitute a deliberation and a meeting for purposes of the Texas Open Meetings Act.

The Attorney General was asked whether e-mails or other electronic communications could constitute a violation of the Texas Open Meetings Act ("Act"). The A.G. was asked specifically about three types of electronic communications. Declining to opine on the specific fact scenarios, the A.G. instead provided general legal guidance as to the applicability of the Act to electronic communications. The A.G. first noted that boards of river authorities and groundwater districts are governmental bodies subject to the Act. The A.G. reviewed the meaning of "meeting" as defined in the Act and determined that a meeting is a deliberation, which is a "verbal exchange." The A.G. further determined that a verbal exchange does not require words be spoken in person. To support this proposition, the A.G. cited several Texas cases indicating that members of a governmental body need not be in each other's physical presence to constitute a quorum. The A.G. concluded that an electronic communication does not escape the requirements of the Act simply by virtue of being electronic. Therefore, electronic communications can constitute communications subject to the Texas Open Meetings Act. Tex. Att'y Gen. Op. No. GA-0896 (2011).

A city that has adopted civil service rules under Chapter 143 of the Local Government Code may create and maintain a reserve police force.

The Attorney General was asked whether a city that has adopted civil service rules under Chapter 143 of the Local Government Code ("LGC"), thereby requiring officers to pass a civil service examination, could maintain a reserve police force of officers who do not take a civil service examination. The A.G. stated that the term "police officer" as defined in LGC Chapter 143 means a member of the police department appointed under Chapter

143 or entitled to civil service status. The A.G. examined whether a reserve police officer met either of these qualities. The A.G. immediately dismissed the notion that reserve officers are appointed under Chapter 143 because reserve officers are appointed under Chapter 341 of the LGC. Further, the A.G. noted that Chapter 341 specifically prohibited reserve officers from receiving the financial benefit of full-time employment or from participating in a pension fund created for the benefit of full-time paid peace officers. To the contrary, police officers under Chapter 143 with civil service status may be entitled to full compensation and pension benefits. Accordingly, the A.G. found that a reserve officer was not a police officer under Chapter 143. The A.G. noted, however, that pursuant to Chapter 341 a reserve officer who assumes the duties of a regular officer must comply with the requirements of a regular officer. This limitation, the A.G. stated, suggests that reserve officers' duties are different from those of regular officers. Further, both Chapters 143 and 341 acknowledge the existence of complementary police forces, regular and reserve. The A.G. concluded that a city may maintain both types of forces without violating the requirements of Chapter 143. Tex. Att'y Gen. Op. No. GA-0893 (2011).

Texas law does not require a housing authority to reimburse a municipality, county, or political subdivision for improvements, services, or facilities provided to the housing authority.

The Attorney General was asked whether the Texas Local Government Code ("LGC") § 392.005(b) requires a public housing authority to reimburse a political subdivision that furnishes improvements, services, or facilities for a housing project in lieu of paying taxes or special assessments. The LGC exempts housing authorities and housing authorities' property from all taxes and special assessments of a "municipality, a county, another political subdivision, or the state." The statute specifically states that a housing authority "may, in lieu of paying taxes or special assessments, agree to reimburse in payments to the municipality, county, or political subdivision an amount not greater than the estimated costs . . . for the improvements, services or facilities." The A.G. cited the Code Construction Act and stated that the word "may" should be construed as "creat[ing] discretionary authority or grant[ing] permission or a power." The A.G. opined that having the power to act does not by itself require execution of the act. Accordingly, the A.G. found that § 392.005(b) of the LGC does not require a housing authority to reimburse a political subdivision for improvements, facilities, or services. The A.G. refused to comment, however, about whether a housing authority would be required to reimburse a political subdivision under some other statute or contractual obligation. Tex. Att'y Gen. Op. No. GA-0887 (2011).

It is unclear whether a notary public is an "officer" under Chapter 603 of the Texas Government Code.

The Attorney General was asked whether the provisions of Chapter 603 of the Texas Government Code that impose duties on "officers" are applicable to notaries public. Already subject to Chapter 406 of the Government Code, such treatment would subject notaries public to additional duties. Texas law does not define the term "officer." Texas courts have held, however, that "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of

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the control of other.” Notaries public do not fit this definition. In fact, the United States Supreme Court has called the duties of Texas notaries public “essentially clerical and ministerial.” This did not end the A.G.’s inquiry, however, because other legal authorities indicate that notaries public are officers. For example, the Texas Constitution implies notaries public hold “civil office of emolument” and “an office or position of profit under this State.” Further, notaries must take the oath of office pursuant to the Texas Government Code. Some Texas courts have stated in passing that a notary is an officer. Finally, the A.G. noted that it had concluded in an opinion that a notary is an officer for some purposes. The A.G.

ultimately determined that it could not definitively answer the question. A notary public may or may not be an officer under Chapter 603 of the Texas Government Code. *Tex. Att’y Gen. Op. No. GA-0886 (2011).*

Municipal Corner is prepared by Daniel Gonzales. Daniel is an Associate in the Firm’s Energy and Utility Practice Group. If you would like additional information or have questions related to these or other matters, please contact Daniel at (512) 322-5858 or dgonzales@lglawfirm.com.

The New Landscape of Rainwater Harvesting in Texas

by Kristen O. Fancher

Texas continues to set the standard for rainwater harvesting policy across the nation and is considered to be one of the few western states on the cutting edge of this type of conservation method. The Texas Legislature passed multiple bills during the 2011 legislative session that amend existing law on rainwater harvesting to further encourage, promote, and develop statewide rainwater harvesting policy. In particular, House Bill 3391, passed during the 2011 regular session, requires new government buildings that have a roof size of at least 50,000 square feet and that will be located in an area of the state that receives at least 20 inches of average annual rainfall per year to incorporate rainwater harvesting systems for water supply for both indoor and outdoor use. The bill also encourages school districts to utilize rainwater harvesting systems at district facilities.

One of the main changes is that state law now prevents cities and counties from denying building permits simply because a rainwater harvesting system is used or is included in the design of the building. A city or county can only deny a permit if the rainwater harvesting system does not meet minimum state construction or design standards. Property Owners’ Associations (“POAs”) are also limited in how they can regulate rainwater harvesting. POAs cannot prohibit outright the use of rainwater harvesting systems, but POAs can regulate the size, type, and appearance of rainwater harvesting systems that are visible from a street, another lot, or from a common area.

Another change is that the Texas Health and Safety Code no longer prohibits the use of rainwater harvesting systems for indoor potable, or drinkable, uses. The new law also requires a person who intends to connect a rainwater harvesting system to a public water supply system to obtain the consent of the city or owner/operator of the public water system where the rainwater harvesting system is located before connecting the rainwater harvesting system to a public water supply. The law makes clear that a city or the owner/operator of a public water supply system is not liable for any adverse health effects caused by the consumption of water collected by a rainwater harvesting system that is connected to the

public water supply and used for potable purposes, as long as the municipality or the public water system is in compliance with state drinking water standards.

The Texas Commission on Environmental Quality (“TCEQ”) is required to implement the new laws by developing rules that regulate the installation and maintenance of rainwater harvesting systems to be used for indoor potable purposes. TCEQ has held stakeholder meetings to receive input, and is currently in the process of developing these rules. TCEQ currently plans to hold a formal public rulemaking hearing and comment period in August 2012. The Texas Water Development Board is also required to make training on rainwater harvesting available to the members of the permitting staffs of cities and counties on a quarterly basis.



Texas has historically led the nation in financial incentives for rainwater harvesting systems and continued its tradition by passing laws in 2011 that provide additional financial incentives for rainwater harvesting. The new laws encourage financial institutions to consider loaning money for developments where rainwater harvesting will be the sole source of water supply and also encourage cities and counties to promote rainwater harvesting by using incentives, including discounts on rain barrels or rebates for water storage facilities. While Texas law already provided some regulation of rainwater harvesting, the new laws, which became effective on September 1, 2011, further water conservation efforts and provide a wider range of uses, incentives, and regulation of this popular conservation tool.

Kristen Fancher is an Associate in the Water and Districts Practice Groups. She assists clients with regulatory compliance matters, water resource and supply planning, and water utility service issues. If you would like additional information or have questions related to this article, please contact Kristen Fancher at (512) 322-5804 or kfancher@lglawfirm.com.

TCEQ to Consider Comments Regarding Proposed Drought Rules

by Martin C. Rochelle and Cristina D. Ramage

As we have advised in several previous editions of *The Lone Star Current*, on November 4, 2011, the Texas Commission on Environmental Quality (“TCEQ”) published for public comment in the *Texas Register* proposed new rules relating to the “Suspension or Adjustment of Water Rights During Water Shortage.” These proposed rules resulted from the passage of the TCEQ’s Sunset Bill, HB 2694, by the 82nd Legislature last spring, which amended Chapter 11 of the Texas Water Code to provide for the TCEQ’s issuance of emergency orders concerning water rights. HB 2694 authorized the agency’s executive director to temporarily suspend or adjust the right of any water right holder to divert and use water during “a period of drought or other emergency shortage of water” and required the Commission to adopt rules to implement these new provisions. TCEQ’s November 4, 2011, publication of the proposed Chapter 36 rules initiated a comment period that ran through December 5, 2011, allowing stakeholders and other interested persons the opportunity to comment, provide input, and seek clarification regarding the rules.

As of the close of the comment period on December 5, TCEQ received over thirty comment letters from various stakeholders throughout the state, including the Texas Parks and Wildlife Department, the TCEQ Office of Public Interest Counsel, and various political subdivisions and private interests across the state. Lloyd Gosselink also submitted comments to the proposed rules on behalf of a number of its municipal, river authority, and regional water district clients. Generally, most commenters expressed support for TCEQ’s initiation of a protocol to manage the suspension or curtailment of water rights during periods of drought or emergency water shortages. However, a vast majority of the comments received by the TCEQ stressed the need for additional clarification of the conditions for issuance of an order by the executive director, as well as the notice and opportunity for hearing to be afforded to water right holders upon the issuance of such orders.

Several comments addressed the proposed definitions for “drought” and “emergency shortage of water” in the proposed rules, the need for clarification of same, and for suggested refinement of these definitions. One commenter noted that “the criteria proposed by TCEQ to define a drought as described in § 36.02(2) do not appear to be stringent enough to identify a drought that would warrant the triggering of emergency action.” Other commenters noted that the definitions of drought and emergency shortage of water are unclear and could result in confusion and uncertainty as TCEQ implements the rules.

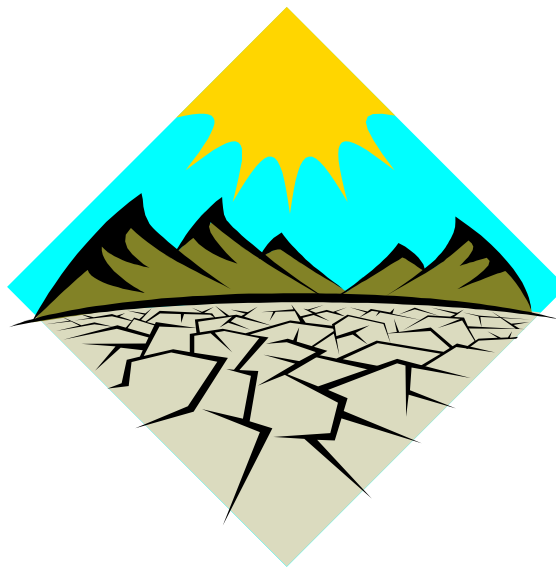
Many comments also addressed the duration of the suspension or adjustment orders issued by TCEQ, as the proposed rules provide that such orders will be issued for a 180-day duration, “unless oth-

erwise specified,” with what appears to be an unlimited number of additional 90-day extensions, as well. Several commenters opined that such duration is simply too long and could result in burdensome restrictions being placed on junior water right holders for too long a period, and that the rules should be amended to accommodate a shorter duration for orders and subsequent extensions.

Other comments noted the lack of specificity and due process afforded by the proposed rules as related to the procedural protocol under which TCEQ will hold a hearing to determine whether to affirm, modify, or set aside a suspension or adjustment order. Currently, the proposed rules allow the executive director to issue a suspension or adjustment order without notice and opportunity for hearing, and provide that “if an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued.” Commenters urged the Commission to provide more specificity in the rules as to the precise procedural protocol and type of notice and hearing opportunity to be afforded water right holders upon issuance of such an order.

Another prevalent comment related to the conditions for issuance of a suspension or adjustment order as outlined in the proposed rules, notes that the rules are vague and do not clearly specify how the Commission will consider the implementation of water conservation and drought contingency plans and other factors, as it decides whether to issue an order. While some commenters opined that the proposed rules do not appropriately protect the prior appropriation doctrine system, other commenters urged the Commission to include additional language in the rules so as to ensure greater deference to the water use “preferences” prescribed under Water Code § 11.024. As currently drafted, the proposed rules allow the executive director, “in accordance with the priority doctrine in Texas Water Code § 11.027,” to temporarily suspend or adjust a water right during drought or emergency shortage of water, and provide that the order “to the greatest extent practicable, [should] conform to the order of preferences established by Texas Water Code § 11.024.” As we have previously advised in profiling these rules, the Water Code § 11.024 preferences suggest that diversions for municipal or domestic purposes, for example, will be allowed before diversions for other uses, including industrial, mining, agricultural or recreational uses, during times of drought or other emergency shortage of water.

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In addition to its acceptance of written comments, the TCEQ also held a public hearing on the proposed rules on December 1, 2011, during which many stakeholders provided verbal comments to the proposed rules. The TCEQ will consider both the verbal and written comments it has received as it moves forward to finalize these proposed rules, which are slated for action and possible adoption at the Commissioners' Agenda on April 11, 2012. In the interim, Lloyd Gosselink's Water Practice Group will continue to monitor this rulemaking as well as other regulations and developments related to the ongoing drought, all in an effort to keep our clients informed of the TCEQ's adoption and implementation of these important regulatory measures.

Martin C. Rochelle is a Principal with the Firm, where he chairs its Water Practice Group. Martin represents a broad array of clients across the state in the areas of water rights and supply, water quality, and water reuse, and he is actively engaged in the development of sound water policy at the Texas Capitol. Cristina D. Ramage is an Associate in the Firm's Water Practice Group. Cristina assists clients with water supply planning, permitting and regulation in the areas of surface water and groundwater. If you have questions concerning the rules discussed in the article, or the protocol to be employed by TCEQ for adopting and/or implementing the rules, please feel free to contact Martin at (512) 322-5810 or mrochelle@lglawfirm.com, or Cristina at (512) 322-5887 or cramage@lglawfirm.com.

New Report by Texas Coalition for Affordable Power Marks 10 Years of Electric Deregulation in Texas

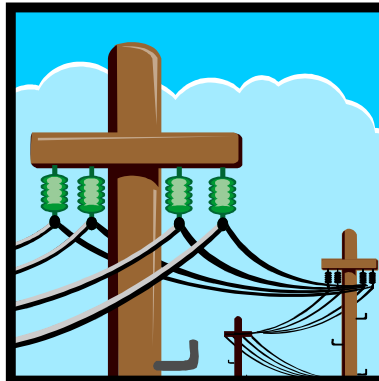
by R.A. "Jake" Dyer

On Jan. 1, 2002, precisely at the stroke of midnight, Texas broke with its long tradition of regulating most electric utility service. No longer would giant, vertically-integrated utilities maintain their monopoly grip on residential and business customers. No longer would Austin political appointees determine directly the cost of air conditioning and lighting homes. Instead, new Retail Electric Providers would vie for business in most parts of Texas.

To mark this month's 10-year anniversary of this colossal policy change, the Texas Coalition for Affordable Power ("TCAP"), a coalition of more than 160 cities and political subdivisions, is releasing an updated report on the history of the law.

Among the key findings of the updated report:

- Average electricity prices in Texas have declined in the last two years. However, Texans in deregulated areas of the state have paid consistently higher electricity prices than Texans living in areas still subject to rate regulation.
- Electricity rates above the national average have cost Texans more than \$11 billion during the 10-year period of deregulation. Average residential rates have been higher in Texas than average rates nationwide until only very recently.
- As the number of electric providers has increased, so too has the complexity of electric contracts. Complaints filed with the Public Utility Commission against electric providers have been much greater in number during deregulation, as compared to complaints filed during those years prior to deregulation.
- Prior to the implementation of the deregulation law, Texas had the highest generation reserve margins in the nation. It now has the lowest reserve margin, which has led to serious reliability challenges for the state's power grid.
- There have been two statewide rolling blackouts in four years under deregulation, and at least nine reliability emergencies in 2011 alone. By contrast, the Electric Reliability Council of



Texas ordered statewide rolling blackouts only once in the 30-plus years before deregulation.

- Some generators and other parties have recommended market changes that are designed specifically to increase their profit margins. Many of these proposals abandon competitive principles, and instead rely upon artificial price supports and regulatory intervention to engineer higher prices.

The nearly 100-page report, which is based on months of research, includes a review of journalistic accounts, regulatory documents, academic studies, and data from the United States Energy Information Administration. A previous version of the report, released for the Texas Legislature in 2009, became a useful tool for lawmakers, legislative staff, and journalists. The updated report will be released in January in a digital format, at TCAP's website: www.TCAPTX.com.

TCAP was originally two separate non-profit corporations — the Cities Aggregation Power Project and the South Texas Aggregation Project. TCAP and their predecessor coalitions were formed as bulk purchasing groups to give Texas cities extra clout in the deregulated electricity market. TCAP is now the largest coalition of its type in the state. It purchases in excess of 1.3 billion kilowatt-hours of power each year for street lighting, office buildings, water plants, and other municipal needs.

Lloyd Gosselink policy analyst R.A. "Jake" Dyer has spent more than a decade monitoring consumer issues in Texas. His long journalism career included nearly a decade with the Fort Worth Star-Telegram, where he was named Reporter of the Year in 2007, and nearly a decade with the Houston Chronicle, where he was nominated for a Pulitzer Prize. In 2010 Dyer authored Natural Gas Consumers and the Texas Railroad Commission, a report on pocketbook and policy issues. In 2011 he authored The Story of ERCOT, a special report on the Texas grid operator. If you have any questions or would like additional information, you may contact Jake at (512) 322-5898, or rdyer@lglawfirm.com.

Update on *The Aransas Project v. Shaw, et al.*

by Kristen O. Fancher

After a two-week bench trial before Judge Janis Jack in the federal district court in Corpus Christi, the trial portion of the notorious litigation styled as *The Aransas Project v. Shaw, et al.*, has come to an end. As reported in previous editions of *The Lone Star Current*, The Aransas Project (“TAP”), a non-profit environmental group based out of Rockport, Texas, sued the three Commissioners of the Texas Commission on Environmental Quality (“TCEQ”), the TCEQ Executive Director, and the South Texas Watermaster (“TCEQ Defendants”) in March 2010. Three other defendants -- Guadalupe-Blanco River Authority, San Antonio River Authority, and the Texas Chemical Council -- ultimately joined the TCEQ Defendants to become defendants in the case. TAP’s lawsuit sought a declaratory judgment that the TCEQ Defendants’ alleged actions/inactions resulted in a take of the whooping crane in violation of the Endangered Species Act, and also requested the court to enjoin TCEQ from approving or allowing water diversion activities that destroy or alter whooping crane habitat.

In addition to the 21 expert witnesses called to testify during trial, Judge Jack issued a subpoena on the first day of trial requiring Tom

Stehn, former U.S. Fish and Wildlife Service’s whooping crane coordinator at the Aransas National Wildlife Refuge, to testify. The subpoena was issued in spite of the federal government’s policy that its employees not testify in court in order to prevent disclosure of confidential information. On the last day of trial the judge requested the parties to submit written closing arguments, and she also informed the parties that she may not make a ruling in the case until this summer due to the large volume of exhibits and technical issues involved in the case. Given the importance of this decision to all surface water users across the state, *The Lone Star Current* will continue to monitor the case and provide an update once the judge issues a decision.

Kristen Fancher is an Associate at the Firm and a member of the Water and Districts Practice Groups. She assists clients with regulatory compliance matters, water resource and supply planning, and water utility service issues. If you would like additional information or have questions related to this article, you may contact Kristen at (512) 322-5804 or kfancher@lglawfirm.com.



Ask Sheila:

Dear Sheila,

We do a good job of making sure all our workers present the necessary I-9 documentation when we hire them to show they are eligible to work in the United States. Recently, we received a letter from the Social Security Administration stating that the Social Security Number we reported for one of our employees does not match the employee’s name in the SSA database. We like this employee very much, and hope we don’t have to fire him! He showed us a very legitimate-looking social security card when we hired him. What do we do next?

Signed, Nervous Employer

Dear Nervous Employer,

First, don’t panic. Although the Social Security Administration (SSA) has, in 2011, resumed its practice of sending out “No Match” letters, the Department of Justice has emphasized that the receipt of an SSA no-match letter does not necessarily mean that the employee is not authorized to work in the U.S. In fact, the government does not want you to fire an employee based solely on the receipt of such a letter. The no-match letter simply means there is an error in either the employer’s records or the SSA’s records, and seeks the employer’s and/or the employee’s assistance in trying to make the two records match. There are other reasons besides questionable immigration status that could cause the problem – a simple typing

error when the employee, the employer, or the SSA recorded the name or social security number, an unreported name change due to marriage, or even identity theft. We recently saw a no-match letter where it turned out the middle and last name of the employee were reversed based on cultural differences.

You still must take the letter seriously and respond quickly. Employers or employees who ignore no-match letters are often investigated by Immigration and Custom Enforcement (ICE), as sometimes the reason for the no-match is that the employee provided a false SSN. Ignoring a no-match letter will be used as evidence that the employer knowingly hired an illegal worker, leading to fines of up to \$10,000 per worker/per incident. When ICE audits, it is common to see a request for all no-match letters received by the employer.

If you get a letter, the first thing to do is check your employment records to determine if the information provided to SSA matches those records. If not, you can contact SSA for an easy correction. If you need the employee’s help in verifying the records, ask as a second step. The employee may be able to show you an original social security card, or explain an unreported name change. If the answer is not evident, then require that the employee contact the SSA. It is not advised that you terminate or otherwise retaliate against the employee at this time, as doing so could be seen as national origin discrimination. You should give the employee a reasonable time to resolve the matter, normally about 120 days. If, after that time, it appears that the employee is not permitted to legally work in the U.S., termination may be appropriate.

“Ask Sheila” is prepared by Sheila Gladstone, the head of the Firm’s Employment Law Practice Group. If you would like additional information or have any questions related to this article or other matters, please contact Sheila at (512) 322-5863 or sgladstone@lglawfirm.com.



IN THE COURTS

Portland Cement Ass'n v. EPA, No. 10-1359 (D.C. Cir., Dec. 9, 2011).

The D.C. Circuit Court of Appeals held that EPA's cost-benefit analysis of a rule setting emissions standards for Portland cement facilities must consider the effects caused by another rule being considered concurrently. The EPA sets National Emission Standards for Hazardous Air Pollutants ("NESHAP") based on the amount of emission reductions achieved by the best controlled similar sources. At the time that EPA was promulgating NESHAP for Portland cement facilities, it was also working on a rule regulating commercial and industrial solid waste incinerators ("CISWI"). Some cement kilns combust secondary materials that would cause them to fall under the CISWI rule rather than the NESHAP rule; the two rules are mutually exclusive. The court held that because the NESHAP standards are set based on the existing facilities that are subject to the rule, EPA could not set the NESHAP without knowing which and how many kilns would be subject to CISWI rather than NESHAP.

Texas v. EPA, No. 10-1425 (D.C. Cir., Dec. 1, 2011).

The Court of Appeals for the D.C. Circuit is allowing a lawsuit by the State of Texas to proceed. In May, EPA took over a part of Texas' air permitting program, arguing that because Texas refused to regulate greenhouse gases under its Prevention of Significant Deterioration ("PSD") program, EPA would do so. Under EPA's rule, Texas could continue issuing permits for other pollutants but EPA would begin issuing permits for greenhouse gas emissions. Texas filed suit challenging that rule, and EPA argued that the suit should be delayed while other challenges to EPA's greenhouse gas regulations were decided. The court held that the Texas case does not have to wait for the other challenges to be decided, and ordered the parties to submit briefing schedules for the case.

National Solid Wastes Management Ass'n v. City of Dallas, No. 3:11-CV-3200 (N.D. Tex., Nov. 18, 2011).

The National Solid Wastes Management Association and several private waste haulers have filed suit in the U.S. District Court for the Northern District of Texas against the City of Dallas, seeking

to stop a flow control ordinance from taking effect in January. The ordinance requires commercial haulers of waste in Dallas to dispose of all solid waste at Dallas' landfill. The plaintiffs claim, among other things, that the ordinance violates the contracts clause of the U.S. Constitution.

Shell Oil Co. v. Ross, 2011 WL 6277778 (Tex. Supreme Court, December 16, 2011).

The Texas Supreme Court recently overturned a jury decision that was upheld by the 1st Court of Appeals in Houston, holding that the royalty owner (the Ross family) should have discovered royalty underpayments before the time expired for filing suit. The case involved a 2002 suit brought by the Ross family against Shell Oil Company and its subsidiary claiming that Shell underpaid royalty payments earned through a lease between the Ross family and Shell during the period from 1994 to 1997. The Ross family's suit claimed that the statute of limitations for bringing suit should be extended because Shell fraudulently concealed and misrepresented its underpayments. At trial, Shell admitted that it made a mistake in its payments to the Ross family. The jury found in favor of the Ross family and the Court of Appeals held that the evidence presented supported the jury's finding. The Supreme Court overturned both decisions and held that the Ross family did not exercise reasonable diligence to discover the underpayment and that their claims are barred by limitations because readily accessible and publicly available information could have revealed Shell's wrongdoing before the limitations period ended. The Court relied heavily on the Ross family's receipt of royalty payment statements from Shell that varied greatly from one statement to the next throughout the four years of underpayment.

Rolling Plains Groundwater Conservation District v. City of Aspermont, 2011 WL 5041964 (Tex. Supreme Court, October 21, 2011).

On October 21, 2011, the Texas Supreme Court issued a ruling that the Texas Legislature did not waive sovereign immunity in Chapter 36 of the Water Code (before its amendment in 2009). The case arose from the City of Aspermont's failure to pay water transportation fees and to comply with the Rolling Plains Groundwater Conservation District's ("District") rules. The District filed suit under the former § 36.102 of the Texas Water Code for the payment of past due fees, penalties and costs, and sought a declaration that the City must comply with District rules. The City claimed that it was immune from suit and the Court held that the former § 36.102 did not waive governmental immunity. Section 36.102 of the Texas Water Code has since been amended to allow suit against governmental entities for violating the rules of a groundwater conservation district. The Court of Appeals held that the City was not immune from the declaratory judgment aspect of the District's lawsuit that requested the trial court to find that the City must comply with the District's enabling act, Chapter 36 of the Texas Water Code, and the District's rules. The City did not appeal this decision to the Texas Supreme Court and the trial court will hear the declaratory judgment aspect of the case.

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Ward Timber Ltd., et al. v. Texas Water Development Board, Cause No. D-1-GN-11-000121 (200th Judicial District Court, Travis County, October 31, 2011).

The District Court in Travis County recently denied the Texas Water Development Board's ("TWDB") plea to the jurisdiction and found that the TWDB's finding that no interregional conflict exists between the Region C and Region D Regional Water Plans is not supported by substantial evidence. The TWDB had found that there is no conflict between the Region C and Region D Regional Water Plans. Ward Timber, Ltd. thereafter brought suit against TWDB in Travis County claiming that there was in fact a conflict between the Region C and Region D plans, primarily because the Marvin Nichols Reservoir project was included as a recommended water management strategy in the Region C Plan. The suit alleges that the conflict between the two plans includes Region C's recommendations for the construction of the Marvin Nichols reservoir project that would be located in Region D. The suit also alleged that the Region D Regional Water Planning Group found that construction of the reservoir project in Region D would conflict with the interests and goals of Region D. The trial court remanded the case back to the TWDB to make a new decision that is consistent with the court's ruling.

CenterPoint Energy Houston Electric, LLC v. Public Utility Commission of Texas, Cause No. 03-10-00633-CV (Tex. App. - Austin).

In 2010, the Public Utility Commission ("PUC") opened a rule-making proceeding, Project No. 37623, to amend the PUC Substantive Rule that provides for an energy efficiency cost recovery factor ("EECRF"). The EECRF ensures timely and reasonable cost recovery for utility expenditures made to satisfy the energy efficiency goals set forth by the Legislature in PURA § 39.905. After the Commission amended Rule § 25.181, CenterPoint appealed the rule, arguing that § 39.905 of PURA requires the Commission to include a "lost-revenue adjustment mechanism" ("LRAM") in Rule § 25.181 and that its failure to include the LRAM rendered the rule invalid. Such a mechanism would allow a utility to be compensated for the revenues lost as a result of successful energy efficiency programs. On November 10, 2011, the Third Court of Appeals upheld the Commission's rule as valid, holding that PURA § 39.905 does not permit, much less require, the Commission to adopt a LRAM as part of the EECRF.

Railroad Commission of Texas v. Texas Coast Utilities Coalition, Cause No. 03-10-00242-CV (Tex. App. - Austin).

The Cost of Service Adjustment ("COSA") mechanism is the result of a negotiated settlement between the Gulf Coast Coalition of Cities ("GCCC") and CenterPoint Energy Texas Gas ("CenterPoint Gas") in CenterPoint Gas' rate case filed in 2008. However, the Texas Coast Utilities Coalition ("TCUC") did not agree to the COSA and filed suit to determine the legality of the COSA tariff. The district court concluded that the Commission did not have statutory authority to impose the COSA on the TCUC cities with original jurisdiction or to adopt the COSA in the environs. Both CenterPoint Gas and the Railroad Commission appealed the district court's

judgment to the court of appeals. On October 27, 2011, the Third Court of Appeals reversed the district court's judgment that the Railroad Commission had exceeded its authority in adopting or imposing the COSA clause and remanded to the district court. The Third Court of Appeals reasoned that under the Gas Utility Regulatory Act ("GURA"), the Railroad Commission has wide latitude to ensure that gas rates are just and reasonable. Because the Court determined the COSA was a "rate," it concluded that the Railroad Commission had authority to set rates using the COSA mechanism, so long as the rates were just and reasonable. This holding could be detrimental for consumers because the Court opened the door for the Railroad Commission to apply other "formula rates" instead of requiring a full rate proceeding.

Gulf Coast Coalition of Cities v. Railroad Commission of Texas - Appeal of GUD 9902, 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 Houston Division, Cause No. D-1-GN-10-001813.

After the Railroad Commission issued its Final Order in GUD No. 9902 on February 23, 2010, CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas, the Gulf Coast Coalition of Cities, and the City of Houston appealed to district court, complaining of numerous reversible errors. The Travis County District Court heard oral argument on the issues on June 29, 2011. On November 4, 2011, the court affirmed the entire decision of the Railroad Commission. Of particular importance to cities is the court's affirmation of the Railroad Commission's decision that municipal franchise fees should not be collected from customers in the environs.

Atmos Energy Corp., et al. v. Cities of Allen, et. al., and Railroad Commission of Texas, No. 10-0375, 2011 WL 5601803 (Tex. Supreme Court, November 18, 2011).

On June 28, 2010, Cities of Allen, *et al.*, CenterPoint Energy Resources Corporation, Texas Gas Service Company, and Atmos Energy Corporation all filed petitions for review at the Texas Supreme Court of the Third Court of Appeal's decision regarding utilities' Gas Reliability Infrastructure Program ("GRIP") filings. All parties sought to correct errors in the decision made by the Third Court of Appeals regarding the Railroad Commission's interpretation of the GRIP Amendment and related rules promulgated by the Railroad Commission. Cities sought a judgment declaring the GRIP rule void to the extent that it prohibits an opportunity for a meaningful hearing on contested appeals from municipal GRIP rate ordinances. The Supreme Court of Texas heard oral argument on September 15, 2011, and delivered its opinion on November 18, 2011. Affirming the court of appeals, the Court concluded that the Railroad Commission has appellate jurisdiction that is limited to a review of a utility's filing for compliance with the GRIP statute and rules.

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 Proposes CAFO Reporting Rule. On October 21, 2011, the EPA proposed a regulation that would collect information about concentrated animal feeding operations (“CAFO”). The information collected under the proposed rule would allow EPA to increase water quality protection through better implementation of the NPDES permitting program for CAFOs. The proposed regulation would apply to all permitted and unpermitted CAFOs. EPA will accept comments on the proposed rule until January 19, 2012.

EPA Expects to Propose NPDES Electronic Reporting Rule. In 2008, EPA initiated a rulemaking that would require electronic reporting for NPDES permit holders. This regulation would identify the essential information that EPA needs to receive electronically, primarily from NPDES permittees with some data required from NPDES agencies (NPDES-authorized states, territories and tribes) to manage the national NPDES permitting and enforcement program. In the past, EPA primarily obtained this information from the Permit Compliance System (“PCS”). However, EPA has cited an increasing need to better reflect a more complete picture of the NPDES program and the diverse universe of regulated sources and the inability of the PCS to meet its needs to manage the NPDES program as catalysts for this rulemaking. This proposed rule was slated to be published in the December 2011 *Federal Register*, but has not yet been published.

Greenhouse Gas Reporting for Most Facilities Begins; Delayed for Others. The deadline for mandatory reporting of greenhouse gas emissions for most facilities subject to the greenhouse gas reporting rule (40 CFR Part 98 – the “Reporting Rule”), including municipal waste landfills and large stationary fuel burning sources, passed on September 30, 2011. EPA has amended the Reporting Rule, extending the deadline an additional six months (until September 28, 2012) for twelve types of sources that were required to begin collecting data in 2011, including industrial landfills, industrial wastewater treatment plants, and electric transmission and distribution equipment. Most facilities that have sources that fall under both the original deadline and the new deadline are allowed to extend the deadline for all of their sources under the amended rule.

Counties Proposed for Ozone Non-Attainment. EPA has published notice soliciting comments on EPA’s recent responses to the state designation recommendations for the 2008 Ozone National Ambient Air Quality Standards (“NAAQS”). In 2008, EPA set the health-based NAAQS standard for ozone at 0.075 parts per million, but delayed implementing that standard while it considered lowering the standard. In September 2011, EPA decided to implement the 2008 standard, and is in the process of designating areas that would be in non-attainment of the 2008 standard. In Texas, the counties in the Dallas and Houston areas that are being considered for non-attainment can be seen at <http://www.epa.gov/ozonedesignations/2008standards/rec/region6R.htm>. Comments on EPA’s notice are due by January 19.

New Air Standards for Power Plants Announced. On December 16, 2011, the EPA signed standards to limit air emissions of heavy metals (including mercury, arsenic, chromium, and nickel), and acid gases (including hydrochloric acid and hydrofluoric acid) from power plants. EPA was under a court order to complete the rules by that date. The new standards affect both new and existing coal-fired and oil-fired electric utility steam generating units. Existing sources will have no less than three years, and up to four years, to comply with the new rule. The EPA also signed revisions to the standards that new (but not existing) plants must meet for particulate matter, sulfur dioxide, and nitrogen oxides.

Proposal to Revise Test Methods for Air Emissions. EPA has proposed revisions to test methods, performance specifications, and associated regulations for measuring air emissions in 40 CFR parts 51, 60, 61, and 63. The revisions consist of allowable alternatives that were not previously available, changes that facilitate the use of mercury-free equipment, and updates needed to correct obsolete provisions or to add flexibility. No changes are proposed to any compliance standard, reporting, or recordkeeping requirement.

Changes to Boiler Rules Proposed. On December 2, 2011, the EPA proposed changes to rules regulating air emissions from existing and new boilers and commercial and industrial solid waste incinerators (“CISWI”). The changes are proposed pursuant to a decision by the EPA in March, 2011, to reconsider earlier boiler and CISWI rules. According to the EPA, only about 1% of the boilers in the U.S. will need to add new pollution controls to meet the rule as it is now proposed. The proposal also revises EPA’s definitions of the units that would fall under the CISWI rules. The EPA will accept comments on the proposed rules until January 31, 2012.

Texas Commission on Environmental Quality

TCEQ to Consider Rules to Implement Drought Provisions of HB 2694. On October 18, 2011, the TCEQ proposed rules to implement the drought provisions within HB 2694, the TCEQ Sunset Bill. HB 2694 added § 11.053 to the Texas Water Code, authorizing the executive director to temporarily suspend or adjust water rights during times of drought or other emergency shortage

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of water. This rulemaking implements the new § 11.053 and includes rules defining “drought” and “emergency shortage of water.” It also specifies the conditions under which the executive director may issue an order and prescribe the maximum duration of a temporary suspension or order. The proposed rules also set out procedures for notice of, opportunity for hearing on, and appeal to the commission of an order issued by the executive director. A public hearing regarding the proposed rules was held on December 1, 2011, and the comment period closed on December 5, 2011. The proposed rules are scheduled to be adopted on April 11, 2012.

TCEQ Proposes Rules Regarding Public Interest Counsel. On November 18, 2011, the TCEQ proposed rules to implement § 3.04 of HB 2694, the TCEQ Sunset Bill, which required the Commission by rule to establish factors the Public Interest Counsel must consider before deciding to represent the public interest as a party to a Commission proceeding. The proposed rules include factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the Office of Public Interest Counsel. A public hearing will be held on the proposed rules on January 24, 2012, and the TCEQ will accept comments on the proposed rules until January 30, 2012. These rules are scheduled for a May 16, 2012 adoption date.

TCEQ Proposes Rules to Implement New Contested Case Hearing Procedures. On October 14, 2011, the TCEQ proposed new rules to implement certain provisions within House Bill 2694, the TCEQ Sunset Bill, which amended the Texas Water Code to add new §§ 5.315, 5.115(b), and 5.228(c) and (d), relating to the contested case hearings process. These rule amendments will restrict certain state agencies from contesting applications for permits or licenses in the air quality, water, and waste programs. The limitation applies to requesting contested case hearings or reconsideration by the executive director, as well as appealing the issuance of permits or orders through the administrative process by filing a motion to overturn or a motion for rehearing. Under the proposed rule, certain state agencies may be a party to a contested case hearing on an application at the State Office of Administrative Hearings but will be prohibited from contesting the issuance of a permit or license. The proposed rules will also revise the role of the executive director in contested case hearings for permit applications, and will add a new deadline for discovery in contested case hearings in which prefiled testimony is used, except for hearings in which discovery was completed before September 1, 2011, and water and sewer ratemaking proceedings. These proposed rules are scheduled for an April 11, 2012 adoption.



Public Utility Commission of Texas

Docket No. 39504 - Remand of Docket No. 29526 (Application of CenterPoint Energy Houston Electric LLC, Reliant Energy Retail Services, LLC and Texas Genco, LP to Determine Stranded Costs and other True-Up Balances Pursuant to PURA § 39.262). After the Texas Supreme Court reversed and remanded CenterPoint Energy Houston Electric, LLC’s (“CenterPoint”) true-up appeal, CenterPoint sought to recover an additional \$2.3 billion in stranded costs. Prior to the hearing on the merits in the remanded proceeding, the parties reached a settlement agreement that reduced the Company’s request by \$600 million, allowing CenterPoint to recover \$1.695 billion. The Commission approved the settlement agreement on October 19, 2011. The average residential customer will see an increase of \$2.74 per month over a 14-year period in addition to the amount of \$6.33 that the average customer was already paying for stranded costs.

Docket No. 39722 – Remand of Docket No. 31056 (Application of AEP Texas Central Company and CPL Retail Energy, LP to Determine True-Up Balances Pursuant to PURA § 39.262). In July 2011, the Texas Supreme Court entered a final judgment in the appeal of AEP Texas Central Company’s true-up case, Docket No. 31056, remanding certain issues to the PUC. The Commission subsequently opened Docket No. 39722 for the purpose of determining AEP TCC’s stranded cost balance on the issues remanded from the appellate courts. In October 2011, AEP TCC filed its application seeking an additional \$1.2 billion in stranded costs. After lengthy negotiations, the parties reached a settlement agreement on December 2, 2011. As a result of the settlement, AEP TCC’s recovery of stranded costs was reduced by nearly \$400 million to \$800 million. The Commission adopted the settlement agreement at its open meeting on

December 15, 2011. As a result, the average residential ratepayer in AEP TCC’s service area will pay an additional \$3.29 per month for 14 years.

Docket No. 39708 – Application of Southwestern Electric Power Company for Approval of Turk Rate Plan, Associated Rate Increase, and Deferred Accounting Order. On August 31, 2011, Southwestern Electric Power Company (“SWEPCO”) filed an application to increase rates based on its investment in the Turk coal plant under construction in Arkansas. SWEPCO sought a rate increase for recovery of a portion of the Turk Plant financing costs, based on a two-step plan that would have ultimately amounted to a 17.5% increase over existing rates. In the third and final step of its plan, SWEPCO proposed to bring a full rate case in May 2013, where the reasonableness and prudence of the \$1.5 billion of the Turk Plant construction work in progress (“CWIP”) would be litigated. The novelty in this proceeding was the fact the SWEPCO sought to conduct piecemeal ratemaking by increasing rates based on its increased investment in the Turk Plant without a

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review of any evidence on the Company's O&M expenses or revenues that could mitigate the need for increased rates. Cities opposed the proceeding, arguing that SWEPCO should not be permitted to increase rates for CWIP outside of a rate case. At the December 8, 2011 Open Meeting, the Commissioners concluded they would not authorize CWIP outside a rate case for policy reasons.

Docket No. 39868 - El Paso Electric Company's Petition for Review of the City of El Paso's Rate Resolutions and Request for Expedited Relief.

On October 27, 2011, El Paso Electric Company ("EPE") filed a petition for review of resolutions passed by the City of El Paso ("City") requiring EPE to file a new rate case on or before February 1, 2012, and setting a public hearing to consider temporary rates for EPE. In response to the petition filed at the Commission, the City filed a motion to dismiss for lack of jurisdiction on November 7, 2011. The City held a temporary rate hearing on October 25, 2011, and on November 15 voted to set EPE's temporary rates at current levels. EPE filed a motion for an interim order to immediately stay the rates until the Commission issues a final order in the appeal. On December 2, the parties filed a joint request that the Commission take up and decide the motion to dismiss filed by the City and the motion for interim order to stay the City's rate ordinance filed by EPE. On December 15, the Commission ruled that it did not have jurisdiction to consider the petition filed by EPE, as the City had not taken final action to set EPE's rates.

Cost of Texas Wind Transmission Lines Well Over Initial Estimates.

When the PUC approved the build-out of transmission

lines to carry wind power across Texas, the project was estimated to cost \$4.93 billion. However, the project is now estimated to cost at least \$6.79 billion, an increase of 38%. These figures come from a July 2011 Competitive Renewable Energy Zone ("CREZ") Progress Report prepared for the PUC that also indicates that the increase in cost is partially due to the distances initially used to calculate the lines. While the estimates used straight line distances, the PUC often approved routes that followed fences, roads, or other rights-of-way that minimize the impacts on landowners, resulting in distances that were 10-50% longer than initially estimated.

Railroad Commission of Texas

CenterPoint Texas Gas - Texas Coast Division COSA. On April 29, 2011, CenterPoint Gas Texas Coast Division filed its third Cost of Service Adjustment ("COSA") pursuant to a 2008 settlement agreement. Based on CenterPoint's 2010 operating results, the Company claimed the need for an increase in annual revenues of \$914,910. The parties were unable to reach a settlement agreement on CenterPoint's proposed COSA during the 90-day review period for the Cities and the case is now on appeal before the Railroad Commission of Texas. The parties submitted briefs in lieu of a hearing in early November. A Proposal for Decision will likely be issued in early 2012.

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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FERC Chairman Wellinghoff Speaks at Lloyd Gosselink

John Wellinghoff, Chairman of the Federal Energy Regulatory Commission, said that the rest of the country can learn something from Texas when it comes to wind energy in a presentation at the Firm's conference room before a meeting of the Texas Renewable Energy Industry Association. The visit was arranged and hosted by Paul Gosselink as part of his representation of various renewable energy facilities. In addition to extolling the abundance of wind energy, Wellinghoff noted that Texas had extensive solar and geothermal resources and was in a position to be a leader in both fields. For additional information regarding Chairman Wellinghoff's remarks, please contact Paul Gosselink at (512) 322-5806 or pgosselink@lglawfirm.com.

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816 Congress Avenue, Suite 1900
Austin, Texas 78701

