

The Lone Star Current

TCEQ Initiates Rulemaking to Implement HB 2694 Drought Provisions

By Martin C. Rochelle and Cristina D. Ramage

Amidst the challenges faced by water rights holders and water suppliers across the State that have surfaced as a result of one of the worst droughts in Texas history, last spring the Texas Legislature issued a mandate to the TCEQ to create a new, more effective, protocol for managing the State's surface water resources during times of drought. These protocols will have tremendous implications for water suppliers as they struggle to address demands for water in light of record temperatures this past summer and drought conditions over the past year. TCEQ has initiated a rulemaking to implement this new protocol at the same time as its Executive Director has issued "calls" on junior water rights in several river basins as a result of the drought, thereby restricting or prohibiting diversions and use of water to which senior rights are entitled.

With the passage of the TCEQ's Sunset Bill, HB 2694, by the 82nd Texas Legislature, Chapter 11 of the Texas Water Code was amended to provide for the TCEQ's issuance of emergency orders concerning water rights and to authorize 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." Significantly, HB 2694 authorized the TCEQ's Executive Director to temporarily curtail or suspend water right diversions in light of the priority date of water rights, pursuant to Texas Water Code § 11.027 ("first in time is first in right") but with due regard to the "preferences" of uses included in § 11.024 of the Water Code (where a municipal use has preference, for example, over an industrial or irrigation use), which heretofore has been utilized by TCEQ only in acting on com-

peting applications for water rights but not for administering the order in which existing rights may be diverted.

In response to the Sunset legislation, the TCEQ has initiated a rulemaking process to define the terms "drought" and "emergency shortage of water," and to further develop the protocol for mandatory adjustment and suspension of water rights during water shortages. These changes to the law and ensuing regulations governing drought and water use are occurring at an extremely critical juncture and will undoubtedly have a great effect on drought management and water rights curtailments in the future.

Based upon the legislative directive issued to it in newly adopted Water Code § 11.053, the TCEQ is currently in the process of developing rules to implement a protocol for temporary adjustments to water rights, and the agency has solicited feedback from stakeholders and interested parties. Specifically, the TCEQ recently posed a series of questions for which it sought responses:

1. How should "drought" and "emergency shortage of water" be defined?
2. How should development and implementation of conservation plans be considered?
3. What conditions should be required for issuance of a curtailment order?
4. What should be the duration of the temporary order?
5. What type of notice, opportunity for hearing, and appeal are required after this order is issued?

TCEQ received a variety of comments in response to these questions. Many of the comments focused on the definition of the terms "drought" and "emergency shortage of water" for purposes of implementing suspensions and temporary orders. One commenter opined that the term "emergency shortage of water" should be defined narrowly, so as to only allow the TCEQ authority to address emergency conditions when conditions present an

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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.



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You can also access *The Lone Star Current* on the Firm's website at www.lglawfirm.com.



FIRM NEWS

Geoffrey Gay was awarded the "Marvin J. Glink Private Practice Local Government Award" by the International Municipal Lawyers Association ("IMLA") in a ceremony at the 76th Annual Conference on September 13 in Chicago. This award recognizes a private practitioner who, as part of a private practice, has provided outstanding service to the public, and who possesses an exemplary reputation in the legal community, the highest of ethical standards, and who is devoted to mentoring young lawyers and educating lawyers in local government law.

Paul Gosselink and **Lambeth Townsend** have been selected for inclusion in *Super Lawyers Texas: 2011* (Thomson Reuters).

Georgia Crump, **Geoffrey Gay**, and **Lambeth Townsend** were recently selected by their peers for inclusion in *The Best Lawyers in America® 2012* (Copyright 2011 by Woodward/White, Inc., of Aiken, S.C.).

Martin Rochelle, Chair of the Texas Water Conservation Association's Water Laws Committee, will moderate a panel of experts discussing "Clean Water Act § 404 Permitting" at TWCA's Fall Conference on October 13 in San Antonio.

Thomas Brocato will be discussing "Energy Legislation" and **Eileen McPhee** will be presenting "Common Ethical Problems and Pitfalls" at the Texas Coalition of Cities for Utility Issues Legislative Wrap-Up Seminar on October 21 in Irving.

Eileen McPhee will present "Texas Legislature Part II: Total Telecom Deregulation - Buyer Beware" at the Texas Association of Telecommunications Officers and Advisors Conference on October 27 in Austin.

Martin Rochelle will provide a "Legislative Update" on water-related legislation recently passed by the 82nd Texas Legislature at the 10th Annual Texas AWWA Drinking Water Seminar on October 28 in Austin.

Sheila Gladstone will discuss "Employment Law Issues" at the Texas Workers' Comp Forum on November 2 in Austin.

Martin Rochelle will present "Special Considerations in the Permitting of Reservoirs: a Lawyer's Perspective" at the World Lakes Conference on November 2 in Austin.

Sheila Gladstone will be discussing "What TELCOs Need to Know" at the National Telecommunications Cooperative Association Conference on November 7 in Savannah, Georgia.

Sheila Gladstone will present "Social Media - Can a Tweet Land You on the Street?" at the Texas Chapter Public Risk Management Association 2011 Conference on November 18 in Galveston.

Sheila Gladstone will present a "Hiring and Employment Law Update" at the Houston CPA Society Tax Expo on January 9, 2012 in Houston.





MUNICIPAL CORNER

Depending on the facts, a governmental entity may be prohibited from requiring a contractor or other vendor to sign a project labor agreement as a condition of submitting a bid. The Attorney General was asked whether § 271.121 of the Local Government Code prohibited a governmental entity from requiring a contractor or other vendor to sign a project labor agreement (“PLA”) as a condition of submitting a bid. A PLA is a multi-employer, multi-union, pre-hire agreement designed to systemize labor relations at a construction site. Section 171.121 of the Local Government Code, also called the “Right to Work” statute, applies to a governmental entity when it procures goods, awards a contract, or oversees “procurement or construction for a public work or public improvement.” The statute prevents a governmental entity from considering whether a vendor has an affiliation with another organization, and requires the governmental entity to ensure that person’s right to work is not diminished because of his affiliation with an organization. The A.G. determined that a PLA could violate the Right to Work statute, but whether a PLA actually violated the statute depended on the specific terms of the PLA. Whether a PLA’s terms violate the Right to Work statute is a fact question outside the purview of the Attorney General’s opinion process. Tex. Att’y Gen. Op. No. GA-0858 (2011).

A Type A general-law municipality has the authority to adopt and enforce an ordinance prohibiting the discharge of certain firearms or other weapons on property located within its original corporate limits. The Attorney General was asked whether § 229.002 of the Texas Local Government Code prohibited a Type A general-law municipality from adopting an ordinance regulating the discharge of a firearm or other weapon in an area that is within the municipality’s original city limits. Section 229.002 limits a municipality’s authority to regulate the discharge of firearms or other weapons in the city’s extraterritorial jurisdiction (“ETJ”) and in areas annexed by the municipality after September 1, 1981. The A.G. opined that by definition the city’s ETJ and the area annexed by the municipality are not in a municipality’s original corporate boundaries; therefore, § 229.002 does not prohibit a Type A general-law municipality from regulating the discharge of a firearm or other weapon in a area that is within the municipality’s original city limits. Tex. Att’y Gen. Op. No. GA-0862 (2011).

Texas law does not authorize municipal charter provisions imposing a duty on a county judge to order a municipal recall election. The Attorney General was asked whether the Harris County Judge had the authority to order a recall election pursuant to a city’s municipal charter. The A.G. stated that home rule cities derive their broad powers from the Texas Constitution, not the legislature. A home rule city has all the powers of the state as long as the powers are not inconsistent with the Texas Constitution and the general laws

of the state. Accordingly, the A.G. analyzed whether the city charter’s imposition on a county judge to discharge the duties of the city council was inconsistent with Texas law. The A.G. found that while a county judge has authority to order some elections, a recall election is a special election and may only be ordered by the authority expressly designated to do so by law. Further, the Texas Supreme Court has found that a county judge does not have inherent authority to order a special election. Therefore, any charter provision imposing a duty on a county judge to order a recall election is inconsistent with Texas law and unenforceable. Tex. Att’y Gen. Op. No. GA-0870 (2011).

The chief of police of a school district may not receive compensation for service on the city council if the chief’s job does not include any teaching responsibilities. The Attorney General was asked whether a school district chief of police may be compensated for service on a city council. Article XVI, section 40 of the Texas Constitution prohibits individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas from receiving a salary for serving on the governing bodies of school districts, cities, towns or other local governmental districts. However, the Texas Constitution provides an exception from this rule for a “schoolteacher” or retired school administrator. The A.G. considered the meaning of the term “schoolteacher.” While no Texas court has addressed the meaning of the term “schoolteacher,” the A.G. determined that the term meant an individual “employed to instruct students in a school setting, which may include an athletic facility.” The A.G. concluded that the job description for school district police chief did not include any teaching responsibilities. Therefore, the school district chief of police may not be compensated for service on the city council. Tex. Att’y Gen. Op. No. GA-0874 (2011).

A municipal utility district made up of two consolidated municipal utility districts may tax customers within the district according to tax classifications based on land ownership in the original districts. The Attorney General was asked whether the Texas Constitution prevented a consolidated municipal utility district (“MUD”) from levying different debt service tax rates on property within each of the two former MUDs to fund payments on each district’s pre-consolidation debt. Article VII, section 1 of the Texas Constitution states that taxation shall be equal and uniform. However, the A.G. noted that Texas courts have long recognized that absolute equality and uniformity in taxation is an unattainable ideal and not required by the constitution. The A.G. stated that the constitutional mandate only requires that parties with the same class of taxation be taxed alike. Accordingly, a MUD may tax those within its boundaries differently based on classification if the classification is “not unreasonable, arbitrary, or capricious and when it operates equally on persons or property with the class.” The A.G. further opined that a MUD could charge a different debt service tax rate on annexed property that was not part of the original districts. Finally, the A.G. stated that a MUD could also levy a district-wide tax in a consolidated district for debt issued by the MUD after consolidation. Tex. Att’y Gen. Op. No. GA-0883 (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.

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“imminent and substantial endangerment to human health” and where no other feasible alternative exists. Another commenter suggested that the definition for “drought” should be flexible enough to allow for determinations as to whether a drought exists on a basin-by-basin basis. Most commenters agreed that “drought” and “emergency shortage of water” should be distinct definitions, with “drought” being defined according to a variety of meteorological, scientific, hydrologic, and water supply-related determinations. Some commenters emphasized the importance of maintaining the integrity of the prior appropriation system in all circumstances other than those extreme circumstances where human health is threatened. In fact, multiple comments addressed the Legislature’s mandate that the Executive Director temporarily suspend or curtail diversions of water in a manner that “to the greatest extent practicable, conforms to the order of preferences established by Section 11.024.” This policy shift will, for the first time, allow the Executive Director to balance considerations of priority with § 11.024 use preferences in administering curtailments during times of drought or emergency shortages of water.

Many comments submitted to the TCEQ addressed the relationship of water conservation and drought contingency plans to water shortage conditions, with most commenters emphasizing that TCEQ should consider the extent to which a beneficiary of a TCEQ order restricting the diversion and use of junior rights has implemented its own water conservation and drought contingency plans. At least one commenter remarked that implementation of “meaningful” drought measures by a water rights holder making “calls” on junior rights should be a prerequisite to agency intervention and/or assistance. The degree to which TCEQ will require uniformity among drought contingency plans, and the extent to which the agency will evaluate an entity’s adherence to and enforcement of its drought contingency plan before issuing an emergency order intended to benefit the entity, remain issues under consideration as TCEQ continues its rulemaking process.

These and other issues will be evaluated by TCEQ as it formulates draft rules to implement the emergency drought provisions of HB 2694. The rules are scheduled to be published in the November 4, 2011 *Texas Register*, with a public hearing on the rules scheduled for December 1, 2011. A public comment period will run until December 5, 2011, and will allow stakeholders and other interested parties to provide feedback and generate suggestions regarding the proposed rules. The rules are then scheduled for formal adoption by TCEQ Commissioners in April 2012.

Meanwhile, as the TCEQ continues its efforts to implement necessary and appropriate drought management provisions, water suppliers throughout Texas face ever-increasing challenges in their efforts to plan for and manage the water resources available to them, and in light of the challenges brought on by this historic drought. Lloyd Gosselink’s Water Practice Group will continue to track the development of these rules and will keep our clients informed of the TCEQ’s adoption and implementation of these important measures. As of press time, the proposed rules have been filed with the Chief Clerk, and are available for viewing on the TCEQ’s website at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/proposals/11033036_pro.pdf.

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 or implementing the rules, please contact Martin at (512) 322-5810 or mrochelle@lglawfirm.com, or Cristina at (512) 322-5887 or cramage@lglawfirm.com.

FCC NOI and PEG - Important Acronyms for Cities

by Georgia N. Crump

Last April, the Federal Communications Commission (“FCC”) issued a Notice of Inquiry (“NOI”) in which it sought comments related to “expanding the reach and reducing the cost of broadband deployment by improving policies regarding public rights of way and wireless facilities siting.” Described as a leading element in the FCC’s Broadband Acceleration Initiative, the NOI seeks to “update [the FCC’s] understanding of current rights of way and wireless facilities siting policies, assess the extent and impact of challenges related to these matters, and develop a record on potential solutions to these challenges.”

The FCC requested comments addressing the timeliness and ease of the permitting process, the reasonableness of charges, the extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices, consistent or discriminatory/differential treatment, presence or absence of uniformity due to inconsistent or varying practices and rates in different jurisdictions or areas, and other rights of way con-

cerns including “third tier” regulation or requirements that cover matters not directly related to rights of way use or wireless facilities siting.

Perhaps even more importantly for municipalities was the FCC’s invitation for comments on whether the FCC has authority to adjudicate rights of way disputes under Section 253 of the Communications Act of 1934. The FCC noted that it had not resolved this issue, and the courts have taken differing approaches to the question of federal preemption of local regulatory provisions.

Although the FCC stated that it was interested in systemic practices rather than individual or anecdotal situations, many of the comments it received from the communications industry were anecdotal, albeit non-specific, complaints about how local governments had been behaving when presented with tower siting requests. Nu-

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merous cities in Texas were mentioned in some industry comments, although again no specific complaints were lodged against these cities. In response, various cities and coalitions of cities, along with the Texas Municipal League, filed reply comments challenging the FCC's jurisdiction over zoning and right of way issues, and particularly addressing the industry's allegations that Texas cities have been obstructionist in their policies or practices with regard to the siting of telecommunications facilities or the use of public rights of way. In addition, coalitions of cities in other states and individual cities across the nation filed detailed and substantive reply comments to disabuse the FCC of the notion that any perceived inability of citizens to obtain ubiquitous broadband services is the result of actions or inactions by local governments.

Reply comments in this NOI were filed on September 30, 2011. The reaction of the FCC to the multiple sets of comments and reply comments will be very important to all Texas municipalities, and will bear watching very closely.

On another note, SB 1087, passed by the Texas Legislature in the 82nd Regular Session, amended § 66.006 of the Texas Utilities Code with regard to fees received by municipalities from cable television operators for the support of public, educational, and governmental

("PEG") programming (usually 1% of the cable operator's gross revenues from cable services provided in the city). The federal law already required that funds received for support of PEG programming be used for capital expenditures only (*i.e.*, no salaries or other expenses). The recent amendment to the Texas Utilities Code adds language to Chapter 66 requiring cities receiving the PEG fee payments to: (1) maintain these revenues in a separate account established for that purpose; (2) not commingle the PEG funds with any other money; (3) maintain a record of each deposit to and disbursement from the separate account, including a record of the payee and purpose of each disbursement; and (4) not spend revenue from the fees except directly from the separate account.

The statute took effect on September 1, 2011; cities are advised to set up this separate account in order to be in compliance with the new law and not jeopardize the receipt of these funds.

Georgia Crump is a Principal with the Firm and a member of the Energy and Utility Practice Group. She focuses primarily on utility and telecommunications related issues, including representation of both private and municipal clients. If you would like additional information or have questions related to this article or other matters, please contact Georgia Crump at (512) 322-5832 or gcrump@lglawfirm.com.

Dress Codes and Religion in the Workplace

by Ashley M. Dalton

Many employers spend time, effort, and money on creating a uniform dress code and "image" to give their organization a professional and cohesive appearance, as well as enable their business to stand out and gain a competitive edge. But is it legal to stipulate how employees look and dress? Yes, and no.

It is perfectly okay, and often wise, for employers to implement policies that lay out their expectations or requirements for employees' work attire and appearance. But, such policies and expectations cannot infringe upon one of the protected categories of federal and state discrimination laws, which include race and sex, as well as religion.

Abercrombie & Fitch, the retail clothing giant, has recently found itself at the center of several hotly debated religious discrimination cases. At least two of those cases involved charges against Abercrombie & Fitch for wrongful failure to hire. The plaintiffs, who for religious reasons wore headscarves, interviewed with Abercrombie & Fitch, but were not hired because they violated the "Look Policy" under which employees "must wear clothing that is consistent with the Abercrombie brand" and "cannot wear hats or other coverings, and cannot wear clothes that are the color black." Another case involved a plaintiff who, upon being hired by Abercrombie & Fitch, was told she could work in the stock room as long as her hijab matched the company colors of navy blue, gray, or white. But her job duties also required that she occasionally be on the sales floor. One day when the district manager saw her and asked her to remove the hijab, she refused and was fired.



While employers have the right to set the tone or "look" of their businesses by setting requirements for clothing, makeup, jewelry, and other "mutable" factors, this right is limited when it comes to certain "immutable" factors. "Immutable" factors include an employee or applicant's race, sex, ethnicity, national origin, and religion. Many other religions besides Islam call for characteristic attire or appearance, including Sikhs, various Jewish groups, Rastafarians, and some Pentecostal Christian groups.

Employers are obligated to reasonably accommodate religious-based requests, even if such requests violate longstanding company policy. "Reasonable accommodation" for religious requests is not as strict as for disabilities. In this context, for religion it simply means some accommodation, such as waiving a policy or a slight change in job duties, which does not cost the employer a significant amount of money. If an employer can make an accommodation, then it must make it. In deciding if an accommodation is reasonable, an employer may take into account safety considerations. Paramilitary organizations with uniform requirements, such as police departments, may enforce their uniform policies if they are reasonable and consistently applied.

With the EEOC reporting a rise in religious discrimination claims in the past ten years, it is wise for employers to be mindful of employees' religious practices and needs for accommodation in the workplace.

Ashley Dalton is an Associate in the Employment Law Practice Group. If you would like additional information or have questions related to this article or other employment law matters, please contact Ashley at (512) 322-5808 or adalton@lglawfirm.com.

Avoiding Pitfalls in Conducting Director Elections in 2012

by David J. Klein

Over the next twelve months, the focus of our nation will shift towards the November 6, 2012 presidential election. However, there will also be many local, non-partisan elections held in 2012. General and special law water districts, and general and special groundwater districts typically hold director elections in May of even-numbered years. Water supply corporations generally conduct their director elections between January 1 and May 1 of even- or odd-numbered years. The 82nd Legislative Session in 2011 produced two bills that will impact these director elections in 2012, namely Senate Bills (“SB”) 100 and 333. It is critical that districts and water supply corporations not only be aware of the statutory changes from these bills, but also implement these changes so that they will be in compliance with these applicable laws when conducting their director elections in 2012.

Senate Bill 100

SB 100 was proposed and adopted in part to implement the Military and Overseas Voter Empowerment (“MOVE”) Act of 2009, a federal law aimed at enfranchising military and overseas voters in federal elections. In short, the MOVE Act required states to transmit validly-requested absentee ballots to Uniformed and Overseas Citizens Absentee Voting Act voters no later than 45 days before a federal election. This requirement not only applies to the November general election, but it also includes the primaries as well. In Texas, the presidential primary election is scheduled for March 6, and the runoff is set for May 22. Meanwhile, the Texas limited uniform election date, the date on which many districts hold their director elections, is set for May 12, between the primary and the primary runoff date. For many counties in Texas, conducting all of these elections in May will be a challenge.

SB 100 not only implemented the MOVE Act, but it also attempted to give additional flexibility to local governmental entities that typically held their elections in May of even-numbered years. Specifically, SB 100 amended Texas Election Code (“TEC”) § 41.001 to read as follows: “Except as otherwise provided in this subchapter, each general or special election in this State shall be held on one of the following dates: (1) the second Saturday in May in an odd-numbered year; (2) the second Saturday in May in an even-numbered year, for an election held by a political subdivision other than a county; or (3) the first Tuesday after the first Monday in November.”



Thus, this amendment provides that although a county can only hold its elections in May of even-numbered years or November of any year, an election for director of a water district can be held on any May or November uniform election date in any year. SB 100 also amended TEC § 41.0052(a), providing that, “[t]he governing body of a political subdivision, other than a county, that holds its general election for officers on a date other than the November uniform election date may, not later than December 31, 2012, change the date on which it holds its general election for officers to the November uniform election date.” In other words, under SB 100, political subdivisions that traditionally hold director elections on the May uniform election date have the option to move their election date to the November uniform election date. This will mean that the election will be conducted along with the partisan

elections, such as the presidential election.

When considering whether or how to implement these new election provisions, a political subdivision is faced with at least the following considerations. First, the political subdivision must evaluate its legal authority to move the election date. Although SB 100 clearly amends the election process, some political subdivisions are subject to other election laws. For example, a general law water district is also subject to Chapter 49 of the Texas Water Code, a groundwater conservation district is also subject to Chapters 36 and 49 of the Texas Water Code, and a special law water district or groundwater conservation district is also

subject to its enabling legislation. Before changing their election protocols, political subdivisions should evaluate this entire statutory rubric. Second, a political subdivision should also consider the financial impacts of calling an election in May or November. While a political subdivision has the ability to conduct its own election, the costs are typically lower if it can work with the local county, especially if that county is also conducting the election for other political subdivisions.

Senate Bill 333

SB 333 significantly amended the process for conducting elections for directors of water supply corporations. Water supply corporations are non-profit organizations created under the Texas Non-Profit Corporation Act and Chapter 67 of the Texas Water Code.

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The Bill Analysis for SB 333 provides that although Chapter 67 previously required water supply corporations to establish written procedures for holding elections, the framework for such procedures is open-ended. Further, the Bill Analysis notes that some water supply corporations have “adopted procedures that result in a ‘closed’ process whereby current directors hand pick who they would like to serve on the board and then control the election by obtaining proxies.” In fact, this Bill Analysis offers that the use of proxy voting is due to the inability of water supply corporations to obtain a quorum at the annual meeting of the membership. For these reasons, SB 333 was proposed to impose specific procedures on water supply corporations in order to conduct a more open election process.

With the adoption of SB 333, the standards for conducting an election for water supply corporation directors are now expressly defined and regimented. There are specific pre-requisites that must be met before a member can be placed on the ballot for election as a director. For example, a member must timely file an application to run for a director seat with the water supply corporation, and that member must also meet certain substantive criteria to be eligible.

SB 333 has also overhauled the election process itself, removing the ability to conduct proxy voting and instead establishing a protocol where members can vote (i) in person at the annual meeting of the membership, (ii) by mailing in the ballot before the election date, or (iii) by hand delivering the ballot before the election date. Independent election auditors are now required for a director election, and these individuals are generally tasked with overseeing the significant aspects of the election, such as accepting completed ballots, counting ballots, and providing a written report of the election results to the board of directors.

To facilitate obtaining a quorum at the annual membership meeting, SB 333 provides that any person who submits a ballot by mail or by hand-delivery is considered present at that meeting. Further, SB 333 directs water supply corporations to adopt written election procedures that implement these statutory changes. Again, there are express deadlines associated with these new election process mechanisms, and it is of the utmost importance that each water supply corporation not only implement these statutory changes, but also make these changes within the required period of time.

David Klein is an Associate in the Districts and Water Practice Groups. David practices in the area of water utilities, representing municipalities, districts, and landowners. The attorneys in Lloyd Gosselink’s Districts Practice Group, including David, have successfully assisted clients with implementing the statutory changes in SB 100 and 333 into their day-to-day operations. If you have any questions about this article or any other issues, you may contact David at (512) 322-5818 or dklein@lglawfirm.com.



Ask Sheila:

Dear Sheila,

We have an employee who was called up from the Reserves to active duty in 2003. He has not yet been released from duty, although he gives us regular updates on his status. I thought there was a five-year limit on an employer’s reinstatement obligation – now the Army seems to be telling us that the limit doesn’t apply in this case. Is this true? If so, for how long do we need to be ready to reinstate him?

Signed, Soldier’s Employer

Dear Soldier’s Employer:

You are right that the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) generally denies reemployment rights to individuals whose cumulative length of absence for military service exceeds five years. This statute is not intended to protect career military personnel, only those called up for special, temporary service. However, there are exceptions to the five-year rule, including any service “performed by a member of the uniformed service who is ordered to or retained on active duty . . . because of a war or national emergency declared by the President or the Congress.” It is this exception that your employee’s orders likely invoke.

On September 14, 2001, President G. W. Bush issued Proclamation #7463, entitled “Declaration of National Emergency by Reason of Certain Terrorist Attacks.” The proclamation states that a “national emergency exists by reason of the terrorist attacks at the World Trade Center . . . and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” There is no end date to the declaration.

Reservists called up after 9/11 are considered by the military to have been called up under this Declaration of National Emergency. That means that you have a legal duty to reinstate the employee upon his release, assuming he reports or reapplies to work within 90 days of an honorable discharge. This obligation lasts until the National Emergency Declaration is revoked by the President. If the employee requires further medical rehabilitation after his release in order to return to work, his reporting back period is extended up to two years. If, when he returns, another employee occupies his position, you must move or terminate the other employee and reinstate the Reservist to the position he had. The Texas Workforce Commission will not charge back your account for unemployment claimed by an employee displaced by a returning soldier.

“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

City of Hugo v. Nichols, Nos. 10-7043 and 10-7044 (10th Cir. Sept. 7, 2011).

The City of Hugo, Oklahoma filed suit against the Oklahoma Water Resources Board (“Board”) seeking a declaratory judgment that the Oklahoma statutes governing water resource allocation violated the dormant Commerce Clause. The City of Irving, Texas intervened in the suit. The lawsuit claimed that the Oklahoma laws governing its permitting process discriminate against permits for out-of-state water use and thus violate the dormant Commerce Clause. The Tenth Circuit Court of Appeals held that the political subdivision standing doctrine prevents Hugo from suing its parent state because federal courts lack jurisdiction over this type of controversy between political subdivisions and their parent states. The court also held that Irving lacked standing to sue Oklahoma because its claims lack redressability, meaning that a favorable court judgment would not be able to provide relief to Irving. In other words, if the court held in favor of Irving and invalidated the Oklahoma laws as they apply to Irving, Oklahoma could still process permit applications in whatever manner it wished with respect to Hugo, thus leaving Irving without any true relief.

Tarrant Reg’l Water Dist. v. Herrmann, No. 10-6184 (10th Cir. Sept. 7, 2011).

Similar to the *City of Hugo v. Nichols* case discussed above, the Tenth Circuit Court of Appeals held in favor of Oklahoma in its dispute with the Tarrant Regional Water District (“District”), holding that Oklahoma laws regulating the transfer of water did not restrict interstate commerce under the dormant Commerce Clause. The District sued the Oklahoma Water Resources Board, arguing that Oklahoma laws placing certain limits on out-of-state water transfers were impermissible barriers to interstate commerce. Unlike the City of Irving in *City of Hugo v. Nichols*, the court found that the District had standing based on its claim that the Red River Compact preempted Oklahoma’s water allocation statutes. The court reasoned that Congress must explicitly consent to state regulation of interstate commerce, and it did so in this situation through the Red River Compact. The court found it persuasive that the Compact used phrases such as “unrestricted use,” “control,” “freely administer,” and “in any manner” to permit the Oklahoma legislature to regulate interstate commerce relating to the state’s apportioned water.

Luminant Generation Co. v. EPA, D.C. Cir., No. 11.1315 (filed September 12, 2011).

Luminant filed suit in the D.C. Circuit against the EPA seeking to invalidate the EPA’s Cross-State Air Pollution Rule, alleging that the rule will force it to close two power generating units at its Monticello Power Plant and lay off 500 workers.

Texas v. EPA, D.C. Cir., No. 11-1302 (filed September 22, 2011).

The State of Texas has filed suit against EPA seeking to invalidate the EPA’s Cross-State Air Pollution Rule. The rule regulates emissions from power plants that cross state lines. Texas claims that it was denied a meaningful opportunity to comment on the rule because EPA’s proposed rule only regulated nitrogen oxide emissions during ozone season in Texas, but the final rule regulates both sulfur dioxide and nitrogen oxide.

Natural Resources Defense Council v. EPA, D.C. Cir., No. 11-1328 (filed September 19, 2011).

NRDC has filed suit against the EPA, based on EPA’s decision to grant a three-year exemption for biomass facilities from prevention of significant deterioration (“PSD”) and Title V permitting requirements based on their greenhouse gas emissions. According to NRDC’s petition, the biomass exemption is overly broad and should not have been granted to certain types of biomass, such as those that burn whole trees. Similar cases are likely to be consolidated with this case as the case moves forward.

FPL Farming Ltd. v. Environmental Processing Systems, LC, 2011 WL 3796612 (Tex. 2011).

On August 26, 2011, the Texas Supreme Court held that a regulatory permit to drill injection wells issued by the Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality (“TCEQ”)) does not immunize the driller from tort liability for the conduct authorized under the permit. FPL Farming Ltd. owns land used for rice farming in Liberty County, and sued the operator of a wastewater injection well on an adjacent tract for physical trespass. FPL alleged that after the operator injected substances containing wastewater more than a mile beneath the surface, some of the wastewater migrated to FPL’s land and contaminated its water supply. The Court held that common law does not immunize a permit-holder from civil tort liability because a permit merely removes a government barrier to an activity and does not bestow affirmative rights on the permit-holder. The Court also noted that Texas statutes specify that a permit does not relieve a holder of civil liability. The Court likened the situation to that of a restaurant that is licensed by health authorities but could remain liable to patrons who are sickened by food and bring negligence actions against it. Notably, the Court did not rule on whether subsurface wastewater migration can constitute a trespass, but only whether obtaining a permit immunizes the holder from tort liability generally.

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Texas Rice Land Partners v. Denbury Green Pipeline-Texas, 2011 WL 3796574, No. 09-0901 (Tex. 2011).

The Texas Supreme Court recently held that a pipeline company cannot acquire common carrier status and therefore cannot acquire eminent domain power over private landowners based on a state agency's grant of a permit. Denbury applied to the Railroad Commission to become a common carrier for a pipeline that would transport its CO₂ from its private reserve in Mississippi to the Hastings Field in Brazoria and Galveston Counties. The one-page Railroad Commission permit application contains two separate boxes for the applicant to indicate whether the pipeline will be operated as a common carrier or as a private line. Denbury marked the common carrier box and then attempted to take land for the pipeline from Texas Rice Land Partners and a lessee using eminent domain power. Texas Rice Land Partners and the lessee refused to allow Denbury access to the property. Denbury then sought an injunction to allow access to the property. Both the district court and court of appeals held in favor of Denbury based on its status as a common carrier. The Texas Supreme Court reversed, holding that the permit issued by the Railroad Commission without hearing, investigation, or notice to landowners was not sufficient to qualify the company to become a common carrier and to have the authority to condemn private property. Although the Texas Natural Resources Code gives private pipeline companies that are common carriers the power of eminent domain, the question of whether a carrier is operating for public or private use is one for courts to determine. In this case, the pipeline was for private use, and the evidence did not establish a reasonable probability that transportation for another entity would ever occur. The Court expressed concern that the application for a common carrier permit from the Railroad Commission can essentially be a ploy to obtain eminent domain power.

Texas Parks and Wildlife Dep't v. The Sawyer Trust, 2011 WL 3796347, No. 07-0945 (Tex. 2011)

In an 8-1 opinion issued by the Texas Supreme Court, the Court held that The Sawyer Trust ("Trust") was barred by sovereign immunity from seeking a declaratory judgment that the portion of the Salt Fork of the Red River that crossed its property is non-navigable and that the Trust cannot assert a takings claim under the circumstances. The Trust sued the Texas Parks and Wildlife Department requesting the court to find that the Salt Fork of the Red River is not navigable and that the Trust owns the riverbed where it crosses Trust property in Donley County. The Court opined that because the state owns the land beneath this section of the river, a declaration of non-navigability would have given title to the Trust and would allow it to sell sand and gravel from the streambed. Reversing the decisions below, the Court held the agency was protected by sovereign immunity and thus could not be sued for title to land. Although the Trust argued it was making a constitutional takings claim, which is outside the scope of sovereign immunity, the Court held that the remedy requested by the Trust in its lawsuit precludes a takings claim because the Trust sought title to the riverbed rather than money or just compensation for property. The Court also noted that the Department has not

done anything that would require it to compensate the Trust even if the riverbed is not navigable. However, the Court remanded the case to allow the Trust to assert a claim that a governmental official acted outside the scope of his duties—a claim that is not barred by sovereign immunity.

Lesley v. Veterans Land Board of Texas, 2011 WL 3796568, No. 09-0306 (Tex. 2011).

In another opinion issued by the Texas Supreme Court on August 26, 2011, the Court held that the executive holder of mineral rights (a subdivision developer) breached a fiduciary duty to the non-executive mineral right holders because the developer filed restrictive covenants limiting the future leasing of mineral rights. Developer Bluegreen Southwest One ("Bluegreen") acquired land and all of the executive rights for a parcel over the Barnett Shale in North Texas, which Lesley and others had conveyed to Bluegreen's predecessor. Lesley had reserved an undivided one-half interest in the minerals in previous conveyances of the property, but none of the executive rights. Bluegreen subdivided the land into a residential development and included restrictive covenants forbidding oil and gas drilling in the subdivision. Lesley sued Bluegreen, the Veterans Land Board as the owner of lots in the subdivision, and other lot owners, claiming that the parties breached the duty owed to non-executives by failing to lease. The Court agreed with Lesley that Bluegreen breached its duty, and ordered the restrictive covenants cancelled. The Court reasoned that even though Bluegreen, as a developer, acquired the executive mineral rights for the specific purpose of protecting the subdivision from the activities associated with developing the minerals, the common law provides protection to the surface owner through the accommodation doctrine. The Court also held that the suit against the Veterans Land Board was a suit for land from which the agency is immune.

Hudspeth County Underground Water Conservation District No. 1 v. Guitar Holding Co., 2011 WL 3792816, No. 08-09-00156-CV (Tex. App.—El Paso, 2011).

In this long-running dispute, the El Paso Court of Appeals ruled on three issues involving the distribution of attorneys and other fees assessed by the Hudspeth County Underground Water Conservation District No. 1 ("District"). The issues in this case originated in 2002 when Guitar Holding Company ("Guitar") challenged the District's decisions on the District's rules and issuance of groundwater permits. The case was ultimately appealed to the Texas Supreme Court, but Guitar narrowed the appeal to only include the issue of the validity of the District's transfer permit rules and did not include all of the issues decided at the district court and appeals court. The Texas Supreme Court held in favor of Guitar that the District's transfer rules were invalid based upon its interpretation of the applicable provision in the Texas Water Code and remanded the case back to the trial court. The only issue remaining for the trial court to decide on remand was the award of attorneys and expert witness fees and other costs incurred by the District under Sec. 36.066(g) of the Texas Water Code. The trial court held on remand that the District did not win the case and declined to

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award the recovery of the District's fees and costs. The El Paso Court of Appeals reversed the trial court's decision on recovery of fees and costs, holding that Guitar waived its right to dispute the District's status as the prevailing party because it failed to raise the issue in its appeal to the Texas Supreme Court. The court also held that the District was not entitled to the fees and costs that the parties had earlier agreed upon in the amount of \$99,761.08 because of evidence that the amount was not reasonable and necessary. Instead, the court ordered that the District be awarded the trial court's determination of "reasonable and necessary" fees in the amount of \$75,288.64. Finally, the court remanded the case to the trial court to determine the amount of reasonable and necessary post-remand attorneys fees.

Slay v. TCEQ, 2011 WL 3890402, No. 03-10-00297-CV (Tex. App.—Austin, Aug. 31, 2011).

The Austin Court of Appeals ruled in favor of TCEQ in this case, holding that the district court did not have jurisdiction to hear a case because the TCEQ penalty policy used to calculate fines does not qualify as a rule under the Administrative Procedure Act. The case arose when TCEQ found Slay and the other plaintiffs to be in violation of Environmental Protection Agency ("EPA") and TCEQ rules because of the presence of hazardous wastes on Slay's property. The wastes were eventually removed by EPA and the property was designated as a Superfund site. Slay and the other plaintiffs brought suit to challenge the monetary penalties imposed by TCEQ for the violation. The court based its decision on the concept that a policy is not a rule if it concerns only "internal management or organization" and does not affect private rights. In reaching its conclusion, the court considered it important that the TCEQ commissioners were not bound to follow the policy's methodology when determining final penalty amounts; they maintained statutorily authorized discretion apart from the policy. The court also held in favor of TCEQ on the issue of the amount of the fine, stating that the \$177,500 penalty TCEQ imposed on plaintiff was not arbitrary and capricious despite having been raised from the \$1,500 fine amount the administrative law judge recommended.

San Antonio Water System v. Lower Colorado River Authority, 2011 WL 3307509, No. 03-10-0085-CV (Tex. App.—Austin, July 29, 2011).

The City of San Antonio, acting by and through the San Antonio Water System ("SAWS"), sued the Lower Colorado River Authority ("LCRA") for breach of contract based on LCRA's decision to change some of the terms of a water supply project that the parties had been working on for several years. In 2002, SAWS and LCRA entered into a contract, the purpose of which was for SAWS to pay for capital improvements to increase water output of the Colorado River by 330,000 acre-feet and, in exchange, LCRA would sell SAWS up to 150,000 acre-feet of water per year to cover its municipal needs. After SAWS spent over \$43 million on studies, LCRA determined its region would need more water than previously thought and would thus not be able to supply any water to SAWS. After SAWS filed suit for breach of contract, LCRA filed a plea to the jurisdiction alleging that it was immune from suit.

The trial court ruled in favor of LCRA. The Austin Court of Appeals reversed the trial court, holding that SAWS can sue LCRA in its breach of contract action because the suit falls within LCRA's waiver of governmental immunity. The court found that a statutory waiver of governmental immunity applied because the contract involved an agreement to provide goods and services to LCRA in the form of studies.

Bosque River Coalition v. TCEQ, 2011 WL 3329586, No. 03-10-00475-CV, (Tex. App.—Austin, Aug. 2, 2011).

The Austin Court of Appeals held that the TCEQ abused its discretion when it denied a request submitted by the Bosque River Coalition ("Coalition") for a contested case hearing on the application of a dairy farm owner to amend his existing concentrated animal feeding operation ("CAFO") permit. The dairy farm owner applied for a permit to increase the number of cattle under his existing CAFO permit from 700 to 999 and to apply liquid and solid wastes closer to Gilmore Creek, located along the North Bosque River watershed. The Coalition filed a written request for a contested case hearing citing members who owned and used land within three miles downstream of the dairy. The TCEQ executive director denied the request on the grounds that none of the three Coalition members making the request had standing. The court held the executive director should have referred the case for a hearing rather than deny the request on the basis of "unsupported factual conclusions." The case was remanded to the TCEQ.

Texas General Land Office v. Porretto, 2011 WL 3359702, No. 01-09-00520-CV (Tex. App.—Houston [1st Dist.], Aug. 4, 2011).

This case involves a suit by the Porretto family against the General Land Office ("GLO") and other defendants for interference with the Poretto family's ownership of beachfront property. The court held in favor of the GLO on three issues involving a dispute over title and use of a privately owned section of the Galveston beach. In 1959, the Porretto family began acquiring beachfront property in Galveston. Eventually, the Texas GLO leased part of the beach for a beach replenishment project, and when the Porrettos could not sell their property they sued GLO for interference with their good title and unconstitutional taking of their property. The court held that formerly dry land along the beachfront in question is now under state title because it is submerged under the Gulf of Mexico and there was no evidence of a governmental taking because the state ultimately did not claim any land other than the land submerged under the Gulf. The court also held that the Poretto family's challenge to the Texas Open Beaches Act is invalid because it did not identify any property right that was injured or threatened with imminent injury by the public's right to access along the shore.

AES Corp. v. Steadfast Ins. Co., 100764, 2011 WL 4139736 (Va. 2011).

In February 2008, the Native Village of Kivalina, an Alaskan village, filed a lawsuit against AES and other defendants for emitting greenhouse gases, causing global warming and rising sea levels,

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and requiring that the village be abandoned (see earlier articles regarding this and other greenhouse gas-related cases). AES requested that its insurer, Steadfast, pay for its defense. Steadfast filed a declaratory judgment action, claiming that it did not owe AES a defense. The Supreme Court of Virginia agreed with Steadfast, holding that Kivalina's claim that "the damages it sustained were the natural and probable consequences of AES's intentional emissions" meant that the case did not allege an "accident or occurrence" covered by the standard CGL policy. An appeal of the underlying Kivalina case is pending before the Ninth Circuit Court of Appeals.

Cities of Allen, et. al. v. Railroad Commission of Texas - GRIP Appeal.

On June 28, 2010, Cities of Allen, et. al., CenterPoint Energy Resources Corporation and Texas Gas Service Company, and Atmos Energy Corporation all filed petitions for review of the Third Court of Appeal's decision regarding utilities' Gas Reliability Infrastructure Program ("GRIP") filings at the Supreme Court of Texas. All three parties seek 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 seek 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 the parties are awaiting the Court's ruling.

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 Expects to Propose CAFO Reporting Rule. EPA plans to propose a regulation that would collect information about concentrated animal feeding operations ("CAFO"s). 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 expects to publish the rule in the *Federal Register* in October 2011.

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 as catalysts for this rulemaking 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. This proposed rule is expected to be published in the December 2011 *Federal Register*.

EPA Expects to Propose a Rule for Stormwater Discharges at Construction Sites. EPA continues to remain on track to propose a rule in October to regulate construction stormwater discharges from development and redevelopment projects. EPA is considering proposing different standards for new developments than for redevelopments and is also accepting public input on possible phase-in methods for any new standards. The agency is studying local standards that have already been put in place as part of the rule proposal process. EPA is considering whether to mandate certain retrofit practices for all municipal sewer systems or to allow local systems to adopt their own retrofit plans and cycles. EPA expects the proposed rule to be published in October with a final rule to be published in 2012.

EPA Proposes Revising GHG Reporting Rule for Electronics Manufacturers. Under a proposed revision to the mandatory greenhouse gas reporting rule, electronics manufacturers would be required to report emissions from all fluorinated heat transfer fluids. In the original rule, EPA limited the reporting requirements to fluorinated coolants with a vapor pressure greater than one millimeter of mercury at 25 degrees Celsius. EPA is also soliciting comments on whether it would be practical for electronics manufacturers to implement the changes by March 31, 2012, the date that the next reports are due, or whether it should extend the deadline to September 28, 2012.

EPA Proposes to Simplify GHG Reporting From Certain Petroleum and Natural Gas Systems. In response to industry requests, EPA is proposing a rule that would provide "greater flexibility or simplified calculations methods" for reporting greenhouse gas emissions from several petroleum and natural gas sources. The revisions are scheduled to take effect before the March 31, 2012 reporting deadline.

EPA Proposes Rules Regulating Oil and Gas Operations. On July 28, the EPA published four proposed rules regulating emissions from the oil and gas industry. Specifically, EPA is proposing

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to (1) revise new source performance standards for volatile organic compounds, (2) revise new source performance standards for sulfur dioxide, (3) set national emissions standards for hazardous air pollutants (“NESHAPS”) for oil and gas production, and (4) set NESHAPS for gas transmission and storage. EPA plans to publish final rules in late February, 2012 in response to a court-ordered deadline.

EPA Finalizes Cross-State Air Pollution Rule. On August 8, EPA published its final Cross-State Air Pollution Rule (“CSAPR”), to require coal-fired power plants to reduce sulfur dioxide and nitrogen oxide emissions that cross state lines. Texas has filed a petition for reconsideration and a petition for review with the D.C. Circuit Court of Appeals, claiming that the proposed rule differs significantly from the final rule, in that in Texas the proposed rule only covered nitrogen oxide emissions during ozone season, whereas the final rule regulates annual nitrogen oxide and sulfur dioxide emissions. According to the Texas petition, this difference denied Texas a sufficient opportunity to meaningfully comment on the rule. The rule is scheduled to take effect on January 1, 2012.

EPA Rescinds Revised Ozone Rules; Begins Enforcing 2008 Ozone Standard. In 2008, EPA lowered the 8-hour ozone standard from 0.080 to 0.075 parts per million (“ppm”). In the face of challenges by environmental groups claiming that the new standard was not stringent enough, EPA delayed implementing the revised standard. In 2010, EPA proposed lowering the 8-hour standard to a value between 0.060 and 0.070 ppm. EPA continued to enforce the prior 0.080 ppm limit while it considered other standards. EPA has now withdrawn its 2010 ozone limit proposal, leaving the 2008 limit in place, but without guidance on how it intends to implement the 2008 standard. However, in a September 22, 2011 memo, EPA stated that it “fully intends to implement this current standard” and plans to issue initial non-attainment area designations this fall and to finalize the designations by mid-2012. The ozone standards are scheduled for review in 2013, and EPA plans to propose new ozone standards in the fall of 2013.

Texas Commission on Environmental Quality

TCEQ Staff Proposes Rules to Implement Drought Provisions of HB 2694. On September 29, 2011, TCEQ Staff 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 of water. This rulemaking will implement the new §11.053 and will include rules defining “drought” and “emergency shortage of water.” It will also specify the conditions under which the executive director may issue an order and prescribe the maximum duration of a temporary suspension or order. The rules will also set out procedures for notice of, opportunity for hearing on, and appeal to the Commission of an order issued by the executive director. The anticipated proposal date of this rulemaking is October 18, 2011. The rules will then be published for comment in the *Texas Register* on November 4, 2011.

Public Utility Commission of Texas

Docket No. 38929 - Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates. On January 7, 2011, Oncor Electric Delivery Company, LLC (“Oncor”) filed an application to increase rates by \$353 million. After lengthy negotiations the parties, including the Steering Committee of Cities Served by Oncor, reached a settlement in May that reduces Oncor’s rate increase to \$136 million and provides for a 10.25% return on equity. Additionally, the agreement provides for cities to receive increased payments in the future as well as retroactive franchise fee payments dating back to September 2009 that were previously denied by the Commission in Oncor’s last rate case. After much debate, the Commission approved the settlement agreement at its Open Meeting on August 19.

Project No. 39465 - Rulemaking Relating to Periodic Rate Adjustments. During the last session, the legislature passed Senate Bill 1693, which adopted a periodic rate adjustment (“PRA”) for electric utilities. Under this law, utilities are allowed to annually file abbreviated rate cases to recover the costs of distribution plant investment. The Commission opened this project in June to develop rules to implement the PRA. Initial and reply comments on the draft rule have been filed. At the request of Cities, State Agencies, and Texas Industrial Energy Consumers, Commission Staff conducted a public hearing on the rule on August 15, 2011. Among other issues Cities noted in the rule, Cities expressed concern that the rule is very favorable to utilities, providing advantages such as limitations on discovery, short timelines for approval, and limitations on the scope of review before the relevant costs can be recovered. The new PUC Substantive Rule § 25.243 was adopted by the Commission on September 15, 2011.

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). On March 18, 2011, the Texas Supreme Court rendered its decision in the CenterPoint stranded cost case, reversing the Commission’s decision with respect to several issues. The docket was remanded to the PUC so that a special recovery mechanism – securitization -- could be established for the stranded costs. Securitization will allow the utility to issue bonds totaling the amount to be recovered, which permits the utility to recover the proceeds of the bonds immediately while the bonds are repaid by a charge imposed on consumers’ bills, usually over the twelve-year repayment period of the bonds. In addition to the \$2 billion CenterPoint sought to collect as a result of the Supreme Court’s decision, CenterPoint is asking for another \$2.3 billion in the remand docket. Parties filed testimony challenging CenterPoint’s request on September 12, 2011. The Commission has scheduled a hearing for October 13-14, 2011.

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). On July 1, 2011, the Texas Supreme Court rendered its decision in American Electric Power Texas Central Company’s (“AEP TCC”)

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stranded cost case, Docket No. 31056. In 2006, the Commission determined that AEP TCC should recover \$1.5 billion in stranded costs. On appeal, the district court in March 2007 issued a judgment affirming in part and reversing in part the Commission's order. After the Third Court of Appeals issued its decision in June 2008, the Texas Supreme Court ultimately held that the PUC should have awarded AEP TCC an additional \$420 million in stranded-costs related amounts as well as carrying costs going back to January 1, 2002. Therefore, AEP TCC has been accruing interest on the unrecovered balance for almost 10 years, meaning the Court's decision could entitle AEP TCC to amounts as high as \$800 million to \$1.2 billion. In total, AEP TCC's stranded costs would be approximately \$2.5 billion, which may be translated into \$7.45 per month for the average residential customer. The Steering Committee of Cities Served by AEP TCC is participating in the remand.

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 is proposing a three-step process for the recovery of the construction and operating costs of the Turk Plant. Docket No. 39708 seeks approval of the first two steps that would ultimately amount to a 17.5% increase over existing rates. As the third and final step of its plan, SWEPCO proposes to bring a full rate case in May 2013, where the reasonableness and prudence of the \$1.5 billion spent on the Turk Plant will be litigated. The novelty in this proceeding lies in the fact that SWEPCO is seeking to conduct piecemeal ratemaking by increasing rates based on its increased investment in the Turk Plant without a review of any evidence on the Company's O&M expenses or revenues that could mitigate the need for increased rates. Cities Served by SWEPCO are participating in the proceeding.

Railroad Commission of Texas

GUD 10000 – Statement of Intent to Change the Rate CGS and Rate PT Rates of Atmos Pipeline – Texas. On September 17, 2010, Atmos Pipeline – Texas ("APT") filed a rate application seeking to increase rates by \$38.9 million annually. On April 18, 2011, the Railroad Commission decided the case at its Open Meeting, reducing APT's requested increase to \$26 million. Parties, including the Atmos Cities Steering Committee ("ACSC"), filed motions for rehearing on May 12 and responses to motions for rehearing on May 23, 2011. On June 27, all motions for rehearing were overruled. Parties, including ACSC, have appealed the Commission's decision to Travis County District Court.

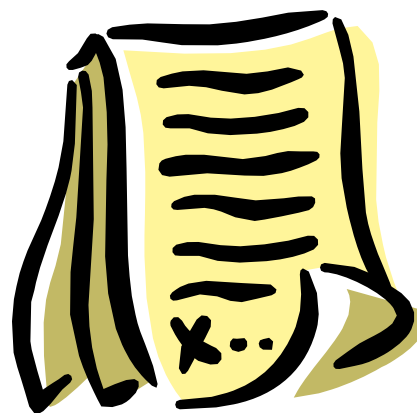
CenterPoint Texas Gas - Texas Coast Division COSA. On April 29, 2011, CenterPoint Gas Texas Coast Division filed its third Cost of Service Adjustment ("COSA") pursuant to the July 3, 2008 Settlement Agreement with CenterPoint. Based on CenterPoint's 2010 operating results, the Company claimed the need for an increase in annual revenues of \$914,910, or an increase of

\$0.28 per residential customer per month, \$0.44 per small commercial customer per month, and \$6.31 for large-volume commercial customers per month. 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 case will go to hearing in early November.

Texas Gas Service - Rio Grande Valley COSA. On April 28, 2011, Texas Gas Service Company ("TGS") filed a COSA tariff claiming a revenue deficiency of \$2.5 million. Cities Served by TGS and the City of McAllen were able to come to an agreement with TGS that TGS would receive a \$2.1 million increase. The new rates went into effect on August 1, 2011.

Atmos Mid-Tex RRM and Atmos West-Tex RRM. Both Atmos West Texas and Atmos Mid-Tex made their 2011 Rate Review Mechanism ("RRM") filings on April 1, 2011. These filings are made pursuant to settlement agreements with Atmos that allow for this expedited rate review process as a substitute to the statutory GRIP process. In its RRM filing, Atmos West Texas requested a \$2.9 million increase, which would amount to a per month increase of \$1.01 for residential customers and \$2.69 for commercial customers. Atmos Mid-Tex requested a \$15.7 million increase, amounting to an average monthly increase of \$0.56 for residential customers and \$2.08 for commercial customers. After negotiations in July, the Atmos Cities Steering Committee ("ACSC") worked out a compromise with Atmos Mid-Tex to allow Atmos Mid-Tex to receive a \$6.6 million increase directly associated with the steel service line replacement program to increase safety, and rejected all other portions of the \$15.7 million request. In late July, the Steering Committee of Cities Served by Atmos West Texas denied the entirety of Atmos West Texas' \$2.9 million increase. Atmos West Texas did not appeal that decision to the Railroad Commission of Texas.

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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