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TEXAS SUPREME COURT UPDATE: CITIES DO NOT HAVE IMMUNITY WITH RESPECT TO "PROPRIETARY" CONTRACTS

by José de la Fuente

This firm has been involved with and has followed several cases over the past few years in which courts considered the question of whether cities are immune from suit in cases arising out of contracts that relate to a city's proprietary (as opposed to governmental) functions. On April 1st – and certainly not as an April Fool's prank – the Texas Supreme Court finally answered this question by unanimous opinion in *Wasson Interests, Ltd. v. City of Jacksonville*: cities do not have immunity with respect to claims arising from proprietary function contracts. It follows that without the protection of governmental immunity or the protection of limitations on the type of damages that may be recovered when immunity is deliberately waived by the legislature (such as by section 271.151 et seq of the Local Government Code, allowing recovery of amounts due and owed under a goods and services contract), the liability of a city may be unlimited.

While many city activities are governmental functions, such as police and fire protection, street construction and design, and other functions listed in Section 101.0215(a) of the Texas Tort Claims Act ("TTCA"), some other functions are "proprietary," meaning that they are performed at the city's discretion, in the interest of the inhabitants of the city, as opposed to being done in the interest of the public as a whole. Section 101.0215(b) of the TTCA identifies some proprietary functions, including operating a public utility and operating amusements owned by the city, but that list is not exclusive. Essentially, if a function is not governmental in nature, then it is proprietary, and vice-versa. This category of proprietary function contracts may include many commonplace contracts for cities, including economic development agreements and a broad variety of utility contracts for municipally-owned utilities.

Importantly, the effect of the *Wasson* decision is not only forward-looking; because the Court found that no immunity ever attached to a city performing a proprietary function, the Court's opinion affects both future and existing contracts. The opinion also leaves some level of uncertainty. What about a contract that relates to both governmental and proprietary functions (for example, a city contract for fuel that is used for both police vehicles and public utility vehicles)? If a function is not expressly designated by the legislature as a governmental function or a proprietary function, is it subject to this rule? Despite this uncertainty, it would be wise for a city to consider implementing certain steps and protocols in its contracting decisions going forward.

1. When contracting, consider whether the contract involves or may involve a proprietary function.

The *Wasson* opinion looked to the TTCA for a list of proprietary functions, but it should be noted that there are some other functions that have been found to be proprietary by courts over the years, so the TTCA list should not be considered exhaustive. The proprietary functions listed in the TTCA are: operation and maintenance of a public utility; amusements owned and operated by a city; and any activity that is

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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 proud to announce that for the fifth year in a row, Lloyd Gosselink has been recognized for creating a culture where employees love to work by being selected for inclusion in the Texas Association of Business's list of **100 Best Companies to Work for in Texas**. Of those 100 companies, we were the highest-ranked law firm, coming in at #11 in the Small Companies (15-99 employees) category. The awards program is a project of *Texas Monthly*, Texas Association of Business, Texas SHRM, and Best Companies Group.

Keep Austin Beautiful
Enthusiastic members of the Firm and their families participated in Keep Austin Beautiful's Annual Clean Sweep on April 9, 2016.

Sheila Gladstone will be discussing "Social Media" at the Correctional Management Institute of Texas - Annual Texas Jail Association Conference on May 10 in Austin.

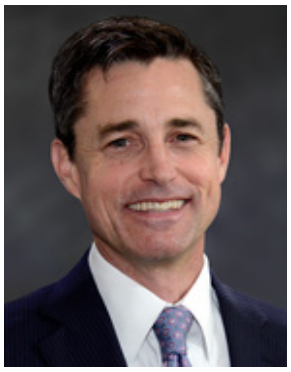
Jason Hill will be speaking on "Surface and Groundwater Regulation" at the 10th Annual John Huffaker Agricultural Law Course at Texas Tech School of Law on May 27 in Lubbock.

Ashley Thomas will present "Employee Drug Testing" at the Texas City Attorneys Association Summer Conference on June 16 in Bastrop.

Joe de la Fuente will be presenting "Mandamus and Ultra Vires Issues" at the Texas City Attorneys Association Summer Conference on June 16 in Bastrop.

Georgia Crump will be discussing DAS and Rights-of-Way Licensing at the Texas City Attorneys Association Summer Conference on June 17 in Bastrop.

Stefanie Albright will be speaking on "Ethics Considerations for Districts in Emergency Situations" at the Texas Association of Water Board Directors Annual Conference on June 23 in Fort Worth.



Commissioner Jon Niermann

Texas Commission on Environmental Quality

On October 1, 2015, attorney Jon Niermann began his service at the Texas Commission on Environmental Quality following his appointment by Governor Greg Abbott. Commissioner Niermann's term runs through August 31, 2021, and he succeeds to the position on the Commission previously filled by Carlos Rubenstein and, later, Zak Covar. While the role of Commissioner is new to Niermann, he is no stranger to the environmental community or to the Commission's work. Commissioner Niermann comes to TCEQ after nearly seven years at the Texas Attorney General's Office, where he served as chief of the Environmental Protection Division, and he and his staff represented the TCEQ and the State in air, waste, and water matters. While at the Attorney General's Office, he served as lead negotiator for the State in the Deepwater Horizon settlement. Prior to his service to the State, he was in private practice in Austin.

A native of Irvine, California, Commissioner Niermann obtained his Master of Business Administration and Juris Doctorate from the University of Oregon. He resides in Austin with his wife Stephanie, their three-year-old, Lucy, and a Blue-Lacy hound.

The Lone Star Current recently had the opportunity to interview Commissioner Niermann, who graciously responded to our questions. We appreciate his willingness to take the time to share his unique perspective with our readers.

Lone Star Current: What has been your biggest surprise since becoming Commissioner?

Niermann: The breadth of expertise at the TCEQ. In my time in private practice, and especially in my time at the Attorney General's Office, I saw first-hand the depth of expertise of agency staff in specific program areas. Now, as Commissioner, I get an up-close view of all of the agency's efforts. In my short time at the agency, I've really enjoyed getting briefed on these varied program areas and seeing the wide-ranging capabilities of this agency.

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

Niermann: Water. As the population of this state continues to grow, water resources will become increasingly strained. Our agency will be faced with ensuring the continued recognition of property rights, while also ensuring that Texans have sufficient amounts of clean water for the protection of public health, for the environment and for economic development.

While the rains of 2015 may have temporarily dulled the immediacy of this challenge, I believe we should view this respite as an opportunity to improve water policy without some of the pressures that come with severe drought.

And, EPA regulation continues to be a big challenge. Although the courts have told the current Administration time and again that it has overstepped its statutory authority, it is undeterred. EPA continues to promulgate costly regulations that are beyond its legal authority—often with little or no environmental benefit. Our mission at TCEQ is to protect the environment with regulations that are lawful and based on sound science and common sense. When EPA's agenda interferes with that purpose, TCEQ will push back.

LSC: What facet of your job as Commissioner do you most enjoy?

Niermann: I really enjoy working with TCEQ staff, and that's been true throughout my legal career. We are fortunate to have such talent and experience. I also enjoy meeting with stakeholders and learning about their particular concerns. That's a big help in informing the way we go about protecting the environment. One of our primary roles as Commissioners, of course, is to set policy. But the truth is we don't make the policy so much as we ratify the good policy proposals that are presented to us. So, ultimately, what I enjoy most about being a Commissioner is setting in motion a policy that is the product of an active community stakeholder process and that I know will have meaningful environmental benefits. Our recent approval of the draft implementation plan for TMDLs on the upper San Antonio watershed is a good example of this.

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

Niermann: I had a short career as a heavy-equipment operator.

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

Niermann: The Lion and the Bird, by Marianne Dubuc. I honestly cannot find

the time for my own stack of books. This one is from my 3-year-old's collection. It deals with kindness, friendship, longing, and the passage of time. What I enjoy most about it is how Lucy has responded to it. I feel a little bit like Peter Sellers' character in Being There when I say this, but it is also beautifully illustrated.

LSC: If you weren't serving as Commissioner at TCEQ and couldn't practice law, and it was possible to pursue any other trade or profession, what would it be, and why?

Niermann: At one point or another I've thought that I'd enjoy being a cabinet maker, history professor, ship captain, custom home builder, architect, radiologist, or civil engineer. But I think maybe I'll go with folk singer. It would be nice to know how to carry a tune and play the guitar, and to be creative and do a little traveling.

MUNICIPAL CORNER

Groups of county and/or district judges meeting to appoint certain county officials do not qualify as "governing bodies" under the Texas Open Meetings Act, and thus compliance with the requirements of the Open Meetings Act is not required for such appointment meetings. Tex. Att'y Gen. Op. KP-0038 (2015). The Attorney General was asked to what extent the requirements of the Texas Open Meetings Act (the "Act") may apply to a meeting of district and county court-at-law judges when they meet to appoint county officials. The AG begins by citing the definition of "governmental body" under the Act to determine if the definition would include a judicial group meeting for the aforementioned purposes. Specifically, the Act states that a "governmental body" is "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members." The term under the Act also would include "a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality" and/or "the governing board of a special district created by law."

The AG continues by stating that judges appoint county auditors and any assistants at "a special meeting held for that purpose." Citing a previous opinion from 1987, the AG explains that this office previously concluded that a group of judges meeting for these purposes would not fit under the definition of "governmental body" provided in the Act because such a group of judges "does not constitute a board, commission, department, committee, or agency within the executive or legislative department of the state nor is it a department, agency, or political subdivision of a county or a city or the governing board of a special district created by law." Tex. Att'y Gen. Op. No. JM- 740 (1987). The AG then states that the law governing judicial appointment of auditors has not changed substantively since 1987, and thus, the analysis and conclusion of that opinion is still applicable - a group of district judges meeting to appoint the county auditor pursuant to Chapter 84 of the Local Government Code is not a "governmental body" under the Act.

Secondly, the AG addressed the scenario of district and county court judges meeting to appoint a community supervision and corrections department director. The Texas Government Code (Sec. 76.004) directs this specific group of judges to appoint this director and establish the department as a whole and approve the department's budget and community justice plan. The AG states that, although it establishes a department, the group of judges itself is not "a board, commission, department, committee, or agency" that is "directed by one or more elected or appointed members" because the judges are not elected or appointed to serve as a member of the group. Membership in the group is established, not by election or appointment, but by statute. Lastly, the AG explains that in previous years, groups of judges like this had a managerial role in these departments and thus qualified as a "governing body" under the Act. However, because the managerial role of the district and county judges with respect to a department has been significantly curtailed, a court would likely conclude that the group of judges described in Section 76.002(a) of the Government Code who appoint the director of a department is not a "governmental body" as that term is defined under Subsection 551.001(3)(H) of the Act. Thus, the requirements of the Open Meetings Act need not be followed in either of these circumstances.

The superintendent of a county hospital would not violate Texas nepotism laws by employing the wife of the county judge of that same county. Tex. Att'y Gen. Op. KP-0045 (2015). The AG was asked whether Texas nepotism laws would prohibit the superintendent of a county hospital from employing the wife of that county's county judge. Section 573.041 of the Texas Government Code contains the state's prohibition on nepotism for a public official, and specifically provides that a public official may not be involved in the appointment of an individual to a position that is compensated from public

funds if the individual is related to the public official in the first degree by affinity (i.e., a husband and wife).

The AG begins by stating that under Texas nepotism law, a county judge may not appoint his or her spouse to a position paid with public funds without violating the nepotism statute. However, the AG continues, the nepotism prohibition applies only to a public official with statutory appointment or confirmation authority over the position in question. Thus, the determinative issue is whether the county judge has actual, statutory authority to hire a person to the position currently occupied by that judge's spouse.

County hospitals are governed by Chapter 263 of the Texas Health and Safety Code. The Code states that the general management and control of a county hospital belongs to the hospital board of managers, which is a group of appointed county residents. The Board then appoints the superintendent of the hospital, who serves as the CEO of the hospital and who has a number of responsibilities and duties under the Code. Specifically, the superintendent holds the power to appoint hospital employees, but the Board does as well, as it must consent to any appointment of the superintendent. Thus, the AG concludes, it is the superintendent and the Board of the hospital that has the requisite "actual, statutory authority" to hire the judge's spouse, and not the county commissioners or the county judge. Thus, the state nepotism statute does not prohibit the superintendent from appointing the wife of the county judge.

The Texas Constitution would likely prohibit a municipality from paying a private party's costs incurred in a successful appeal to a zoning board, as such payment constitutes a gratuitous payment of public funds. Tex. Att'y Gen. Op. KP-0056 (2016). The AG was asked whether state law authorizes a city to reimburse an individual for costs incurred in a successful appeal to that city's zoning board. The director of the zoning board authorized a property owner to develop his property as a "frac-sand transloading facility" under a city ordinance. Neighbors of that property appealed the director's determination to the full zoning board, where evidence demonstrating the adverse health and safety effects of "frac-sand transloading" facilities was presented. The board was persuaded by this evidence, and reversed the decision of the director. The city council agreed, and now the city asks whether or not the costs associated with the successful appeal, specifically, the preparation of the persuasive evidence, may be reimbursed to the appellant without violating the Texas Constitution or Chapter 211 of the Texas Local Government Code.

The AG first notes that Chapter 211 of the Local Government Code does not resolve the city's question "as a statutory matter," and then shifts the focus of the opinion to Article III Section 52 Texas Constitution. In general, Article III, Section 52(a) places an absolute prohibition on a municipality from providing a gratuitous grant of public funds to an individual, though the AG notes there are some exceptions that do not apply to the present situation. The Texas Supreme Court, however, concluded that a payment of public funds is not gratuitous if the political subdivision receives return consideration for such grant. The AG cites a Texas Supreme Court decision from 2002 that prescribes a three-part test to determine whether or not a payment of public funds complies with Art. III, Sec. 52(a). Under this test, the city must: (1) ensure that the transfer is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.

In applying this standard to the present facts, the AG observes that the contemplated "reimbursement" of funds is more an after-the-fact reward or gratuity, rather than an expenditure of funds that would achieve a public purpose or entitle the city to consideration in return. The AG notes that while there may be some incidental "benefit to the community" stemming from the private individual's appeal to the zoning board, the city is not under any legal obligation (by code, contract, or other law) to reimburse these costs of appeal to the individual. Citing a 1960 Texas Supreme Court decision, the AG states that the use of public money to pay a claim based on facts that show no governmental liability constitutes a "gift or donation in violation of our Constitution." Thus, the AG concludes, the Texas Constitution would likely prohibit the city from paying a private party's costs incurred in a successful appeal to a zoning board.

Municipal Corner is prepared by Troupe Brewer. Troupe is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

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abnormally dangerous or ultrahazardous. It is important to think broadly in considering whether a contract will relate to a governmental or proprietary activity. This is likely to be especially true for contracts for common supplies, like pens, paper, fuel, gravel, cleaning materials, etc. If the contract relates to a governmental function but contemplates performance over a period of time, think about whether and how the scope of the contract might change. Will there be a need to apply the goods or services to a proprietary function in the future? If so, consider treating the contract as proprietary.

2. Consider separate contracts for governmental and proprietary activities. Although it may seem like a hassle, cities may want to consider entering into two separate contracts with the same vendor—one that relates to proprietary activities and another that relates to governmental. This could be particularly helpful for long-term supply contracts. If the city discovers a better deal on light bulbs one year into a three-year contract, it could at least end the governmental-related contract

early without fear of paying for future lost profits.

3. Insist on contractual limitations on liability.

Section 271.153 of the Texas Local Government Code limits the damages a plaintiff may recover from a city based on a breach of a goods or services contract. If immunity is not applicable to proprietary contracts, then the statutory limitation would not apply. But, cities can still contractually limit their exposure. At the very least, cities can and should insist that they will not be liable for consequential damages, specifically, lost profits. This could be easily accomplished by stating that damages will be limited to amounts recoverable under section 271.153 of the Texas Local Government Code.

4. Use merger and written amendment clauses.

If the governmental-proprietary distinction applies to proprietary contracts, plaintiffs will no longer be judicially and statutorily limited to claims based on written and properly authorized contracts. Instead, they can claim the parties agreed to additional terms, whether at the outset of the contract or by amendment somewhere down the line. To avoid factually-complicated disputes over the substance of the parties' agreement, include clauses that make clear that the contract contains the entire agreement (merger clause) and that amendments must be in writing and authorized by both parties (written amendment clause).

5. Watch out for contractual pitfalls.

It may seem obvious, but carefully scrutinize proposed contracts. Provisions that might not have had any real effect in the face of immunity protections must be given extra thought. For example, look at termination clauses. Do they give the city the right to end the contract? Under what conditions? Does the contract contain liquidated damage provisions that might apply despite limitations of liability? After immunity, careful contract consideration is the best protection a city can employ to avoid liability and perhaps even litigation.

With respect to contracts, the *Wasson* decision may have significant and far-reaching effects for cities in Texas. In an upcoming issue of this newsletter, we will identify some additional municipal functions that have been deemed "proprietary" by courts, and describe some other detailed strategies and steps that a city can take to better protect the public's assets when there is a risk related to a proprietary function contract.

José de la Fuente is the Chair of the Firm's Litigation Practice Group. If you would like additional information or have questions related to this article or other matters please contact Joe at 512.322.5848 or jdelafuente@lglawfirm.com.

IRS PROPOSES NEW DEFINITION OF "POLITICAL SUBDIVISION" FOR TAX-EXEMPT PURPOSES

by Lauren Kalisek and Ashleigh Acevedo

On February 23, 2016, the Internal Revenue Service ("IRS") published proposed rules to amend 26 C.F.R. Part 1 to revise the definition of "political subdivision" for tax-exempt bond purposes ("Proposed Rule") (REG-1290367-15; 26 C.F.R. Part 1). The purpose of this rulemaking is to confirm the types of entities authorized to issue tax-exempt municipal bonds. Under the current version of Section 103 of the Internal Revenue Code ("Code"), the definition of a "political subdivision" is broad and can pose difficulties in determining whether an entity meets those prerequisites. Consequently, courts and the IRS must make case-by-case determinations on the tax-exempt status of entities in light of the unique facts and circumstances of each entity. As such, the goal of the Proposed Rule is to clarify the process of determining which entities are "political subdivisions" for the purpose of being able to issue tax-exempt bonds and to increase consistency in such determinations.

Summary of Proposed Rule

The Proposed Rule revises the definition of a "political subdivision," requiring entities to meet two new factors. In addition to the traditional requirement that a political subdivision exercise sovereign power, the Proposed Rule now requires an entity to also show governmental purpose and governmental control. Thus, to be a "political subdivision" for the purposes of being able to issue tax exempt bonds, the entity must meet all three of the following requirements: (1) exercise sovereign power, (2) have a governmental purpose, and (3) be under governmental control.

Sovereign Powers

The Proposed Rule maintains the longstanding requirement that a political subdivision be empowered to exercise at least one of the generally recognized sovereign powers: eminent domain, police power, and/or taxing power.

Governmental Purpose

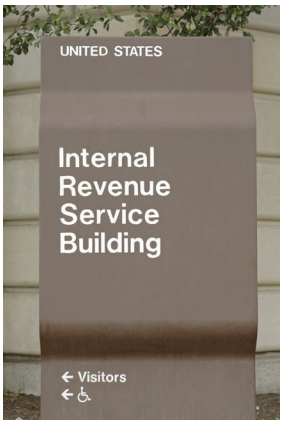
Codifying common practice in case law and the administrative process, the Proposed Rule now requires consideration of whether the entity serves a public purpose. This purpose, generally evidenced in the entity's enabling legislation, must exist at the time the entity is created and must continue throughout the entity's existence. Although a private benefit can also exist, that benefit must only be incidental to the public purpose served.

Governmental Control

Governmental control depends on the nature of the control over the actions of the entity and who possesses such control. For governmental control to exist, the entity's control must be ongoing and include the power to direct significant actions. Three

touchstones of control are provided in the Proposed Rule: (1) a governmental entity controls both the appointment and removal of a majority of the subordinate entity's board; (2) a majority of the governing body of the entity is elected at large, so long as elections are periodic and of reasonable frequency; or (3) a governmental entity significantly controls or directs the use of the subordinate entity's use of funds.

Correspondingly, control of the entity must be vested in a state or local governmental unit or a qualified electorate, rather than in private individuals, business corporations, trusts, partnerships, or other entities generally unassociated with the government. As such, if an unreasonably small faction of private persons controls an electorate, that electorate's control does not constitute governmental control. To make such a determination, the Proposed Rule contains a quantitative range of acceptable and unacceptable concentrations in voting power: an electorate is per se qualified as having governmental control if more than ten members are needed to reach a majority and is per se disqualified as having governmental control if three or fewer voters constitute a majority. For purposes of calculating voting power, related parties are treated as a single voter, and their votes are aggregated.



Applicability and Transition Period of the Proposed Rule

The Proposed Rule provides that the revised definition of a political subdivision will not apply (1) to determining whether outstanding bonds are obligations of a political subdivision or (2) to existing entities for a transition period of three years and ninety days from the date the Proposed Rule is finalized. This transition period should allow entities time to restructure as necessary to satisfy the additional requirements for this new definition.

Likely Effect on Water Districts (including Special Districts and Authorities)

The Proposed Rule may inhibit Article XVI, Section 59 water conservation and reclamation districts from being able to issue tax-exempt bonds. The addition of the governmental control factor in determining whether an entity is a political subdivision has the potential to impact district creations (at the confirmation election) when the electorate is small. In addition, districts that appoint their directors will need to examine the Proposed Rule provisions regarding the method of board appointment and removal.

Path Forward

The IRS has requested public comments in writing regarding this important rule change on or before May 23, 2016. A public hearing has been scheduled for June 6, 2016.

Lauren Kalisek is the Chair of the Firm's Districts Practice Group and Ashleigh Acevedo is an Associate in Districts Practice Group. If you have any questions regarding this Proposed Rule or the public comment process, do not hesitate to contact Lauren at 512.322.5847 or lkalisek@lglawfirm.com, or Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com.

TIPS FOR CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS OF EMPLOYMENT DISCRIMINATION

by Sheila Gladstone and Ashley Thomas

An employee reports to you that she feels she was passed up by her supervisor for a promotion because she is a woman, and her supervisor preferred a man for the job. You are concerned the employee may file a sex discrimination charge with the Equal Employment Opportunity Commission ("EEOC") or a lawsuit to air her grievance. In this situation, your best line of defense is to conduct an internal investigation to determine the facts, gather evidence, and use those facts and evidence to make an employment decision that will stand up in court. This article will provide tips on how to conduct an internal investigation to ensure it provides useful evidence in the unfortunate event of future litigation.

Choose the Right Investigator

The first decision an employer must make is deciding who should be the investigator. Choosing the right investigator becomes especially important if litigation follows because your investigator will likely be your star witness at trial. An employer should consider that the person it selects as investigator in a sense "becomes" the employer in the eyes of a jury. The employer must decide, is this person professional and fair-sounding? Does the individual's training and background show that the employer made a reasoned and caring decision in its choice of investigator? Does the investigator articulate his or her views in an effective manner? In other words, is this person a good witness?

Also important to consider is whether the investigator has the skills necessary to conduct a good investigation. These skills include good interviewing techniques, the ability to take good notes, the ability to write a professional and cogent report, a thorough understanding of the legal issues and pitfalls involved, and familiarity with not only the general guidelines for conducting good investigations, but also the employer's internal policies and procedures regarding the investigation and the underlying alleged conduct. The right investigator must also be impartial and credible – if the investigator has a criminal record,

has been involved in prior accusations of dishonesty or misconduct, has had a personal relationship with a party to the inquiry, or has been disciplined in the workplace himself, a jury may feel the investigator cannot adequately assess the behavior complained about. The right investigator may ultimately be an in-house human resources professional, your organization's attorney, or an outside investigator.

Gather Supporting Documentation

To conduct an investigation, the investigator should review the relevant documents before interviewing witnesses. Such documents will likely include the employer's policies and guidelines, the complainant's personnel file, and comparative documents (e.g., charts showing complainant's performance rating compared to other employees). The investigator may also need to contact your attorney, your human resources department, or your accounting, environmental or safety experts to fully understand the underlying issues.

Conduct Effective Witness Interviews

An investigation should begin by providing appropriate and honest disclosures of what the investigation is about, and include any important acknowledgments in the witness's statement. Don't misrepresent the purpose of the investigation, as this may later taint your findings. Be sure that your notes reflect the witness's words, and that your own style or vocabulary does not make your notes less credible by using phrasing that the witness would never use.

The investigation must then focus on developing the facts. If the investigation is regarding specific events, then inquire about all events that occurred during the relevant time frame, in chronological blocks of time. Ask the 5 "W's" (who, what, when, where, why) for each time block. Be sure to separate opinions from facts in notes, and also identify additional witnesses you may need to interview for the investigation. Get as many details as possible for later comparisons when judging which witnesses were more credible.

Government Employers Must Use the Garrity Warning when Questioning Witnesses about their Own Potentially Criminal Acts

Public sector employees have the right to remain silent under the 5th Amendment when questioned about acts that could self-incriminate them, unless they are told that their statements will be used only for administrative (personnel) purposes, and cannot be used against them in a criminal proceeding. The document assuring witnesses of their rights is called a Garrity Warning, named after a case from the 1960's. Once signed, criminal judges will exclude such statements from evidence if introduced by the prosecution. If an employee continues to remain silent after being offered the notice, then he or she can be disciplined or terminated for failure to cooperate in an investigation, or the investigator may decide to issue a finding without the benefit of the employee's input.

Prepare a Final Investigative Report

A written report is the most effective way to organize the investigator's conclusions and allow for a determination of appropriate remedial action. A thorough, non-privileged report should contain (1) a description of the alleged wrongdoing; (2) a description of the documents, manuals, and witnesses examined; (3) witness statements; (4) a summary of the information elicited; (5) a determination as to credibility where there are fact conflicts; and (6) findings of fact based on the credible evidence. The report should also document unsuccessful attempts to gain information, in order to explain any gaps in the evidence. Finally, be sure to proofread the report to avoid potential allegations that the investigation was not done carefully; and remember, the report may be the main exhibit in any future litigation.

Lloyd Gosselink's Employment Law Practice Group is available to assist employers of all sizes with investigations, by either providing guidance or conducting the investigation for the employer. A prompt and effective internal investigation is an important tool and can only help an employer if faced with legal action down the road by minimizing and avoiding liability.

Sheila Gladstone is Chair of the Firm's Employment Law Practice Group and Ashley Thomas is an Associate in the Employment Law Practice Group and Litigation Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, or Ashley at 512.322.5881 or athomas@lglawfirm.com.

WATER SUPPLY PLANNING OPPORTUNITIES: AUDITING YOUR PORTFOLIO

by Martin C. Rochelle and Nathan E. Vassar

The arrival of spring often signals the annual rite of spring cleaning and a renewed ambition for "back burner" outdoor projects. Many Saturdays may begin by clearing off the work bench or opening up a dusty toolbox. Of course, seasoned garages will often contain most, if not all, of the equipment needed to tackle a project, even if some tools haven't been used for some time. While certain projects may appear novel or difficult, creative solutions may be at one's fingertips by assessing the tools available and putting one or more to use for the particular needs of the job.

In the arena of water supply planning, the spring season similarly presents opportunities for water suppliers and utilities to take stock of their current supplies and their ability to lawfully and most efficiently use those supplies within their current and future service areas – all in light of their existing and projected water supply needs. As we noted in the January 2016 edition of *The Lone Star Current*, over the course of the next several issues we will discuss a number of water supply planning tools that water suppliers should consider as they address current or future water supply challenges.

In future publications we will examine the use of the "Four Corners" doctrine of Texas Water Code Section 11.122(b), which, among other benefits, can be used to expand the value of existing water supplies to a variety of uses and diversion points without concerns of protracted and expensive contested case hearing processes. We will explore reuse opportunities (both direct and indirect) that can support service to particular customer classes, while further extending the use of precious water supplies, including supplies to serve downstream needs. We will address how accounting protocols may be examined and refined to help ensure that the most reliable supplies are available to meet demands in times of emergency or drought. Of course, as our state's population is projected to double in the next half century, conservation efforts are critically important to stretch the value and utility of all water supplies, while challenging utilities with fewer sales and higher rates to address revenue requirements, and we will have some thoughts in that regard, as well. Even the right tools, however, can be ineffective if used without a capable carpenter or crew. As such, we will also outline the value and strengths of team planning and execution. By perusing a catalogue of initiatives and resources, water supply portfolios may be enhanced through use of one or more of these featured planning concepts.

In this article, we highlight the importance of a water supply portfolio audit as a proactive planning tool to assess a utility's current sources of water. Such an audit can be an important first step in order to determine how supplies may be lawfully and most efficiently used to address current and projected water demands.

A comprehensive assessment should first identify the suite of supplies held by the utility, whether the supplies are owned water rights or secured by a contract with a water supplier. An analysis of supplies can identify sources which the utility can most effectively use to supply water, for particular durations, and with applicable limitations or restrictions. It can also identify risks that may be relevant to particular supplies. Assessing existing water supplies in light of a variety of relevant questions is also critically important. Do existing rights contain purpose-of-use or place-of-use restrictions that challenge a utility's ability to serve particular customer classes, its projected growth corridors, and related demands? Are there authorizations in place, via contract rights or water rights, which have not been exercised to date? How are water supplies, in light of their respective reliability, best managed in the supplier's operational protocol? These questions, among many others, are worth exploring first in order to select the appropriate tool or tools to help address a supplier's long-term needs and the needs of those to be served. A comprehensive assessment of current rights to water may help provide an efficient, low-risk solution to supplying water – or to position a utility to supply water – to meet current and/or future demands.

As water suppliers consider existing challenges and opportunities, there may be value in doing so through the lens of a water portfolio audit. Such an assessment may identify water supply needs and/or customer demands, as well as time frames for the utility to select the appropriate strategies to meet demands now and in the future. An assessment may also yield a variety of "low hanging fruit" opportunities to stretch the value of existing authorizations. As such, and as noted above, our July 2016 edition of *The Lone Star Current* will focus on the "Four Corners" doctrine and options that suppliers may have for water rights, such as expanding the uses and locations of use of water under an existing water right. In that article, we will highlight examples of permit amendments that come with no notice or limited notice, and, as such, provide fewer or lower legal hurdles to improve and extend the use of existing supplies.

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ASK SHEILA

Dear Sheila,

Some of our office employees are complaining that the smokers get more breaks than they do. We are thinking of making hourly employees clock out for any smoke breaks that are additional to the normal breaks allowed to other employees. We are also considering taking steps to make sure we don't hire smokers in the future. Can we do this?

Signed,
Smoke-Free Workplace

Dear Smoke-Free Workplace:

The way to deal with this problem is to hold smokers to the same break times as other employees, but not to dock their time. Non-exempt employees can be counseled, disciplined and terminated for abusing break time, but under federal wage and hour law, they can't be forced to clock out for breaks shorter than 20 minutes, no matter how many there are in a day. This is a supervision issue – the supervisors must enforce break times equally among all employees. If an employee can't go two hours without a smoke break, then they need to work elsewhere.

As to your question about not hiring smokers, so far smokers are not a protected category under employment law federally or in Texas (Virginia, where the tobacco lobby is strong, is a different story). That means that you can discriminate against smokers, if you want to, in the hiring process. You can ask applicants if they smoke, you can make a note of applicants who smell of tobacco at the interview, and you can tell applicants that they will not be allowed to smoke anywhere on your property during breaks, nor may they return from breaks reeking of smoke. Be prepared to get push-back, however, from managers trying to recruit for hard-to-fill positions.

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the Firm's Employment Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com.*

IN THE COURTS

Murray Energy Corp. v. E.P.A., 136 S. Ct. 999 (2016).

On February 9, 2016, the U.S. Supreme Court voted 5-4 to stay the United States Environmental Protection Agency's ("EPA") proposed "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (commonly referred to as the "Clean Power Plan"). The Clean Power Plan is EPA's plan to reduce carbon dioxide emissions from coal-fired power plants. The stay will remain in effect, preventing the EPA from implementing the Plan, until the pending appeals are decided by the D.C. Circuit Court of Appeals and disposition of an appeal to the Supreme Court, if one is sought.

Krause v. City of Omaha, No. 15-2985, 2016 WL 690879, at *1 (8th Cir. Feb. 22, 2016).

The United States Court of Appeals for the Eighth Circuit upheld the lower court's decision that road salt was not solid waste under the Resource Conservation Recovery Act ("RCRA") because it served a useful purpose (melting snow and ice) when it was applied to a road located within a flood plain. Since this salt is not a solid waste, its subsequent release into the environment was not a RCRA violation because it was an expected consequence of its intended use.

Texas v. E.P.A., 5th Cir., No. 16-60118, (Feb. 29, 2016 / D.C. Cir., No. 16-01078, Mar. 4, 2016).

On February 29, 2016, the State of Texas filed a lawsuit against the United States Environmental Protection Agency ("EPA") in the United States Court of Appeals, 5th Circuit, challenging EPA's Regional Haze Plan ("Plan"). Texas had proposed revisions to its State Implementation Plan ("SIP") to address the requirements of the Plan, but EPA rejected the State's revisions and imposed a Federal Implementation Plan ("FIP"). The FIP gives eight coal-fired power plants in Texas three to five years to come into compliance with new sulfur dioxide limits. On March 4, 2016, Texas filed a similar suit in the D.C. Circuit in case the courts find that the challenge must be filed there.

In re U.S. Dept. of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of

Waters of U.S., 15- 3839, 2016 WL 723241, at *1 (6th Cir. Feb. 22, 2016).

A three-judge panel of the United States Court of Appeals, Sixth Circuit determined that it has jurisdiction to hear challenges to the final Clean Water Rule – otherwise known as the "waters of the United States", or WOTUS, rule – promulgated by the EPA and United States Army Corps of Engineers last year. The primary issue was the threshold question of whether the appellate court had jurisdiction to consolidate and hear the various WOTUS challenges from numerous other circuit courts or whether the respective circuit courts should hear each challenge individually. The panel determined that the scope of the jurisdictional provision of the Clean Water Act has gradually expanded through case law over the years to allow for more direct circuit court review. In so doing, the Sixth Circuit denied pending motions to dismiss cases from other circuit courts. The decision did not address the nationwide stay put in place by the Sixth Circuit in October 2015.

Randall Kallinen & Paul Kubosh v. City of Houston, 462 S.W.3d 25 (Tex. 2015), reh'g denied (June 26, 2015).

Two individuals sued the City of Houston to compel disclosure of a traffic light study prior to the Texas Attorney General (the "AG") issuing an opinion as to whether the Public Information Act (the "PIA") excepted the study from disclosure. In response, the City filed a plea to the jurisdiction with the district court, arguing that the court lacked jurisdiction over the suit until all administrative remedies had been exhausted, i.e., until the AG had issued a ruling on the opinion request. The district court overruled the City's plea to the jurisdiction and ordered disclosure of the withheld documents. On appeal, the court of appeals disagreed, holding that if an AG opinion is requested, then the AG must issue an opinion prior to suit being filed in district court. The Texas Supreme Court, however, overruled the court of appeals' ruling and held that an AG opinion is not a mandatory prerequisite to the district court's subject matter jurisdiction over a suit to compel disclosure under the PIA.

Texas Comm'n on Envtl. Quality v. Texas Farm Bureau, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015), review denied (Feb. 19, 2016).

On February 16, 2016, the Texas Supreme Court denied the Texas Commission on Environmental Quality's ("TCEQ") petition for review in a suit involving its authority over water rights permitting and enforcement during a time of drought. Thus, the Supreme Court left in place the Thirteenth Court of Appeals' ruling that the TCEQ cannot give preference to or exempt certain junior water rights holders, such as cities or power generators, from curtailment, even if the Governor has declared a state of emergency. (For details on the facts and history of the case, see the In the Courts section in the April 2015 edition of *The Lone Star Current*).

Bragg v. Edwards Aquifer Authority, No. 06-11-18170-CV (Medina County District Court, Texas 2016).

On February 22, 2016, a jury awarded over $2.5 million to pecan farmers Glenn and JoLynn Bragg in a regulatory takings case relating to the denial of a requested groundwater production permit from the Edwards Aquifer Authority (the "EAA"). The case stems from a 2012 remand by the Texas Supreme Court, which held that land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation. In the remanded case, the jury was specifically charged with determining the correct model for compensation in a regulatory takings case. The amount awarded is based on the difference in value of two commercial pecan orchards owned by the Braggs before and after the EAA's denial of the Braggs' groundwater permit application to continue using groundwater from the Edwards Aquifer to produce their pecan crops. With the addition of pre-judgment interest, the total jury award exceeds $4 million. (For details on the 2012 Supreme Court ruling, see the In the Courts section in the July 2015 edition of *The Lone Star Current*).

State of Texas' Agencies and Institutions of Higher Learning, et al. v. Public Utility Commission of Texas, et al., No. 15-0005, (Tex. January 5, 2015).

This 2008 rate case (Docket No. 35717) is now under consideration at the Texas Supreme Court. Of the case's many issues, the Steering Committee of Cities Served by Oncor is appealing the franchise fee issue. The Third Court of Appeals upheld the Public Utility Commission's ("PUC") decision denying Oncor's recovery of certain franchise fee payments negotiated by cities and Oncor, which resulted in cities being denied millions of dollars of franchise fee payments. The parties filed petitions for review at the Texas Supreme Court in February 2015, and, at the Court's request, provided briefing on the merits in January 2016. Earlier this month, the Supreme Court granted the petition for review but has yet to set a date for oral arguments.

Entergy v. PUC, No. 03-14-00706-CV (Tex. App.–Austin, March 24, 2016).

Entergy challenged the PUC's final order regarding costs it sought as a result of implementing a competitive generation service ("CGS") program. The district court affirmed the PUC's order, and Entergy appealed. The Court of Appeals in Austin reviewed the PUC's decision to determine if its interpretation of the Public Utility Regulatory Act ("PURA") § 39.452(b) was reasonable as applied to Entergy's three claims: (1) embedded production-related costs, (2) start-up costs, and (3) interest. Ultimately, the court of appeals held that the PUC's interpretation of PURA was reasonable and affirmed the district court's final order.

In the Courts *is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, Ashleigh Acevedo in the Firm's Water Practice Group, and Hannah Wilchar in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Jeff at 512.322.5835 or jreed@lglawfirm.com, Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency

Drinking Water Map. On February 19, 2016, the EPA released the Drinking Water Mapping Application to Protect Source Waters. This online mapping tool provides an interactive platform for the public, states, water system operators, and other entities to learn about their watershed and water supplier, see whether their drinking water is polluted, and determine how pollution could impact their water supply.

EPA Proposes Changes to Greenhouse Gas Reporting Rules for the Oil and Gas Industry. On January 29, 2016, the United States Environmental Protection Agency ("EPA") proposed changes to the New Source Performance Standards ("NSPS") under the Clean Air Act for the oil and gas industry. The revised NSPS add new monitoring methods for detecting leaks of greenhouse gases (GHGs) from oil and gas equipment. The proposed rule would also establish emission factors for leaking equipment when calculating and reporting GHG emissions from leaking equipment. The deadline for the public to file comments on this proposed rule was March 15, 2016, and the EPA should be evaluating those comments at this point.

Treatment of Tribes in CWA. On January 19, 2016, the EPA published a proposed rule that would authorize federally recognized Indian tribes to administer the quarterly quality restoration provisions of Section 303(d) of the Clean Water Act (the "CWA"), which includes the impaired water listing and total maximum daily load programs. The proposed rule would, for those tribes that are interested in administering their own CWA programs, treat tribes in a similar manner as states. Currently, tribes have the authority to administer some programs under the CWA; but the proposed rule explicitly authorizes tribes to administer the 303(d) program.

Texas Commission on Environmental Quality

Commission Action on Hearing Requests. Effective March 24, 2016, the TCEQ adopted rules implementing changes to the Texas Administrative Procedures Act (the "APA") pursuant to Senate Bill 1267, passed by the 84th Legislature. Senate Bill 1267 revised the APA requirements in Chapter 2001 of the Texas Government Code relating to (i) notice of contested case hearings and agency decisions, (ii) signature and timelines of agency decisions, (iii) presumption of the date that notice of an agency decision is received, (iv) motions for rehearing, and (v) the procedures for judicial review. Additionally, the rulemaking initiative updates the TCEQ's notice requirements in 30 Texas Administrative Code § 55.255(e), which is the TCEQ's applicable rule for water rights and district applications for which a contested case hearing is available. Specifically, the updated rule changes the date for filing a motion for rehearing from 20 days after notification to not later than 25 days after the TCEQ's decision or order was signed, although the deadline may be extended.

Petition to Revise Beneficial Reuse of Treated Effluent Rules. On March 14, 2016, the City of Austin petitioned the TCEQ to initiate rulemaking to adopt new rules under 30 Texas Administrative Code Chapters 209 and 222 concerning the beneficial reuse of treated effluent through subsurface irrigation and land application. The proposed amendments to these regulations would allow an applicant to rely on the beneficial reuse of treated wastewater as an additional, alternative means to dispose of a portion of its treated wastewater when calculating the size of effluent storage and the amount of land required for disposal of treated wastewater. Specifically, the proposed rule would allow an applicant to demonstrate its firm reclaimed water demand – i.e., the minimum volume of its treated wastewater that can be guaranteed to be beneficially reused as a subset of its total volume of treated wastewater that would otherwise need to be discharged or disposed.

TCEQ Updates TRRP Tier 1 PCLs. On March 8, 2016, the TCEQ updated its tables providing the Texas Risk Reduction Program ("TRRP") Tier 1 Protective Concentration Levels ("PCLs") and their supporting tables. PCLs are used as the default clean-up standards in the TRRP program. These revised tables are currently effective.

TCEQ Proposes Designations for Ozone Non-Attainment Areas. The TCEQ is soliciting public comments concerning the area designations (attainment and non-attainment) that the TCEQ will recommend to the EPA for adoption, pursuant to the 2015 Ozone National Ambient Air Quality Standards ("Ozone NAAQS"). The area designations, once adopted by EPA, designate those Texas counties that are in attainment with the 2015 Ozone NAAQS, as well as the counties that are not. After the public comment period closed on April 15, 2016, the TCEQ Commissioners are scheduled to consider the recommendations at their August 3, 2016 public meeting. Ultimately, the Commissioner's recommendations will be considered by the Governor, and the deadline for the State of Texas to submit its recommendations to the EPA is October 1, 2016. It is important to note that states, industry organizations, and one environmental advocacy group have filed appeals challenging the EPA's 2015 Ozone NAAQS, and those cases are currently pending in federal court.

RESTORE Grant Application Period Now Open. Beginning January 15, 2016, the TCEQ will accept applications for more than $56 million in funding for certain projects in the Gulf Coast region. Eligible projects include those that restore and protect natural habitats, mitigate damage to fish and wildlife, improve state parks in coastal areas, protect against coastal floods, promote tourism or consumption of Gulf Coast seafood, and develop the workforce in the coastal region. Applications will be accepted until April 15, 2016. Funding for the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast Act of 2012 – RESTORE – is derived from the penalty payments assessed and received for violations of the Clean Water Act resulting from the Deepwater Horizon oil spill.

Public Utility Commission of Texas

Docket No. 45188, *Joint Report and Application of Oncor Electric Delivery Company LLC, Ovation Acquisition I, LLC, Ovation Acquisition II, LLC, and Shary Holdings, LLC for Regulatory Approvals Pursuant to PURA §§14.101, 37.154, 39.262(I)-(m), and 39.915*. After a four-day hearing on the merits in February and several Open Meeting discussions, the Public Utility Commission ("PUC") concluded its review of the Hunt proposal to acquire Oncor Electric Delivery Company LLC ("Oncor"). While the Final Order will technically approve the transaction, the Commissioners have imposed many conditions suggested by intervenors that may derail the plan. At Hunt's request, the PUC's order will give the purchasers until November 30th to close the transaction before the Order becomes void. The highly controversial issue arising during the hearing was the tax savings Oncor would realize by converting into a real estate investment trust ("REIT"), where Oncor would receive a permanent exemption from federal income tax liability to the extent that distributions are made to REIT owners. The Commissioners decided that in Oncor's next rate case, some portion of the more than $200 million in annual tax savings must be shared with ratepayers. Hunt declared its intent to file a rate case in summer of 2018, but some cities with original jurisdiction have expressed interest in compelling a rate case this month. If the REIT structure is funded and the transaction closes before the cities enter a rate order, the the cities can enter interim rate orders reflecting a sharing of tax savings, which will provoke an appeal to the PUC. It remains to be seen whether Oncor's parent company, Energy Future Holdings, will exercise its right to terminate the Hunt proposal and pursue alternative options on June 30, 2016.

Docket No. 45175, *Appeal of Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. D/B/A Coserv Electric from an Ordinance of the Colony, Texas, and, in the Alternative, Application for a Declaratory Order*. Brazos Electric Power Cooperative, Inc. ("BEPC") and Denton County Electric Cooperative, Inc. D/B/A CoServ Electric ("CoServ") jointly filed an appeal in September, 2015 from certain zoning and land use ordinances of the City of The Colony, Texas and are seeking a declaratory order that would overturn the City's zoning ordinances and land use regulations as applied to BEPC and CoServ. The joint applicants argue that The Colony is wrongfully prohibiting them via The Colony's zoning ordinances from building a substation on property they have condemned in the City. On January 29, 2016, BEPC and CoServ filed a Joint Motion For Partial Summary Decision On Jurisdiction, which PUC Staff supported and the Colony opposed. On March 11, 2016, the State Office of Administrative Hearings ("SOAH") Administrative Law Judge granted Brazos and CoServ's motion, ruling that the PUC has appellate jurisdiction over zoning ordinances that effect the siting of an electrical substation within the corporate limits of a city. The Colony has appealed this ruling to the PUC, and the Commissioners of the PUC have decided to hear this appeal at its regular meeting on May 5, 2016.

Docket No. 45570, *Application Of Monarch Utilities I, L.P. For Authority To Change Rates For Water And Sewer Service*. Monarch Utilities I, L.P. has filed a Class A Water and Wastewater Rate Increase Application – the first of its kind since the PUC gained jurisdiction over water and wastewater ratemaking proceedings in September 2014. The application was referred to SOAH on March 3, 2016, for a contested case hearing. On March 28, 2016, a preliminary hearing was held where a procedural schedule was adopted, setting the matter for hearing the week of June 8, 2016.

Railroad Commission of Texas

Atmos Mid-Tex Files RRM. On March 1, 2016, Atmos Energy Corporation, Mid-Tex Division ("Atmos Mid-Tex") filed its fourth Rider Rate Review Mechanism Tariff ("RRM") with the affected cities. This RRM filing represents a requested increase in annual revenue of approximately $28.9 million, which would result in a monthly increase of $1.52 for the average residential customer. It appears that the RRM filing is $8 million less than what Atmos Mid-Tex would be entitled to under the Gas Reliability Infrastructure Program ("GRIP"). Regardless, this application will be processed in accordance with the RRM Ordinance, not the GRIP process.

Railroad Commissioner Candidates Advance to Party Runoffs. The March 1 primary election for the expiring term of Commissioner Porter of the Texas Railroad Commission ("RRC") indicates that the race will come down to a run-off between Republican candidates: real estate developer Gary Gates and former state Representative Wayne Christian. Together the Republicans won 78% of precincts, with Mr. Gates taking 29% of those votes and Mr. Christian drawing 20%. These two candidates will run off in May for the RRC's open seat. The Republican winner will then face the winner of the Democratic primary, where former educator Grady Yarbrough and Travis County Democratic precinct chairman Cody Garrett advanced to a runoff. Mr. Yarbrough was the top Democrat with 40% of the Democratic votes, and Mr. Garrett finished second with 35%. Commissioner Porter announced his decision not to seek reelection late last year.

Agency Highlights *is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, Ashleigh Acevedo in the Firm's Water Practice Group, and Hannah Wilchar in the Firm's Energy and Utility Practice Group. If you would like any additional information or have questions related to this article or other matters, please contact Jeff at 512.322.5835 or jreed@lglawfirm.com, Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.*

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