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TEXAS RENEWABLE ENERGY TRENDS & LEGISLATION

by Jamie L. Mauldin and Cody Faulk

Texas Utilities Look to Renewable Energy for Environmental and Business Benefits

In 2016, for the third year in a row, renewable energy accounted for the majority of new electricity generation capacity in the nation. As renewable energy becomes more prevalent, available, and cheap, Texas cities and residents are adopting ways to respond to the increased renewable output for both environmental and business reasons. Texas is already the nation's leader in wind energy, and it is one of the top solar-electricity-producing states. As the state's economy continues to grow, electricity consumption has correspondingly increased. And as older, traditional power generators retire, more renewable generation capacity has come online to replace that market demand. Prices for renewable resources are cheaper than traditional gas-fired generation, and some cities are opting to use these cheaper resources to meet their electric needs.

For example, Georgetown is the first city in Texas to go completely green, opting for 100% renewable energy to meet the city's needs. While opting to go green is obviously a win for the environment, the city's choice to go green was a business decision. Georgetown owns its own utility and Georgetown's mayor recently told NPR the decision to go green has more to do with dollars than environmental policy. With solar and wind energy being so readily available, the prices are less likely to fluctuate as much as oil and gas prices. Georgetown has negotiated contracts with renewable energy companies to provide power to the city for at least 25 years.

For other municipally-owned electric utilities, going 100% renewable is not yet an option, but some are still taking the opportunity to provide programs for ratepayers to purchase 100% renewable energy as part of an alternative green energy program. Austin Energy offers its Greenchoice option for its residential and business ratepayers. This program allows ratepayers to pay an additional fee to choose 100% renewable power. Similarly, Denton Municipal Electric offers a GreenSense Renewable Rate, which provides participating ratepayers with 100% of their energy from renewable sources. While these programs cannot provide 100% renewable energy directly to participating ratepayers' homes, they do ensure that the electricity equal to the customer's annual electricity usage is delivered to the grid from a renewable source, which replaces the traditional gas or coal-fired power that would have otherwise been purchased.

For cities that do not own their own utilities and rely on investor-owned utilities ("IOUs") for electric service, residents have options for purchasing 100% renewable energy through their retail electric providers. These electric IOUs build and operate the distribution network that delivers power from the point of generation to homes and businesses. The power is then sold through retail electricity providers, who sell directly to customers. Many retail electric providers offer 100% renewable energy options. For example, TXU Energy and Green Mountain Energy provide 100% renewable power to participating customers and purchase clean energy from wind and solar farms to match a customer's usage.

For IOU customers who choose to install solar panels on their homes, cities should be aware that several IOUs have recently filed applications at the Public Utility Commission seeking to increase rates for those ratepayers. El Paso Electric is currently seeking to increase rates for

Renewable Energy continued on 4

IN THIS ISSUE

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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

Best Companies to Work for in Texas 2017

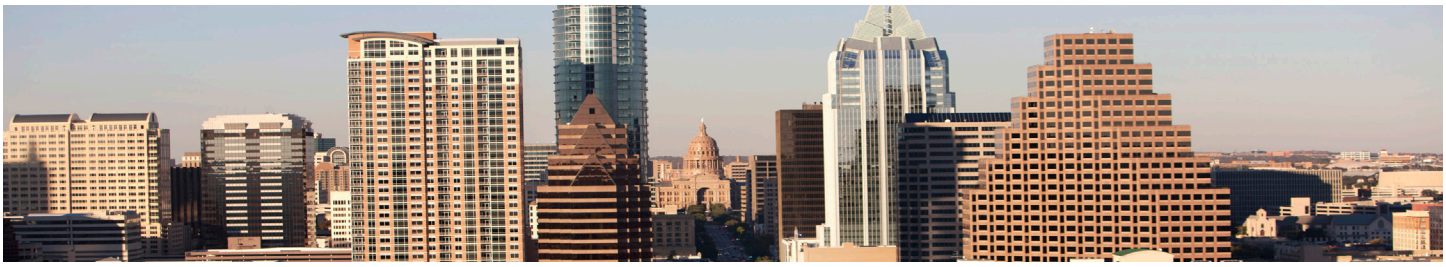
We are proud to announce that for the sixth year in a row, Lloyd Gosselink has been recognized for creating a culture where employees love to work by being selected for inclusion in the Texas Association of Business's list of **100 Best Companies to Work for in Texas**. Of those 100 companies, we were the highest-ranked law firm, coming in at #12 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.

We are pleased to announce that the Texas Water Conservation Association dedicated its 2017 Annual Convention to our co-founder, **Robin Lloyd**. For many decades, Robin served as a TWCA Board Member and its President from 2003-2004. Through his work with TWCA, Robin has been a leader and mentor to water professionals throughout the State of Texas, and his efforts laid the foundation for our Firm's continuing support of and commitment to the important work of TWCA now and for many years to come. To learn more about TWCA's role in shaping the water policy of Texas, visit www.twca.org.

On April 8, our firm participated in the Keep Austin Beautiful City-wide Clean Sweep event. Each year in April, volunteers come together throughout the City of Austin to remove trash and keep our community clean. We have had the privilege to not only volunteer again this year, but also sponsor a site.

Firm News continued on 15

MUNICIPAL CORNER



A county attorney is not entitled to receive extra compensation for representing the state in a criminal matter in the county's district court at the request of the district attorney. Tex. Att'y Gen. Op. KP-0130 (2017).

The Attorney General ("AG") was asked whether a county attorney may be paid additional compensation if that attorney is appointed to serve as a special prosecutor by the district attorney. The Request Letter indicated that the district attorney, and not the court, appointed this special prosecutor and that the district attorney requested a payment of $500 to the special prosecutor for services rendered.

The AG first cited Article 2.02 of the Texas Code of Criminal Procedure which prescribes the specific duties of a county attorney. Those duties include, among others, representing the state alone in the absence of the district attorney, and when requested, aiding the district attorney in the prosecution of any case on behalf of the state in the district court. The AG then turned to the Texas Government Code, noting that a county attorney may not receive any fee or other compensation for prosecuting a case that the county attorney is "required by law to prosecute." Tex. Gov't Code § 41.004(a). § 53, Article III of the Texas Constitution further prohibits the "extra compensation, fee or allowance to a public officer, agent, servant or contractor, after the service has been rendered." Assisting the district attorney as a special prosecutor is within the duties defined by Article 2.02, and thus any compensation provided after performing those duties would be barred by the Government Code and the Constitution.

The Request Letter also cited Article 2.07 as possible grounds for reimbursement; however, the AG explained that while a court may appoint an "attorney pro tem" when an attorney of the state is disqualified, absent, or otherwise unable to perform the duties of his office, Art. 2.07(b) specifically provides that if an appointed attorney is also an attorney for the state, the appointed attorney "is not entitled to additional compensation." A county attorney is certainly "an attorney of the state" and is, therefore, not entitled to additional compensation, even if the county attorney's role as special prosecutor is viewed as serving as "attorney pro tem." Despite that, the AG noted that, while the terms "special prosecutor" and "attorney pro tem" are sometimes used interchangeably, the terms are "fundamentally different." See *Coleman v. State*, 246 S.W.3d 76, 82 n.19 (Tex. Crim. App. 2008). Accordingly, the AG concluded, a county attorney is not entitled to receive extra compensation for representing the State in a criminal matter in the county's district court at the request of the district attorney.

A Texas court would review delegation of legislative power to a private entity with much higher scrutiny compared to such delegation to a public entity, and Texas courts rely heavily on federal jurisprudence in assessing a claim of a constitutional taking of private property. Tex. Att'y Gen. Op. KP-0133 (2017).

The AG was asked whether the Upper San Saba River Management Plan is valid under the Texas Constitution, and particularly, whether or not the delegation of "legislative and executive authority" to a "private board" through adoption of the Plan infringes upon the separation of powers and whether the Plan itself effectuates a constitutional taking of private property. The AG noted initially that the Plan has been "updated" to clarify that the Texas Commission on Environmental Quality ("TCEQ") would delegate its authority not to a private entity but to a board designated by the Legislature as a "local governmental entity" and "agent" of the TCEQ. The AG also noted from the onset of its opinion that the questions posed by the Request Letter largely require a factual analysis, and those specific factual inquiries will not be made by the AG during the opinion process.

The AG began the opinion by discussing that the "legislative power" delegated to the Texas Legislature via the Texas Constitution included the power to set public policy as well as many functions that have "administrative" aspects. The Texas Supreme Court has held that the delegation of that power from the Legislature is sometimes necessary and proper and can be delegated to local governments, administrative agencies, and even private entities under certain conditions.

The AG opined that any delegation to a private entity will be subject to very high scrutiny, as such action raises "more troubling constitutional issues," examined pursuant to an eight-factor test derived from the Boll Weevil Texas Supreme Court case. See *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). A delegation of authority to a public entity is analyzed under a much more lenient standard, which would focus simply on whether the Legislature "establish[ed] reasonable standards" to guide the public entity in exercising the delegated powers. See *Texas Workers' Comp. Comm 'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 654 (Tex. 2004).

While the opinion does not provide any hard and fast determination, it does note that, were the Plan to embody a delegation of legislative authority to a private entity, several factors could "weigh against constitutionality." Under the "updated" Plan that clarifies that the board will be a public entity, a court would analyze the delegation of authority under the "reasonable standards" analysis from Patient Advocates, but the AG does not address the likelihood of the Plan's constitutionality under that standard.

The AG last turned to the constitutional taking that would result from alleged "illegal diversions" allowed under the Plan and from certain users taking "as much water as they want" to the detriment of downstream domestic and livestock users. The AG mentioned the Texas Supreme Court's reliance on federal takings jurisprudence and concluded that any such takings claim would likely be analyzed according to three federal factors: (1) the economic impact of the regulation; (2) the character of the governmental action; and (3) the interference of the regulation on economic expectations. Given the "unique nature" of a landowner's property rights in water and other surrounding factors, the AG refused to offer any further guidance on the applicability of those factors to the underlying facts in this Request.

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 any questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.*

Renewable Energy continued from 1

distributed generation customers up to $14 per month. Oncor recently filed an application for a significant rate increase proposing that residential customers with distributed energy resources with capacity of 3 or more kilowatts be placed in a new rate class that includes a minimum charge. This new charge will flow from Oncor through the customer's retail electric provider to the customer. As more electric IOUs adapt to customers installing solar panels, we can expect that these utilities will seek to increase rates for those customers, similar to El Paso Electric and Oncor. As a result, cities will want to monitor IOU rate cases for potential rate increases for customers in their cities who choose to install distributed generation.

In sum, although Texas is the land of oil and gas, cities and utilities are looking to renewable generation for both business and environmental reasons. As more renewables become readily available, Texans are shifting perceptions and business practices in order to incorporate these resources into the electric grid and also benefit bottom lines. There are many options for cities who own their own utilities and for city customers who want renewable energy delivered to their homes or businesses. However, as the state adjusts to a new type of energy, the regulations will inevitably change with these adjustments.

Renewable Energy Legislation in 2017

The Texas Legislature is in full swing, and renewable energy is one among many of the varying issues being considered this year. While this issue is not a critical priority of the 85th Legislature, legislation has been proposed that may significantly impact the industry, as well as those municipal and state agencies that interact with it. Legislation ranges from how property housing renewable energy infrastructure is taxed to investment vehicles for the financing of renewable generation projects, as well as what fees municipalities can charge electricians who install renewable generation equipment, just to cover a few. Whether this legislation will pass remains to be seen, but it is safe to say the industry is not being ignored by legislators in 2017. This article aims to highlight just a few of these bills.

Senate Bill 600, authored by Senator Konni Burton of Fort Worth, calls for the repeal of the Texas Economic Development Act ("TEDA"), Chapter 313 of the Tax Code, which includes temporary reductions in property taxes for renewable energy producers conducting major capital investments in the State. The TEDA allows a school district to offer a temporary limitation for school property tax purposes on the property value of new investment in the state, similar to the tool provided to cities and counties in Chapter 312 of the Tax Code. Under Chapter 313, a local school district may defer for 8 years the time before a new investment project goes onto the tax rolls at full value. Currently, Tax Code § 313.024 allows for renewable energy electric generation facilities, clean coal projects, and advanced clean energy projects to be eligible for a limitation on appraised property value, offering these industries an avenue to cut their tax bills. The bill was sent to the Natural Resources & Economic Development Committee on February 8 of this year.

House Bill 2435, authored by Representative John Wray of Waxahachie, seeks to add the acquisition, construction, or improvement of a facility related to the generation of renewable energy from wind, solar, geothermal, or other renewable sources of energy to the definition of a "public improvement project" under Chapter 372 of the Local Government Code. Currently, Chapter 372 allows for and regulates the creation of Public Improvement Districts ("PIDs") in Texas, which are a regional development tool that allocates costs to the area of a municipality receiving those benefits as opposed to the entire municipality. A PID is a special assessment area created at the request of the property owners in a defined district and is subject to the approval of the municipality. After being authorized by the city, the owners pay a supplemental assessment with their tax bills, which the PID then uses for additional services that extend beyond current city services. Some projects currently authorized under this program include landscaping, acquisition, construction, or improvement of libraries, mass transportation facilities, parks, and water, wastewater, or drainage facilities. This legislation additionally would authorize a municipality to transfer the operation and maintenance of a project, including a

renewable generation facility, to an entity regulated by the Public Utility Commission of Texas. Including renewable generation facilities within Chapter 372 would allow local communities and developers access to financing that would not typically be available for such projects, which could spur growth in their respective municipalities.

Senate Bill 1797, authored by Senator Donna Campbell of New Braunfels, attempts to create a prohibition in the Texas Occupations Code to prevent a municipality from charging a permit fee, registration fee, administrative fee, or any other fee to an electrician who holds a license issued under the Occupations Code for work performed in the municipality or region. This bill would allow electrical contractors, including solar panel installers, to conduct business throughout the state without having to pay additional local licensing fees beyond that required by the state. While removing a revenue stream for municipalities, this legislation could act to further subsidize the local renewable energy market.

For now, these bills could have varying degrees of impact on the renewable energy industry in Texas. While the Legislature is not considering any legislation impacting renewables on a large-scale basis in this session, renewable energy will likely receive more attention in future Legislative sessions as the Texas renewable energy industry grows.

Jamie Mauldin and Cody Faulk are Associates in the Firm's Energy and Utility Practice Group, and their practice focuses on a wide range of utility regulatory and ratemaking matters. If you would like any additional information or have questions related to this article or other matters, please contact Jamie at 512.322.5890 or jmauldin@lglawfirm.com, or Cody at 512.322.5817 or cfaulk@lglawfirm.com.

TCEQ PUBLISHES NEW EMISSION BANKING RULES FOR MOBILE AND AREA SOURCES

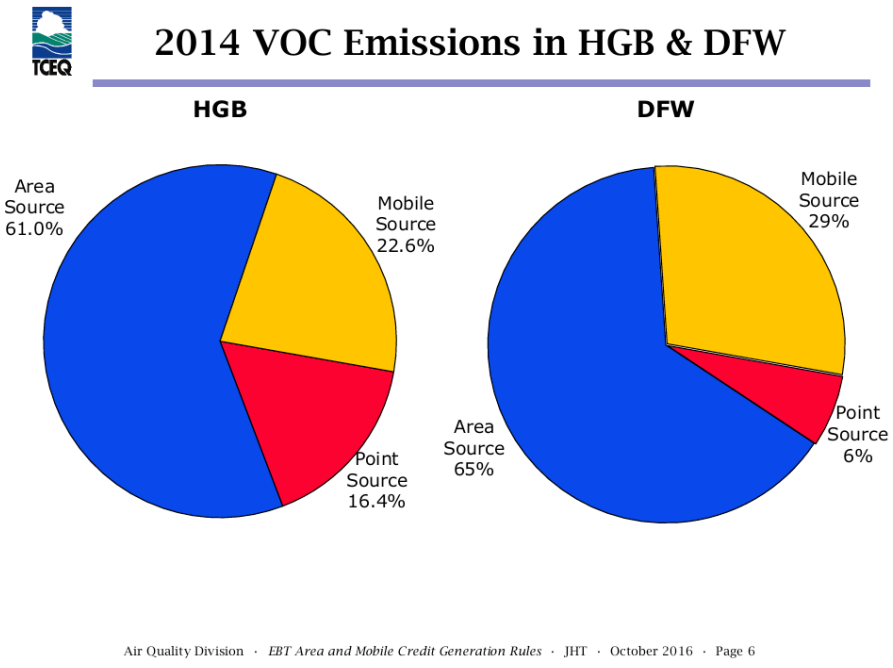
by Paul Gosselink and Jeffrey Reed

At its March 8, 2017 Agenda, the Commissioners of the Texas Commission on Environmental Quality ("TCEQ") approved the publication of proposed revisions to the TCEQ's emissions banking and trading rules, seeking to "address implementation issues that were identified with the generation of emissions credits for area and mobile sources." This rulemaking offers the TCEQ an opportunity, if it chooses to take it, to open up the emissions banking and trading program in a meaningful way to mobile and area sources and to create real improvements to air quality in non-attainment areas (particularly the Houston/Galveston area), while allowing for continued economic development.

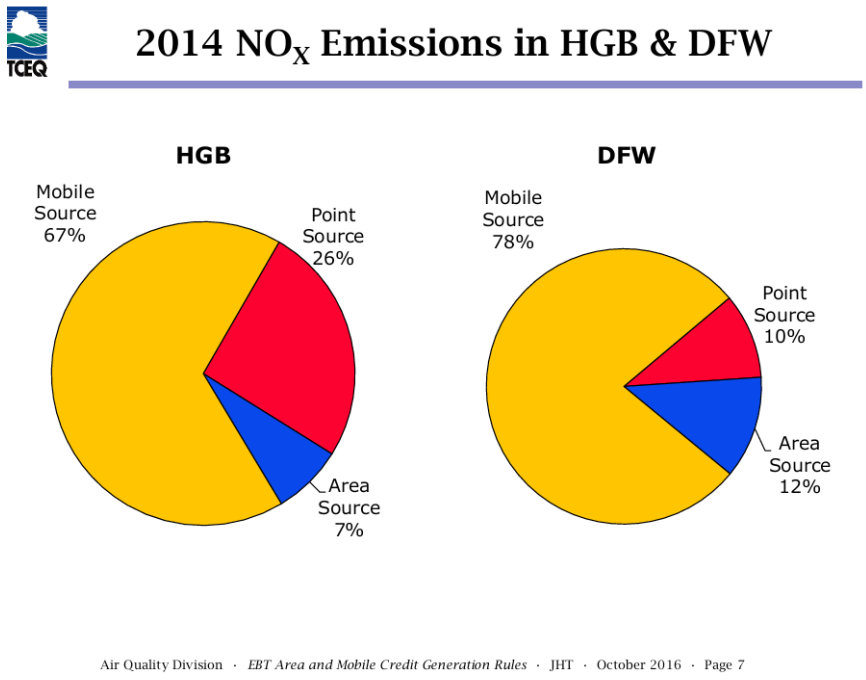
Several counties in the state are currently designated as "non-attainment" for ozone, and with upcoming changes to the ozone standard from 75 ppb to 70 ppb, the designation will expand to more counties. Because ozone is not generally an emission, nitrogen oxides ("NOx") and volatile organic compounds ("VOCs"), the precursors to ozone formation, are regulated. In non-attainment areas, VOC and NOx emissions are capped. If one facility wants to increase the amount of NOx or VOCs that it emits, it has to find another source that is willing to reduce the amount of NOx or VOCs that it emits. The TCEQ certifies the reductions in the form of emission reduction credits ("ERCs"), which can be purchased by the source that wants to increase its emissions. The TCEQ does not set the price for the transaction; the price is set between the buyer and the seller of the ERC. To attempt to obtain improvements in air quality, the TCEQ requires that the facility that is increasing its emissions purchase slightly more ERCs than the emissions it is increasing. This difference can be 10, 15, 20, or 30% above the increase, depending on the area's level of non-attainment.

To qualify as an ERC, an emission reduction must be[1] :

- Permanent;
- Enforceable;
- Quantifiable;
- Real; and
- Surplus.



Although only large point sources (sources such as factories) are required to obtain ERCs to offset emission increases, the TCEQ rules allow for ERCs to be generated from other kinds of sources as well—specifically, mobile and area sources. However, as a practical matter, TCEQ has generally only issued ERCs to point sources. The reason is straightforward: it is much simpler to show that sources meet the requirements when they have individual permits. However, over time, point sources, particularly in the Houston, Galveston, Brazoria ("HGB") non-attainment area, have made most of the easy and inexpensive reductions that they can, leaving area and mobile sources as the next logical source of emission reductions. The two charts provided by the TCEQ show the problem that TCEQ faces in achieving attainment.



As these charts show, area sources are by far the most abundant source for potential VOC reductions, and mobile sources for NOx reductions. The intent of the proposed rule revisions, as expressed in the rule's preamble, is to provide a mechanism to allow area and mobile sources to show that they meet the five criteria for creating certifiable ERCs.

The proposed rules add some new and revise some existing definitions, more closely tieing emission reductions and sources to the TCEQ's emission inventory. For example, sources are defined based on where their emissions are accounted for in the emissions inventory rather than by reference to definitions in other air rules. Further, State Implementation Plan ("SIP") emissions in existing non-attainment areas are tied to the emissions in the latest SIP emissions inventory, and SIP emissions in new non-attainment areas are tied to the most recent emissions inventory submitted to the United State Environmental Protection Agency before the area is designated.

The rules further attempt to address the uncertainty in quantifying emission reductions from area and mobile sources. For example, emission reductions from area and mobile sources are discounted by up to 20% based on whether the reduction is due to a shutdown or control, and the level of record-keeping utilized by the source. The rules also exclude emission reductions from the shutdown of area sources that the TCEQ deems "inelastic," meaning that the shutdown of one source would be likely to give rise to another similar source due to market demands (for example, gas stations).

The rules also establish a two-year deadline for applying for an area or mobile source ERC, which is triggered by the date that the actual emission reduction occurs. The rules allow for emission reductions to be aggregated to achieve the minimum reduction of 0.1 ton per year, but the deadline is triggered by the date that the first of the aggregated emission reductions occurs.

The rules also provide several restrictions specific to ERCs from mobile sources (referred to as "MERCs"). The mobile sources must be part of a fleet and must be operated primarily in a single non-attainment area. An exception is provided for certain capture and control mechanisms for marine and locomotive mobile sources, where the MERC would be owned by a facility in the non-attainment area rather than the mobile source that travels into and out of the non-attainment area. For reductions due to the replacement of a mobile source or its engine, the mobile source must be rendered permanently inoperable or be moved out of North America, and documentation acceptable to the TCEQ must be provided, although several fleet operators commented that traditional enforcement mechanisms such as contracts and regulatory enforcement would be sufficient to protect the integrity of the MERCs in lieu of destruction of the vehicle. The reductions will be determined based on the remaining useful life of the vehicle based on the fleet turnover assumptions in the SIP, and then annualized over 25 years. Likewise, the reductions will be determined based on the emissions level (tier) of the engines based on the fleet turnover assumptions in the SIP rather than the actual emission level (tier) of the engine being replaced.

Public hearings on the proposed rules are set for April 18, 19, and 20. The comment period closes on April 24, 2017, and the TCEQ anticipates addressing comments and adopting a final rule in August 2017. It may be years before we see whether these rules will actually result in reductions from mobile and area sources.

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[1]Reductions that are not permanent can qualify for Discrete Emission Reduction Credits ("DERCs").

FIRST AMENDMENT AND SOCIAL MEDIA IN PUBLIC SECTOR EMPLOYMENT

by Lauren Munselle

Social media continues to be a prevalent outlet for employees to express their opinions and air their grievances freely, sometimes in ways that disparage an employer. But there are limits to when a public employer can take adverse action against an employee for off-duty social media activity. As governmental entities, public employers (unlike private employers) must consider their employees' constitutional rights before taking adverse action against an employee based on social media activity. The First Amendment protects a public employee's speech as a citizen on matters of public concern so long as the employer's interest in maintaining an efficient and effective workplace does not outweigh the employee's free speech interest. This First Amendment protection extends to a public employee's posts, comments, and even "likes" on Facebook and other social media sites.

Over the years, courts have developed a **three-part balancing test** to determine if a public employee's speech is protected under the law:

- First, is the employee speaking as a citizen or in his or her role as a public employee? Employees speaking in the scope of their job duties do not have free speech protection, based on the principle that an employer can regulate speech it has "paid for." For example, a spokesperson for a governmental agency is not engaged in protected speech in that role.

- Second, is the speech a matter of public concern? If the employee is speaking about issues that concern only his, or a small group's, private interests, then the speech is not protected and is subject to employer regulation. For example, if an employee complains about hating his or her boss, then the employee is not protected because the speech involves only personal employment concerns. Recently, the United States ("U.S.") Fifth Circuit Court of Appeals found that an employee's social media comments criticizing her employer's failure to send a representative to the funeral of an officer killed in the line of duty did not constitute speech on a matter of public concern. However, if the employee said she hated her boss because he systematically discriminates against women in the workplace, or because he misspent taxpayer money, this could transform her personal beef into a matter of public concern. Also, statements about political beliefs and supporting particular candidates are almost always considered matters of public concern. Simply "liking" a candidate on Facebook is a constitutionally-protected act.

- Third, if the speech is made by the employee as a private citizen and involves a matter of public concern, then is the speech overly disruptive to the employer's operations? This is a tricky balancing test: does the employer's interest in maintaining an efficient and effective workplace outweigh the employee's interest in free speech? This test requires looking at the cause and effect of each case. For example, a deputy sheriff's political support of his boss's opponent will surely cause some disruption at work but probably not enough to outweigh the significant public interest in allowing a citizen to support his chosen candidate in an election. On the other hand, that same deputy's public support of white supremacist causes may be a matter of public concern, but its disruptive effect on public confidence in nondiscriminatory law enforcement would render the sheriff's department ineffective and would outweigh the employee's interest in free speech.

Effect on Employers

Because First Amendment protections apply to an employee's social media activity as a private citizen, employers must be mindful not only in the application of policies regulating their employees' social media activity but also in the drafting of such policies. While public employers are not affected by the many National Labor Relations Board opinions finding that private employers cannot prohibit employer disparagement in social media, at least one circuit of the U.S. Court of Appeals has similarly opined that a public employer's social media policy containing a blanket prohibition on negative comments regarding the employer was unlawful. In a recent Fourth Circuit case, the court held that the employer's social media policy that generally prohibited "negative comments on the internal operations…or specific conduct of supervisors or peers that impacts the public's perception of the [employer]" was "a blanket prohibition on all speech critical of the employer," and was thus unconstitutionally overbroad.

Though the Fourth Circuit's holding is not binding in Texas, the court's reasoning regarding impermissibly broad social media policies could be adopted by other Circuits, including the Fifth Circuit, whose jurisdiction includes Texas. Thus, public employers should avoid blanket prohibitions in social media policies and conduct a thorough balancing of interests before taking disciplinary action against an employee based on his or her social media activity.

Lauren Munselle is an Associate in the firm's Employment Law and Litigation Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact Lauren Munselle at 512.322.5889 or lmunselle@lglawfirm.com.

ACCOUNTING PLANS: REGULATORS' NEEDS AND WATER PORTFOLIO MANAGEMENT OPPORTUNITIES[1]

by Nathan E. Vassar

Over about the last decade in the water rights arena, accounting plans have become among the most important features of water rights as administered by the Texas Commission on Environmental Quality ("TCEQ"), as the plans govern the daily implementation of diversions of water in light of a variety of factors. As explored throughout this ongoing water supply planning series, a well-rounded water supply strategy includes both legal and technical components. As such, the development of a carefully crafted accounting plan should include the consideration of a variety of regulatory needs, alongside a number of strategic considerations, in order to frame an accounting protocol that satisfies TCEQ's requirements while also meeting the water supplier's (and its customers') needs. So far, our series has focused on tools and strategies that can help maximize the use of water supplies to meet the needs of providers and their customers. Having the right accounting plan in place, however, is central to many planning tools and can support a number of strategies if carefully crafted and maintained.

The development of an accounting plan is more than a "check the box" exercise for water rights applications. Although not required for every water right application, accounting plans are important in order to demonstrate how a water right operates in conjunction with other rights, stream flow conditions, storage and related impacts, reuse of water (when applicable), and carriage losses, among other factors. Significantly, environmental flow conditions, when applicable and required, must be adequately addressed before TCEQ can approve a plan. Beyond these fundamental requirements, however, attention to other needs can differentiate an accounting plan that merely satisfies regulatory requirements from one that is an asset to water rights portfolio management. Consideration should also be given to the needs of downstream diverters, existing accounting plans, and the source of the new supply, particularly if water reuse is involved. Additionally, when a reuse application is sourced in mixed groundwater and surface water-based supplies, the right accounting plan should also include details identifying the division between such sources, among other factors.

No accounting plan should be viewed in isolation, as a supplier's broader water rights should be examined whenever a new authorization is sought. TCEQ rules allow for management of water rights in a manner that may "free up" supplies with more junior priority dates for use prior to the use of more senior, drought-resistant rights. For example, Chapter 297 of the Texas Administrative Code provides that junior rights may be accounted for first each year, so long as a water rights holder uses its most senior dates first, at least for rights having multiple priority dates. The preparation of water use reports, due each year by March 1, also presents an opportunity to consider whether the ongoing management and use of a portfolio of water rights most efficiently accounts for water in a manner that taps into the most valuable, most senior, rights at the best time.

Discussions that start with accounting should also include reliability factors – as to both the water right in question as well as other supplies. The delta between firm and paper yields of certain supplies is often significant. As a result, a supplier's accounting plans, in the aggregate, can greatly inform resource management strategies, influenced by streamflow trends, sedimentation, seasonal demands, and discharges. Further, particularly when amending a water right, there may be opportunities to amend and revise accounting protocols to reflect on-the-ground developments that have occurred since the base right was issued.

The right team can help tailor many of the above considerations to a water supplier's particular needs and circumstances. As analyzed in our earlier article about the development of such a team, a water supplier is best served when its projects and water rights management are scrutinized and supported by team members who are familiar with the evolving landscape of accounting practices and regulatory needs. Experienced technical staff can provide cost-effective analysis of environmental flow conditions in light of TCEQ's regulations. Decision points related to the development of accounting plans require a team with the right background and capabilities in order to help a supplier extend supplies and get the most value out of the accounting plan tool.

Our next article will build upon the accounting framework by identifying how certain water supply needs can be impacted by particular conservation efforts. Many Texas suppliers have implemented conservation measures that stretch existing water supplies and allow flexibility for addressing other needs and growing demands in their service areas. That article will highlight conservation best management practices in the context of water supply development and other traditional methods of growing and maintaining water supplies.

Nathan Vassar is an Associate in the firm's Water Practice Group. Nathan's practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to the development of a strong water supply team or the use of water supply planning tools, please contact Nathan Vassar at (512) 322-5867 or nvassar@lglawfirm.com.

[1] This article is the sixth in an ongoing series of water supply planning and implementation articles to be published in *The Lone Star Current* that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.

ASK SHEILA

Dear Sheila,

We are a mid-sized city and have an employee whose father has been chronically ill for years. The father lives in Paris (France, not Texas), where the employee grew up. Every April, after the employee has used all his vacation time for the fiscal year, he requests leave to go to Paris for six weeks to care for his father. He uses accrued sick leave for part of this, and the rest unpaid. Health insurance is fully paid by the City during these periods every year. I feel like we are being taken advantage of. Is there anything I can do?

Signed, Manager or Doormat?

Dear Manager,

First, I am assuming that the Family and Medical Leave Act ("FMLA") applies here. The FMLA applies if the employer has 50 or more employees in a 75-mile radius, and if the employee has worked for the City for a total of at least 12 months and has actually worked for at least 1,250 hours in the previous 12 months. For smaller employers, the FMLA does not apply, and you would not have an obligation to accommodate this type of leave.

However, if the FMLA does apply, this is a situation where the employee's rights outweigh your very reasonable reservations. The FMLA allows, among other things, for employees to take legally protected time off (up to 12 weeks per year) to care for a parent, child, or spouse with a serious health condition. The employee can choose to take this leave at any time of the year, even during the most beautiful time in Paris, and the care does not need to be only at crisis or physically necessary times. If the visit would bring "psychological comfort" to a long-time, chronically-ill patient to have his son with him six weeks a year, or if it helps relieve the main caretaker's burden, then the leave is protected under the FMLA. Just be grateful he's not taking another six weeks in October, which, under the FMLA, he would have the right to do.

That doesn't mean you can't take some steps to verify FMLA applicability if you are having doubts. For example, you can request medical certification from the father's doctor to confirm the father still has a serious health condition that requires care or comfort. You can use the relatively detailed US Department of Labor form for medical certification of a family member's serious health condition, available at: www.dol.gov/whd/fmla/forms.htm. You might need to have the form translated into French, but the employee is required to get it to the father's doctor and get it back to you within 15 calendar days of your request. Be sure to make the request in writing so that there is no question of the deadline.

Also, in non-emergency situations, like an ongoing, chronic condition, you can require the employee give you 30 days' notice of the need for the leave. Unless the father is in an unexpected crisis, you can postpone leave approval until 30 days after receiving notice. This time also provides an opportunity for you to request and get back the medical certification form, with time to spare if follow-up or clarification is needed.

You can also act on reliable information that the employee is using the time for purposes other than seeing his father in Paris. FMLA leave is not for vacations, and although the employee can take breaks from his father and do other things occasionally, he should not be jetting off to Greece or Portugal or touring the wine country while he is on leave. Managers or other coworkers may be connected with him on social media, and sometimes posts and location information are very telling. After-the-fact information such as photographs, souvenirs, or stories he tells at work may lead to an investigation of leave fraud.

Once there is reasonable suspicion to justify an investigation, you can conduct interviews of coworkers and ask the employee for documentation of the trip, such as travel itineraries, tickets, and hotel reservations, as well as his explanation for the issues that led to suspicion. Although employees are protected from retaliation for using FMLA leave, they are not protected from disciplinary action based on proof of leave fraud. Of course, any discipline related to FMLA leave has some risk, so be sure to seek legal advice before taking final action.

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the Employment Law 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

Water Cases

Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency, No. 14-1823 (2nd Cir. 2017).

On January 18, 2017, the United States ("U.S.") Court of Appeals for the Second Circuit reinstated the U.S. Environmental Protection Agency's ("EPA") Water Transfers Rule. The rule, which was adopted in 2008, codified the EPA's longstanding policy that water transfers between basins are not subject to regulation under the National Pollutant Discharge Elimination System ("NPDES") program in Clean Water Act ("CWA") § 402 if the transfer does not subject the water to an intervening industrial, municipal, or commercial use. In short, the Water Transfers Rule clarified that such transfers do not constitute an "addition of pollutants" under § 402. In 2014, a district court vacated the rule, holding that, under the first step of the Supreme Court's two-part test under *Chevron v. Natural Resources Defense Council* for judicial review of an agency's formal interpretation of a statute, the CWA was ambiguous as to whether Congress intended the NPDES program to apply to water transfers. On appeal, the Second Circuit agreed that the CWA is ambiguous but deferred to the EPA's interpretation, finding that the Water Transfers Rule represents a reasonable policy choice and should be afforded deference under the second step of the *Chevron* test.

Ware v. Tex. Comm'n on Envtl. Quality, No. 03-14-00416-CV, 2017 WL 875307 (Tex. App.—Austin Mar. 3, 2017, no pet. h.).

The Texas Third Court of Appeals recently affirmed a decision to deny reissuance of a term water use permit, clarifying the nature of such right. Bradley Ware applied for a water right to divert water from the Lampasas River in 1997. Determining that there was insufficient water available for a typical water use permit, the TCEQ instead granted Ware a water right with a 10-year term upon a determination that unperfected, appropriated water would be available in sufficient amounts to support such a temporary permit. The permit was given a priority date of July 1, 1997. In 2005, Ware sought renewal of the permit, or alternatively, conversion of the temporary permit to a perpetual right. TCEQ recommended denial. During the ensuing contested case hearing, Ware asserted that his application should be given a July 1, 1997 priority date over any rights that vested or were claimed subsequent to July 1, 1997, and that 75,000 acre-feet of return flows were available for appropriation. The administrative law judge, and ultimately the TCEQ, denied the application, and that decision was upheld by the Travis County District Court. On appeal, the Third Court of Appeals affirmed the decision, holding that term permits confer a temporary right to water already appropriated but unused. Accordingly, such term permits are subordinate to any senior appropriative water rights, and conversion of a term permit to a "de facto perpetual right" is contrary to the water rights scheme established by Texas Water Code chapter 11.

Ctr. for Reg. Reasonableness v. Envtl. Prot. Agency, No. 14-1150 (D.C. Cir. Feb. 28, 2017).

On February 28, 2017, the U.S. District Court, District of Columbia ("D.C.") Circuit ruled that it lacked jurisdiction to consider a challenge of a decision by the EPA prohibiting utilities from blending excess influent during peak flow events at a wastewater treatment facility with flow that has already been through the facility's biological treatment process. The litigation challenged the EPA's refusal to apply a decision out of the U.S. Court of Appeals for the Eighth Circuit striking EPA's prohibition on blending nationwide. For more information about this case, see the October 2016 Edition of *The Lone Star Current*.

Complaint, Nat. Res. Def. Council v. Envtl. Prot. Agency, No, 17-CV-751 (S.D.N.Y. Feb. 1, 2017).

In December of 2016, the EPA finalized a technology-based pretreatment standard under the Clean Water Act, known as the Dental Amalgam Rule, to reduce discharges of mercury and other metals from dental offices into publicly owned treatment works. For more information on this rule, please see the January 2017 edition of *The Lone Star Current*. The Dental Amalgam Rule was withdrawn in response to the regulatory freeze order issued by White House Chief of Staff Reince Priebus on January 20, 2017, which required all regulations sent to the Office of the Federal Register but not yet published to be withdrawn. The Natural Resource Defense Council's ("NRDC") lawsuit tests the procedural legality and scope of the regulatory freeze order. Particularly, NRDC's suit argues that the Dental Amalgam Rule "was adopted and duly promulgated by EPA when it was signed by the EPA Administrator, sent to the Office of the Federal Register, and at the latest, when it was filed for public inspection," and thus, cannot be withdrawn without going through the Administrative Procedure Act notice and comment process.

City of Jersey Vill. v. Tex. Transp. Comm'n, No. 15-0874 (Tex.).

The Texas Supreme Court denied the City of Jersey Village's petition for review of a decision out of the Fourteenth Court of Appeals holding that replacement easements for utility lines relocated as a result of highway expansion are not reimbursable by the state. The City was required to move its utility lines because of a state highway expansion project, which necessitated the City to seek replacement easements to replace its lines. The state was required to reimburse the City for the entire amount of the relocation costs pursuant to Texas Transportation Code § 203.092, but the state refused to pay the costs of replacing the easements. The City filed suit, and the district court ruled that easements are part of the cost of the relocation, thus the state had to pay that cost. On appeal, however, the Fourteenth Court of Appeals reversed the district court, holding that, although the City had a compensable property interest in the easements, and that interest triggered reimbursement for relocation of facilities under § 203.092, the cost of replacement easements were not properly attributable to the relocation of the utility lines, and therefore, were not reimbursable by the state. Because the Supreme Court declined review of the appeals court decision, utilities risk bearing easement relocation costs if existing easements used for utility facilities could be affected by state highway expansion.

Paxton v. City of Dallas, No. 15-0073 (Tex. Feb. 3. 2017).

The Texas Supreme Court held that the attorney-client privilege, in and of itself, is a compelling reason to prevent disclosure under the Public Information Act (the "PIA"), even if the entity claiming the privilege untimely requests an opinion from the Attorney General ("AG") that disclosure is excepted. The City of Dallas received two PIA requests but failed to notify the AG within the ten-business day deadline under Texas Government Code § 552.301 that it would seek a determination from the AG on whether the City could claim a valid exception to disclosure. Though it missed the deadline, the City still sought an opinion and asserted that the documents are protected by the attorney-client privilege. The AG determined that, because the City failed to timely request an opinion, it had waived the privilege and all documents requested must be released. Through appeals of both requests with conflicting results, the Supreme Court ultimately determined that failing to meet the PIA's deadline to assert a statutory exception to disclosure does not alone constitute waiver of the attorney-client privilege, and therefore, the requested information was not subject to compelled disclosure under the PIA solely on that basis. Additionally, the Court determined that there was a compelling reason to withhold information covered by the attorney-client privilege in this case.

Upper Trinity Reg'l Water Dist. & Tex. Comm'n on Envtl. Quality v. Nat'l Wildlife Fed., No. 01-15-00374 (Tex. App.—Houston [1st Dist.] Jan. 26, 2017).

The Texas Court of Appeals in Houston, First District, affirmed the TCEQ's order granting the Lake Ralph Hall reservoir permit to the Upper Trinity Regional Water District (the "District") on January 26, 2017. The permit authorizes the District to construct a new 180,000 acre-feet reservoir on the North Sulphur River in northeast Texas, divert up to 45,000 acre-feet each year for beneficial use, and transfer its diversions from the reservoir to the Trinity River Basin through an interbasin transfer authorization. The permit was challenged by the National Wildlife Federation ("NWF"), which claimed that the requirement in Texas Water Code § 11.085(l)(2) requiring the District to develop and implement a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable in the jurisdiction was not satisfied. On appeal of the TCEQ's decision to grant the permit, the Travis County District Court agreed with NWF that the highest practicable level of water conservation standard was not met. The Court of Appeals reversed, holding that under the common meaning of the terms in § 11.085, TCEQ may permit an interbasin transfer only to the extent that "the applicant's water conservation plan will result in the highest levels of water conservation and efficiency capable of being put into practice and carried out successfully within its jurisdiction." Additionally, the court also concluded that § 11.085(l)(2) does not require an assessment of a water conservation plan using fixed criteria, but rather requires a review of what each individual applicant is capable of successfully accomplishing in its jurisdiction.

Lone Star Groundwater Conservation Dist., et al. v. City of Conroe, et al., __ S.W.3d __, 2017 WL 444362 (Tex. App.—Beaumont Feb. 2, 2017, no pet. h.).

The Texas Court of Appeals in Beaumont ruled on an interlocutory appeal that the district court abused its discretion when it denied the Lone Star Groundwater Conservation District ("Lone Star") and its directors' pleas to the jurisdiction in a suit brought against it by the City of Conroe and other water utilities seeking to invalidate Lone Star's rules and regulatory plan. The Court of Appeals dismissed the claims against the Lone Star directors with prejudice because Texas Water Code § 36.066(a) provides the directors with immunity from suit for official votes and actions except when such actions do not conform to laws relating to conflicts of interest, abuse of discretion, or constitutional obligations. Lone Star also sought dismissal on the grounds that the plaintiffs could not bring suit under the Uniform Declaratory Judgments Act (the "UDJA") rather than under Chapter 36 of the Texas Water Code so that it could recover attorney's fees. However, the Court of Appeals held that the district court erred in denying Lone Star's plea to the jurisdiction regarding attorney's fees. It held that Chapter 36 waives a groundwater conservation district's immunity from suit for a challenge to the validity of its rules and that the plaintiffs can use the UDJA in conjunction with Chapter 36 to seek a declaration that the rules are invalid. But the Plaintiffs could not recover attorney's fees in such a claim because the more specific Chapter 36 controls.

Air and Waste Case

California Communities Against Toxics v. Pruitt, 2017 WL 978974, (D.D.C. Mar. 13, 2017).

The U.S. District Court, D.C. Circuit, has ordered the EPA to complete rulemakings related to the regulation of hazardous air pollutants from 20 major source categories, including municipal solid waste landfills. The EPA did not dispute that it had failed to meet deadlines set forth in the Clean Air Act for promulgating the regulations but disagreed with the plaintiffs over the amount of time the Court should allow the EPA to come into compliance. The court ordered the EPA to complete all 20 source category rulemakings within three years.

Governmental Litigation Case

Hall v. McRaven, No. 16-0773, 2017 WL 387215 (Tex. 2017).

Days before Wallace Hall's term as a Regent of The University of Texas System ended, the Texas Supreme Court issued its opinion in the case arising from Regent Hall's solo investigation of the University's admission practices. The Supreme Court considered Regent Hall's allegations that Chancellor McRaven acted *ultra vires*—i.e., outside his legal authority—in refusing to produce student admission records requested in the course of his investigation. The Supreme Court disagreed.

In refusing to produce the student records, Chancellor McRaven relied on the federal Family Educational Rights and Privacy Act ("FERPA"). The Chancellor's interpretation of FERPA may have been wrong, but according to the Supreme Court, it did not matter. Under the Rule set out in *Hall*, a state official's misinterpretation of collateral law—as opposed to the governmental entity's enabling law—does not constitute an *ultra vires* act.

In so holding, the Texas Supreme Court narrowed its earlier precedent in *Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016). Under *Hall*, to bring a valid *ultra vires* claim, a plaintiff must do more than allege that officials misinterpreted the law. The plaintiff must additionally allege that the defendant "misinterpreted the bounds of his own authority—exceeding the scope of what [the government entity] permitted him to do."

This Opinion should provide some comfort to governmental officials. The Supreme Court has now made clear that these officials don't have to be legal experts on all areas of law. Rather, to avoid acting *ultra vires*, they only need to know and understand the limits of their legal authority as set forth in the statutes that created and govern the governmental entity.

In the Courts is prepared by Jeff Reed in the Firm's Air and Waste Practice Group, José de la Fuente in the Firm's Litigation Practice Group, and Ashleigh Acevedo in the Firm's Water 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, Joe at 512.322.5849 or jdelafuente@lglawfirm.com, or Ashleigh at 512.322.5891 or aacevedo@lglawfirm.com.

AGENCY HIGHLIGHTS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA")

Proposed EPA Budget Cuts. On March 16, 2017, the Trump Administration unveiled its preliminary budget for FY2018, including the budget for the EPA. The preliminary budget proposes funding EPA at $5.7 billion, which is a 31% decrease from current funding levels and is the largest cut to any federal agency. Despite the proposed cuts, the preliminary budget maintains full funding for the State Revolving Funds at $2.3 billion which provides communities with financial assistance for drinking water and water quality infrastructure projects.

WOTUS Rule Re-Write. Pursuant to Executive Order No. 13778 signed on February 28, 2017, the EPA will rewrite the contentious Clean Water Rule–known as the "Waters of the U.S. Rule", or simply "WOTUS Rule"–finalized by the EPA and the U.S. Army Corps of Engineers in June 2015, relating to applicability of the Clean Water Act to certain waters. EPA Administrator Scott Pruitt has indicated that, in rewriting the rule, EPA will consider Justice Scalia's plurality opinion in the 2006 Supreme Court case *Rapanos v. United States*. The current WOTUS Rule, on the other hand, was based on and intended to clarify the scope of Justice Kennedy's concurring opinion, which opined that "waters of the U.S." under the Clean Water Act are waters with a significant nexus to navigable rivers and seas. EPA officials have indicated that the rewrite is moving at a fast pace and is an early priority for the Administration. In January, the Supreme Court agreed to take up the pending WOTUS Rule litigation relating to whether the numerous WOTUS Rule challenges belong in the Sixth Circuit

or the district courts. It is unclear whether all parties pursuing those determinations will still seek Supreme Court review. Briefing was postponed until April 13, 2017.

Deadline for USACE Water Supply Rule Extended. On December 16, 2016, the United States Army Corps of Engineers ("USACE") published a proposed rulemaking that, according to the USACE, would "update and clarify its policies governing the use of its reservoir projects for domestic, municipal and industrial water supply pursuant to the Flood Control Act of 1944 ("FCA") and the Water Supply Act of 1958 ("WSA")." See, 81 Fed. Reg. 91556. Generally, USACE is seeking public comment on the Water Supply Rule regarding the interpretation of key provisions of the FCA and the WSA to clarify its policies governing the water supply use of USACE reservoirs within the authority conferred by the foregoing statutes. By this proposed rulemaking, USACE intends to "improve cooperation of state and local interest in the development of water supplies in connection with the operation of USACE reservoirs for federal purposes as authorized by Congress." The proposed rule only applies to reservoir projects operated by USACE and does not apply to projects operated by other federal or non-federal entities. The deadline to submit comments has been extended to May 15, 2017.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ("TCEQ")

TCEQ Issues Landfill Liner Guidance. The TCEQ has issued new guidance documents related to liner construction at municipal solid waste landfills. The new RG-494 regulatory guidance document covers requesting a water balance alternative final cover, providing a new alternative for designing alternative liners based on a study conducted by the University of North Carolina and funded by several industry participants. The newly revised handbook is a draft revision covering liner construction and testing.

TCEQ Updating Water Rights Application. On February 2, 2017, the TCEQ unveiled revised and updated water rights permit application forms for public comment. Akin to TCEQ's water quality permit application, the new water rights applications include a series of forms that may or may not be necessary, depending on the type of water right or amendment requested. TCEQ's intent in using this format is to make the application more user-friendly and to reduce the number of subsequent Requests for Information that result in processing delays. Comments on the draft were due March 17, 2017, and the TCEQ anticipates releasing the final application by June of 2017.

TEXAS GENERAL LAND OFFICE ("GLO")

GLO Notice of Intent to Delist Endangered Golden-Cheeked Warbler. On March 1, 2017, the GLO sent a letter to the U.S. Fish and Wildlife Service within the U.S. Department of the Interior, serving as the 60-day notice of intent to file a lawsuit to delist the golden-cheeked warbler from the Endangered Species List. The notice letter cites to documented recovery of the warbler population as the justification for delisting the small bird native to central and southern Texas, which has been protected under the Endangered Species Act since 1990. According to the notice letter, more breeding habitat exists than was initially thought at the time of listing, and the golden-cheeked warbler population has increased to nineteen times the size of the 1990 population. The notice letter serves as a petition to delist the warbler and triggers a 90-day review period within which the Secretary of Interior, acting through the U.S. Fish and Wildlife Service, is to make a finding as to whether the petition presents substantial information indicating that delisting is warranted.

PUBLIC UTILITY COMMISSION ("PUC")

PUC Docket No. 46404, Remand of Docket No. 42862, Appeal of Water and Sewer Rates Charged by the Town of Woodloch CCN Nos. 12312 and 20141. In the ongoing appeal of the water and sewer rates set by the Town of Woodloch for customers living outside of the Woodloch town limits, the PUC took jurisdiction to impose a single rate over all Woodloch ratepayers, including in-city residents. Relying on Texas Water Code §§ 13.042(f) and 13.043(j), the PUC determined that a municipality's exclusive original jurisdiction is limited by the grant of appellate jurisdiction to the PUC and the command that the PUC ensure all rates are just and reasonable and not unreasonably preferential, prejudicial, or discriminatory.

Docket 46238, *Joint Report and Application of Oncor Electric Delivery Company and NextEra Energy for Regulatory Approvals Pursuant to PURA §§14.101, 39.262 and 39.915*. NextEra Energy Inc.'s ("NextEra") bid to purchase Oncor Electric Delivery Company, LLC ("Oncor") continues moving forward at the Public Utility Commission ("PUC"). The application was filed on November 1, 2016 and sets forth the terms of NextEra's $18 billion proposal to acquire Energy Future Holdings' ("EFH") 80% share of Oncor.

The Steering Committee of Cities Served by Oncor ("OCSC"), PUC Staff, Office of Public Utility Counsel ("OPUC"), and Texas Industrial Energy Consumers ("TIEC") filed testimony that the transaction was not in the public interest. The primary concerns of all intervening parties was NextEra's intent to curtail the most important aspects of the ring-fence that protected Oncor from being pulled into the EFH bankruptcy and NextEra's failure to offer any tangible, quantifiable benefits to Oncor and Oncor's ratepayers.

The PUC held a hearing on the merits over four days in February. Throughout the hearing, parties examined whether the proposed acquisition structure offered enough safeguards for Oncor's customers. OCSC actively participated in the hearing and submitted an initial brief on March 10 and a reply brief on March 17. At the March 30th Open Meeting, the PUC Commissioners discussed NextEra's proposal and ultimately agreed that the acquisition would not be in the public interest.

The Commissioners stated that NextEra's refusal to maintain an independent board of directors of Oncor and refusal to separate NextEra's credit from Oncor's were deal breakers. An Order denying the application has not yet been issued but is expected soon.

The Judge overseeing EFH's bankruptcy has indicated he will not entertain a third attempt for PUC approval of an acquisition and will instead direct EFH to divest Oncor as a public company.

Docket No. 469578, *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*. OCSC acted to require Oncor to initiate a rate case on March 17, 2017. OCSC originally passed show-cause resolutions for Oncor in anticipation of its acquisition by the investor group led by Ray L. Hunt and transformation to a REIT. After that deal fell through, OCSC suspended their show-cause action. However, because NextEra's application to purchase Oncor proposed no benefits to ratepayers, OCSC lifted its suspension. NextEra's application declared that Oncor would file a rate case on or before July 1, 2017. However, OCSC initiated the earlier rate case to benefit ratepayers by forcing Oncor's regulatory assets, which now total close to $900 million and grow each month, to be dealt with sooner, and to seek commitments from NextEra, including how these regulatory assets will be treated.

Oncor filed its Statement of Intent to Increase Rates on March 17th, requesting to increase rates by $317 million, or 7.5%. OCSC has intervened in this proceeding and is currently reviewing the testimony of Oncor's 25 witnesses.

Docket No. 45259, *Appeal of Centerpoint Energy Houston Electric, LLC from an Ordinance of the City of League City, Texas and Application for Declaratory Relief*. The PUC decided in favor of League City in Docket No. 45259. League City had been in an ongoing dispute with CenterPoint Houston Electric over League City's zoning ordinance requiring utility distribution lines in new developments to be buried underground. CenterPoint appealed the ordinance to the PUC, claiming it conflicts with CenterPoint's tariff because the ordinance removes the customer's "right" to request standard service. CenterPoint also claimed the ordinance is illegal under the Public Utility Regulatory Act because it mandates the utility's operations.

At its March 9th Open Meeting, the PUC considered the Administrative Law Judge's ("ALJ") Proposal for Decision, which was very unfavorable to League City and recommended that the Commission adopt CenterPoint's argument. However, the PUC Commissioners disagreed with the ALJ's recommendation.

The PUC Commissioners unanimously decided that there is no conflict between League City's ordinance and either CenterPoint's tariff or the Public Utility Regulatory Act, as long as the ordinance (1) does not require CenterPoint or ratepayers to pay for the requested non-standard service (2) applies only to customer-specific distribution lines, and (3) does not apply to transmission lines. However, instead of adopting a Final Order, the PUC remanded the case to SOAH for a final fact-determination that the ordinance does not impact transmission lines. League City's position is that it does not.

Project No. 46735, *Report on Electric Utility Distribution System Spending and Reliability*. In January 2017, the Staff of the PUC ("Staff") filed a draft report addressing electric utility distribution spending and reliability. The PUC asked Staff to track and report distribution and vegetation management spending, along with each utility's reliability metrics, in an attempt to determine whether any correlations exist between spending and reliability. The draft report was issued on January 9, 2017, and Staff asked for comments from any interested party before finalizing the report for the Commission. OCSC filed initial comments praising the report for starting the process of building a database for spending and reliability across electric utilities throughout Texas. The comments also noted several areas where Staff should incorporate additional data to give more meaning to the report and ensure it is interpreted properly. OCSC's comments also drew comparisons from the draft report on spending and reliability between Oncor and CenterPoint. Several other groups, including several electric utilities, also filed initial comments with corrections or clarifications to the underlying data used in the draft report and some explanation regarding reliability discrepancies between utilities.

Oncor was the only party to submit reply comments on February 27, cautioning PUC Staff against including graphs and charts that provide summary data for all utilities, unadjusted for the differences between various utilities. Oncor argued that the unadjusted data will result in improper comparisons and incorrect conclusions about the utilities.

RAILROAD COMMISSION OF TEXAS ("RRC")

Atmos Rate Review Mechanisms. Atmos Energy recently initiated two rate review mechanisms ("RRM"), one in the West Texas Division and the other in the Mid Texas Division. The RRM is a systematic process collaboratively developed by Atmos and the cities it serves, specifying how rates will be set over a specified period of time. The process benefits ratepayers by avoiding litigation and providing for transparent review of the utility's expenses and investment.

The Atmos West Texas Division made its third filing under the RRM tariff on December 1, 2016. The company requested $5.15 million from West Texas Cities, reflecting 42.31% of a system-wide increase of $12.17 million. Theoretically, 57.69% of the $12.17 million would be allocated to Amarillo and Lubbock; however, Amarillo and Lubbock rejected the RRM process. Thus, they receive annual Gas Reliability Infrastructure Program filings, which they are not allowed to reject or protest. After back-and-forth negotiations with the cities, Atmos West Texas offered to settle for $4.2 million, which it claims will reduce the average monthly customer increase to $2.11. Parties are currently finalizing the settlement agreement.

Meanwhile, Atmos Mid Texas Division also filed its RRM on March 1, 2017, and the Mid Texas cities are working to come to a settlement agreement in that case.

GUD No. 10580, *Statement of Intent to Change the Rates of City Gate Service (CGS) and Rate Pipeline Transportation (PT) Rates of Atmos Pipeline – Texas (APT)*. On January 6, 2017, Atmos Pipeline—Texas ("APT"), a division of Atmos Energy Corporation, filed a Statement of Intent to change its rates at the RRC. APT seeks to increase its annual revenues by $72.9 million. APT claims that the rate increase is necessary due to increases in operating expenses since APT's last general rate case, which was seven years ago. The proposed rate increase will affect eight firm transportation customers and 70 fully interruptible transportation customers. The Atmos Cities Steering Committee has intervened and is already fully engaged in discovery. Intervenor testimony was due on March 22nd, and the hearing is currently scheduled for April 19-21st.

Railroad Commission Sunset Review Update. This week, the House Energy Resources Committee held a public hearing on the RRC Sunset Bill, House Bill ("HB") 1818, by Representative Larry Gonzales. The bill, along with its Senate companion, Senate Bill 300, makes several changes to the operations of the RRC but does not significantly impact the agency's gas utility division.

The RRC has been the subject of a "Sunset Review," the legislative process used to identify and make improvements to existing state agencies. The body responsible for investigating the agency, the Sunset Advisory Commission, issued several recommendations to lawmakers on how to improve the RRC, including some pertaining to the agency's gas utility functions. However, the legislature declined to include those recommendations in the RRC Sunset Bill. The rejected reforms included a proposal to change the agency's name to one that better reflects its responsibilities, a proposal to transfer administrative law cases currently handled by RRC Staff to the State Office of Administrative Hearings, and a proposal to transfer gas utility cases to the PUC.

As written, the bill mainly makes changes to oil and gas monitoring and enforcement. Since this is the RRC's third Sunset Review in seven years, and the agency's past two Sunset Bills have failed to pass, the House Energy Committee repeatedly stressed that passing HB 1818 is a top priority this session. HB 1818 was voted out of the House Energy Resources Committee and was set on the House Calendar for March 28, 2017.

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.*

Firm News continued from 2

Sheila Gladstone will discuss "Sexual Orientation/Transgender" at the Texas Municipal Human Resources Association meeting on May 3 in Austin.

Thomas Brocato will present "Rate-Setting for Municipal Utilities: 2016 Austin Energy Rate Proceeding" at the 2017 Energy Conference on May 15 in Austin.

Nathan Vassar will present "Untangling Reuse Regulations: State/Federal Limitations and Opportunities for Reuse Projects" at the 2017 Water Reuse in Texas Conference on May 19 in El Paso.

Sheila Gladstone will give an "Update 2017: Sex, Drugs, and Tweets Galore" at the Texas City Attorneys' Association Summer Conference on June 14 in South Padre Island.

Nathan Vassar will discuss "Legislative Privilege: Protections and Cautions" at the Texas City Attorneys' Association Summer Conference on June 16 in South Padre Island.

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