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WHAT'S NEXT AFTER HARVEY?

by Lauren J. Kalisek and José de la Fuente

In just under five days in late August 2017, more than 50 inches of rain fell from a single storm event. Afterwards, scientists reviewing GPS data found the Earth's crust had been pushed down by 2 centimeters. As the scope of Hurricane Harvey and its impact became clear, our firm, like everyone else in the state, grappled with the questions of, what can we do? What can we do to help our employees' friends and families directly impacted? And what can we do for our clients and colleagues in dealing with the damage and planning for recovery? We got to work. We collected and donated supplies and resources to various relief efforts. In addition, we organized a Harvey Response Team made up of attorneys from each of our practice groups to donate some pro bono time in our areas of expertise for communities and businesses in need of immediate help. We helped where we could, as much as we could.

To this end, here is an experience of one of our volunteering attorneys, Joe de la Fuente:

"'You know I'm going down to Houston this weekend, right?' That's the message I texted my wife on Tuesday, August 29th. The water was still rising in many places throughout Southeast Texas, where I grew up. Our firm represents clients from the Sabine to the Rio Grande; these are our people. By Friday morning, I had a truck and trailer full of donated supplies and a Paypal account full of donated money. And off we went, sending some material to staging areas for the Golden Triangle, and using other equipment to break down a succession of flooded houses in Houston. We brought money, relief, supplies, and love. I suspect that I gave out more hugs than boxes. And our fellow Texans needed it all; many of them still do. The industriousness of people – both helping themselves and helping others – was awe-inspiring. I've never been so proud to be a Texan. But there is much yet to be done. So much that it's hard to fathom. But it will get done. As our group worked, sweaty and smelling of mosquito-repellent, every time someone thanked me or another member of the crew, everyone gave the same answer: 'no worries – this is what we do for each other.'"

What we've experienced in the wake this disaster is a great reminder about how our clients serve their members and constituents, how we should serve our clients, and how all of us are called to serve and help each other. From the Sabine to the Rio Grande, and from the Red River to the Gulf, we're all in this together. And that's how it's supposed to be.

Lauren Kalisek is the Firm's Managing Principal and Chair of the Districts Practice Group. José de la Fuente is the Chair of the Firm's Litigation Practice Group. If you have questions about the Firm's Hurricane Harvey Response, please contact Lauren at 512.322.5847 or lkalisek@lglawfirm.com, or Joe at 512.322.5849 or jdelafuente@lglawfirm.com.

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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

Maris Chambers has joined the Firm's Districts and Water Practice Groups as an Associate. Maris represents municipalities, water districts, water authorities, utilities and landowners with their water supply, water quality, and water and sewer utility service interests, including certificates of convenience and necessity. She also assists these entities with their impact fees and wholesale and retail utility ratemaking matters. Prior to joining Lloyd Gosselink, Maris worked in Federal Employment Law, but her true passion has always been the environment. She previously worked for the Region 6 Offices of the U.S. Environmental Protection Agency. While at Region 6, Maris worked with both the Compliance Assurance and Enforcement Division, as well as the Water Enforcement Section of the Office of Legal Counsel. She is very excited to parlay that experience to her work at Lloyd Gosselink. Maris received her J.D. from the University of Oklahoma College of Law, with distinction, and her bachelor's degree from Southern Methodist University. She is a member of the State Bar of Texas and the Austin Bar Association.

Jason Hill will serve as a panelist discussing "Reuse Litigation and Policy" at the TWCA Fall Conference on October 19 in San Antonio.

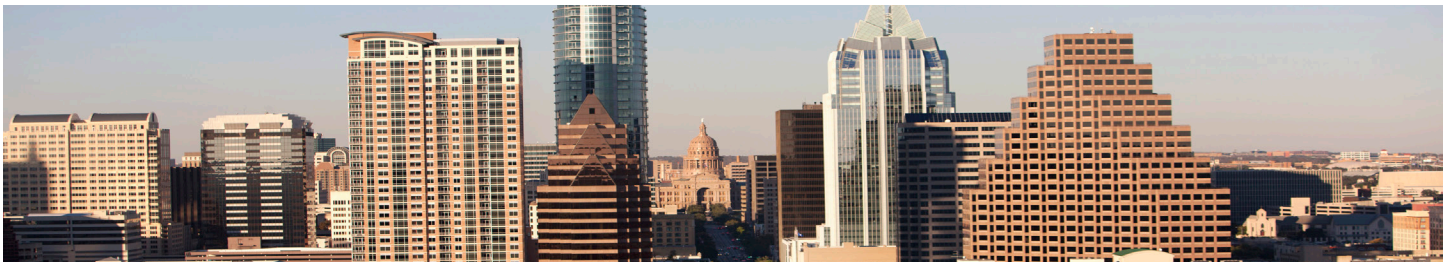
Troupe Brewer will provide a "Legislative Update" at the AWWA Drinking Water Seminar - North Texas Chapter on October 20 in Fort Worth.

Thomas Brocato will present "Third Time's a Charm? Oncor Seeks Another Suitor" at the 2017 Texas Coalition of Cities for Utility Issues Seminar on October 20 in Houston.

Cody Faulk will discuss "The Transmission Line Siting Process for Cities and Their MOUs" at the Texas Public Power Association Seminar on November 2 in San Antonio.

On October 5, our firm volunteered for an evening at the Central Texas Food Bank, helping process and sort several thousand pounds of food that will help feed needy and hungry people in the Central Texas area. Lloyd Gosselink is proud of this opportunity to give back to our community, and we are already making plans to donate our time to this wonderful organization again soon!

MUNICIPAL CORNER



A petition signature will remain valid even if the printed name does not exactly match the voter registration of the signatory, and the plain language of the Texas Election Code prescribes the considerations for an election official in determining the validity of a petition signature. Tex. Att'y Gen. Op. KP-0161 (2017).

The Attorney General ("AG") was asked whether a signature on a petition to allow a candidate to be placed on a ballot could be "rendered invalid by the mere fact that the signer's printed name does not exactly match the signer's voter registration." The AG was also asked specifically what evidence an election official shall consider when verifying the validity of a signature on a petition.

The AG first notes that Texas Election Code ("TEC") § 141.063(a)(2) provides that a signature on a petition is valid if, among other requirements, it includes the following information with respect to each signer: (A) the signer's residence address; (B) the signer's date of birth or the signer's voter registration number and, if the territory from which signatures must be obtained is situated in more than one county, the county of registration; (C) the date of signing; and (D) the signer's printed name. The AG determined that the plain language of this section does not include a requirement for a qualified voter signing a petition to print his or her name exactly as the name appears on the voter registration list. Furthermore, TEC § 141.063(c) states that the use of "ditto marks or abbreviations" does not invalidate a signature if the required information is "reasonably ascertainable."

In light of this provision in the TEC, the AG concluded that the Legislature clearly allows a printed name that does not exactly match the name on the signer's voter registration card to remain valid for petition purposes (as long as the information is reasonably ascertainable). In addition, the AG cited a Texas Supreme Court opinion which held that the omission of certain information listed in the statutory petition requirements will not necessarily invalidate a signature. See *In re Bell*, 91 S.W.3d 784, 787 (Tex. 2002).

As to the required considerations to ascertain the validity of a submitted signature, TEC § 141.065(a) requires that the petition must include an affidavit from the person circulating the petition, whereby the person swears he or she: "(1) pointed out and read to each signer, before the petition was signed, each statement pertaining to the signer that appears on the petition; (2) witnessed each signature; (3) verified each signer's registration status; and (4) believes each signature to be genuine and the corresponding information to be correct." Subsection 141.065(b) further provides that if a petition contains a complying affidavit, "the authority with whom the candidate's application is filed may treat as valid each signature to which the affidavit applies, without further verification, unless proven otherwise." Pursuant to this provision, an election official may not be required to consider any additional information to verify the validity of a signature. The AG cited again to the Court's holding in *Bell* to provide possible guidance in the event of a petition dispute. The Court in *Bell* held that election officials looking to verify a petition signature must "examine the voter registration records maintained" by the county along with all of the information provided by the signer in the petition. *In re Bell*, 91 S.W.3d at 788.

Texas law prohibits a public official from appointing certain relatives to positions compensated with public funds. However, the reimbursement of expenses is not compensation, and thus a public official may appoint a close relative to a volunteer position that provides reimbursement for incurred expenses, but no compensation. Tex. Att'y Gen. Op. KP-0157 (2017).

The AG was asked whether or not Texas' nepotism laws, specifically Texas Government Code ("TGC") § 573.041, would prohibit a public official from appointing a close relative to a volunteer position that provides reimbursement for expenses, but no compensation. Specifically, the Hale County Sheriff asked whether or not his brother and his sister-in-law could volunteer to transport prisoners to other facilities away from the Hale County Jail when the need arises.

The language of TGC § 573.041 provides, in pertinent part, that a "public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office" if the individual at issue is related to the public official within the third degree by consanguinity or within the second degree by affinity. See also TGC § 573.002 ("Degrees of Relationship"). The office of sheriff is a "public official" subject to these laws, and the relationship of brother and sister-in-law falls within the third degree by consanguinity or within the second degree by affinity. The AG noted that such a prohibition applies to the sheriff's appointment of individuals to serve any duty. Thus, the AG concluded that TGC § 573.041 prohibits the Sheriff

from appointing these relatives to any duty compensated directly or indirectly from public funds.

However, the AG importantly notes a prior opinion that concluded that the term "compensation" does not include reimbursement for incurred expenses. Tex. Att'y Gen. Op. No. JM-195 (1984). Therefore, a volunteer who receives reimbursement for actual expenses incurred in the performance of appointed duties is not "directly or indirectly compensated from public funds," and such a scenario would not violate Texas' nepotism laws.

The AG was additionally asked whether paying the Sheriff's relatives a per diem rate, rather than paying for expenses actually incurred, would violate nepotism laws. The AG did not make a determination on this question, but noted that a per diem rate raises fact issues as to whether a volunteer is receiving a legitimate reimbursement of expenses or compensation, and such factual determinations are beyond the scope of the opinions process.

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.*

WATER CONTRACTING OPTIONS: FINDING THE RIGHT STRUCTURE FOR YOUR NEEDS*

by Nathan E. Vassar

In order to manage a water supply portfolio effectively in light of evolving demands and customer bases, the use of an appropriate contract structure is critical, along with other important tools. There are a variety of contract options and considerations to evaluate when pursuing amendments to existing supply agreements and new contracts as well. Our ongoing water supply planning series has focused to date on a number of technical, legal, and practical considerations, including accounting plan approaches, "low-hanging fruit" water rights amendment applications, and conservation, among others. This article now pivots to the contract vehicle that includes the obligations of water suppliers and their customers, and strategies that can help meet a supplier's needs (and those of its customers) in the near term and over decades to come.

A starting point of any contract discussion is the identification of demonstrated need over a specific term. From a wholesale provider's perspective, it is important to know whether a customer's demands are expected to remain constant or if they will likely increase over time. If increased water quantities are not needed until many years in the future, a contract approach that includes a reservation or option quantity can afford flexibility while providing a revenue stream today for water that is set aside. For other customers, a "take or pay" contract may be more appropriate when demands are imprecise and when needs may fluctuate from year to year (or even month to month, depending upon the customer and its use). In this context, an annual take-or-pay quantity may be established that increases over periods of years to accommodate growth. Of course, to the extent that quantities over and above a diversion amount or take-or-pay amount are needed, the contract should provide for a process for such overages. It is not uncommon to include an excess water rate, assuming that such excess water is even available for sale. Alternatively, diversions in excess of the stated quantity can be prohibited altogether and treated as a breach of the agreement. This approach, however, drives home the need to set an appropriate contract quantity that is in line with anticipated demands, including peaking during times of significant need.

Ultimately, addressing water quantity in a contract goes beyond just annual demands and planning horizons – it must also consider practical operating considerations and regulatory limitations. A water supplier must analyze the customer's needs in light of the supplier's broader customer base and available supplies. Such a discussion must also evaluate the reliability of the supply, and whether such supply is backed by storage or is dependent entirely upon streamflow. Drought planning considerations are also critical, and the contract should contemplate how curtailment will operate during times of

drought, pointing to the supplier's water conservation and drought contingency plans as well.

Other questions and issues also merit analysis and discussion when entering into contract negotiations. Specifying how rates are set and the frequency of rate adjustment can help avoid disputes down the road. Transportation of water and identifying delivery points is important, and can either be addressed in a water supply contract or by a separate agreement. Do place/purpose of use restrictions require an amendment to an underlying water right or service area? How do current Regional and State Water Plans contemplate service to this customer, if at all? How is ownership of the water addressed, including reuse rights? These questions, among others, are important to address on the front end, and can be valuable in setting expectations before a contract is executed.

As we have recommended previously, a water supply audit can help inform a number of planning considerations, including how amended and/or new water supply contracts may be structured. In such a context, or independently, it can be helpful to develop a set of deal points that reflect priorities and limitations, and that may include areas where a supplier is unable to compromise, in light of its other obligations to existing customers, regulatory constraints, and anticipated future demands. Such deal points can be developed and then provided to a potential buyer in order to focus negotiations and determine whether the parties can reach a meeting of the minds on key issues.

As this series continues, our focus will next pivot to federal issues in water supply planning, including regulatory regimes with the Army Corps of Engineers and the U.S. Environmental Protection Agency. We will look at the interplay between water rights and Sections 402 and 404 of the Clean Water Act, addressing lessons learned and best practices when dealing with federal interests and agencies.

Nathan Vassar is an Attorney in Lloyd Gosselink Rochelle & Townsend'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 water supply contracts, 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.

**This article is the eighth 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.*

EXERCISE CAUTION WHEN ISSUING A NOTICE OF TERMINATION

by Sheila Gladstone and Ashley Thomas

It is not uncommon for employers, especially in the public sector, to issue a "Notice of Termination" in advance of a final termination decision. Notices of termination usually occur after the employer has investigated and made an initial decision to terminate employment, to give the employee a final opportunity to meet with the decision-maker and provide any information that might change the outcome. In other situations, the employer may choose to have a notice period to allow for transition of duties or to allow the employee time to search for new employment. Employers may believe that if they decide, after hearing from the employee, not to finalize the termination decision and instead allow the employee to continue employment, then they are off the hook for an employment discrimination claim because the employee does not have an "adverse employment action" to complain of, as required for such a claim. But a federal appellate court recently rejected that argument, holding that a notice of termination, even if later rescinded, constituted an adverse employment action, and so the plaintiff's suit against the employer was proper.

In *Shultz v. Congregation Shearith Israel of City of New York*, 867 F.3d 298 (2d Cir. Aug. 10, 2017), the plaintiff, a program director at a synagogue, was recently married and just before leaving for her honeymoon, informed the synagogue's executive director that she was pregnant. After she returned from the honeymoon about a month later, management engaged plaintiff in an extensive discussion about the pregnancy, and then informed her that her employment was being terminated, to be effective 25 days later. Before the termination was effective but after the notice, plaintiff's lawyer informed the synagogue's attorney that plaintiff was planning to pursue claims stemming from the termination. The next week, before the termination's effective date, the synagogue rescinded the termination.

Plaintiff sued the synagogue on the basis of the notice, alleging, among other claims, that the synagogue discriminated against her on the basis of her pregnancy, and interfered with her rights under the Family and Medical Leave Act (FMLA). The trial court dismissed her claims, finding the rescinded termination did not constitute an adverse employment action, as required for such claims.

The Second Circuit Court of Appeals reversed. Following the reasoning of the U.S. Supreme Court's "notice rule" applicable to determining whether a cause of action is time-barred under the statute of limitations, the appeals court held for the first time that the notice itself constituted an adverse employment action. The court focused on the fact that the period of time between the notice and rescission was significant (two weeks), and so she had ample time to experience the termination and its consequences—a very brief period might have led to a different

result. The court also noted that an employer's good-faith decision to rescind can minimize damages.

Though the Second Circuit's decision is not binding in Texas, its reasoning and holding could be adopted in Texas's own Fifth Circuit, especially since it cites and follows reasoning from decisions by the U.S. Supreme Court.

In light of *Schultz*, employers should, before issuing a notice of termination, consider all legal issues, including potential claims, as the notice itself may serve as the "adverse employment action" for an employee's discrimination claim, resulting in a court's consideration of the employer's actions leading up to the notice. Also, if the notice is just an initial stage in the process, employers should consider ensuring the notice is named to reflect its preliminary nature, which may provide employees with weaker grounds for an argument that they have already begun to experience the effects of the termination and its consequences, thereby allowing the employer to shift its decision with less risk. Finally, employers may consider delaying or not issuing notices of termination when the facts are especially unclear or disputed, and instead wait until more facts are gathered, before informing employees their job is on the line.

Sheila Gladstone is the Chair of the Employment Law Practice Group, and Ashley Thomas is an Associate in the Employment Law Practice Group. If you have any questions related to this article or other employment law matters, contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, or Ashley Thomas at 512.322.5881 or athomas@lglawfirm.com.

SEMPRA ENERGY MAKES DEAL TO PURCHASE ONCOR: A YEARS - LONG SAGA MAY FINALLY END

by Thomas Brocato

The fate of Oncor Electric Delivery Company, LLC ("Oncor"), Texas's largest regulated electric utility, may finally become clear after almost three years of numerous bankruptcy and regulatory proceedings. Oncor's parent company, Energy Future Holdings ("EFH"), filed for bankruptcy in 2014 after falling energy prices saddled the company with more than $40 billion in debt. Oncor, thanks to its relative financial health and stable market position, was considered the "crown jewel" of an EFH portfolio that also included Luminant, the state's largest electricity generator, and TXU Energy, a retail electricity provider. The Oncor sale, a crucial piece of any plan to pay off EFH's considerable debt, has since become a years-long saga involving many parties and proceedings.

In 2015, an investment group led by Texas billionaire Ray Hunt launched an $18.7 billion bid to take over Oncor. The Hunt bid hinged on a plan to restructure Oncor as a real estate investment trust ("REIT"), a business structure unusual for an electric utility that would have allowed Oncor to save about $250 million annually in federal taxes. One point of controversy was whether or not those tax savings would be shared with ratepayers. The Steering Committee of Cities Served by Oncor intervened in the ensuing Public Utility Commission ("PUC") approval proceedings and helped secure conditions requiring that some of those tax savings be refunded to customers. Ultimately, however, the reduced tax savings, as well as other PUC-imposed conditions, proved too unattractive for Hunt's investors; and, the deal unraveled.

NextEra Energy, a Florida-based company that had expressed interest in an acquisition since the first round of bidding, emerged as Oncor's next suitor. The NextEra deal was valued at about $18.4 billion and proposed a more traditional corporate takeover. Without the REIT structure of the failed Hunt group bid, the NextEra deal seemed more likely to win PUC approval without the sort of conditions that ultimately killed the Hunt deal. In April 2017, however, the PUC rejected NextEra's proposal after regulators determined that the proposed credit structure of the deal could subject ratepayers to substantial risk.

To limit that risk, the PUC refused to approve NextEra's proposal without "ring fencing" provisions to protect Oncor's credit rating by insulating Oncor's finances from issues that might arise from problems with other NextEra companies. NextEra refused to agree to the ring-fencing provision, as well as other PUC conditions, such as maintaining the independence of Oncor's board and limiting dividend distributions. In June, the PUC rejected NextEra's request for a rehearing. NextEra soon announced that it would be suing the PUC over its decision, which NextEra said overstepped its authority and amounted to an abuse of discretion. The lawsuit is currently underway in Travis County district court.

Despite NextEra's lawsuit, Warren Buffet's Berkshire Hathaway, which itself lost more than $870 million on EFH bonds only a few years earlier, announced a bid to acquire Oncor for $9 billion in cash in July. But before Berkshire Hathaway could seek regulatory approval, Elliot Management Corp., Oncor's largest creditor, began assembling a rival bid to best the offer. Plus, Elliot purchased a slice of EFH's unsecured debt that allowed it to block the Berkshire Hathaway deal. Consistent with its reputation of avoiding bidding wars for companies, Berkshire Hathaway announced that it would not be raising its offer for Oncor, thus ending its acquisition efforts.

Barely six weeks after Berkshire Hathaway made its proposal to purchase Oncor, San Diego-based Sempra Energy offered to purchase Oncor for $9.5 billion. "With its strong management team and long, distinguished history as Texas' leading electric provider, Oncor is an excellent strategic fit for our portfolio of utility and

energy infrastructure businesses," said Debra L. Reed, Sempra's chairman and chief executive in an official company statement. Berkshire Hathaway, which has a reputation for avoiding costly bidding wars, soon announced that it would "stand firm" and would not increase its $9 billion offer. In early September, the U.S. Bankruptcy Court approved the sale to Sempra.

Sempra's plan will now need PUC approval before it can become final. Sempra announced its intention to maintain the independence of Oncor's board, and has since made the same commitments that Berkshire Hathaway made when it won tentative approval from the PUC in July, plus some additional protections. Those commitments include, among others, preserving the ring fencing provisions that had previously insulated Oncor and its ratepayers from EFH's wider financial woes. Sempra and Oncor are expected to make a regulatory filing with the PUC on October 5, 2017, and the Steering Committee of Cities Served by Oncor will again be involved. Whether this third Oncor acquisition application will finally win PUC approval, and resolve the long-awaited fate of Oncor, remains to be seen.

Thomas Brocato is a Principal in our Energy and Utility Practice Group. If you would like additional information or have questions related to this article, please contact Thomas at 512.322.5857 or tbrocato@lglawfirm.com.

ASK SHEILA

Dear Sheila,

On a Monday morning, one of our female clerical employees came to the Department head in tears. She said that on Saturday night, she was with friends at a club, and she ran into her male supervisor who asked her to dance. Both had been drinking. She accepted the dance, and on the dance floor, her supervisor put his hands on her in a sexual way. When she tried to remove his hands, he pulled her even closer and kissed her. She pushed him away and he walked off appearing angry and embarassed. Now, at work, she says she is extremely uncomfortable around him, doesn't feel like the relationship can be professional, and is also worried that her rejection of him might affect her upcoming performance evaluation.

I want to tell her that what happens on her own time is not something that we, as her employer, should be involved in. Do we have to do anything else?

Signed, Minding my own business

Dear Minding my own business,

Unfortunately, sitting on the sidelines in these situations can expose your organization to serious legal liability, even though the supervisor's alleged conduct occurred while off-duty and away from the workplace.

As an employer, you have a duty to ensure that employees are able to work in an environment free from sexually harassing or inappropriate conduct. It is important that the alleged harasser is not just a coworker, but instead a supervisor, because a supervisor's sexual conduct gives rise to an employer's strict liability for his actions, and possible quid pro quo harassment, since the supervisor has the ability to make employment decisions that affect his subordinate and has the potential to base those decisions on the employee's rejection of his sexual advances. Sexual advances by a supervisor are treated differently under the law, even when completely off-duty, because the supervisory relationship, and any resulting intimidating effect, continues back into the workplace. This dynamic makes off-duty conduct become workplace harassment.

As a result, a supervisor who makes a pass at his employee, especially one that was unwelcome, has engaged in inappropriate behavior that may be misconduct, regardless of where the incident occurred, and should be subject to discipline or even termination. In contrast, if two lateral coworkers have a similar off-duty incident unrelated to work (not at a work-related event or conference), the employer may stay out of it unless the unwelcome behavior continues in the workplace, or violated another policy, such as one prohibiting criminal action.

Once aware of the complaint, investigate promptly and thoroughly, following any anti-harassment policy and investigation procedure you may have. To investigate, you should meet with the employee and supervisor separately to get each person's side of the story, determine if there were any witnesses, and if so, interview the witnesses, and determine if there is any evidence that would corroborate either side's story, such as photos, text messages, or posts on social media. If there are no witnesses or evidence of what occurred, it could ultimately come down to a "he said, she said" situation, and conclusions would be based on their credibility.

If you find that the allegation is true, the supervisor should be disciplined, reassigned, demoted, or terminated. Bottom line, the supervisor can no longer supervise this employee; not only is she uncomfortable in the workplace and feels sexually and physically threatened by her boss, but future employment actions of the supervisor will also now be tainted and could be considered a result of the employee's complaint or rejection of the sexual conduct.

Reassure the employee that you take her complaint seriously and that the organization does not tolerate sexual harassment or retaliatory behavior. Remind the employee of the employer's anti-harassment policy, including any complaint procedures. Finally, if the supervisor remains employed after the investigation, whether because of an inconclusive finding or a decision not to

terminate, check in with the employee regularly after the incident to determine if there are any developments or if the incident has reoccurred, and to ensure she feels that her complaint has been adequately addressed.

You should train employees regularly on workplace harassment, and make sure that supervisors and managers are aware of the potential pitfalls and consequences of relationships and off-duty partying with subordinates. Management should understand they will be held to a higher standard with regard to their behavior around their employees, both on or off duty.

"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

Boler v. Earley, 865 F.3d 391 (6th Cir. 2017).

This case arose from a consolidation of cases associated with the water crisis in Flint, Michigan: *Boler v. Earley* and *Mays v. Snyder.* Plaintiffs, residents of Flint affected by the contaminated city water, brought suit against various state and local officials and entities alleging violation of their constitutional rights pursuant to 42 U.S.C. § 1983, which waives immunity of "[e]very person who, under color of statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution. . . ." The United States District Court for the Eastern District of Michigan dismissed the *Boler* case for lack of subject matter jurisdiction based on preemption by the Safe Drinking Water Act ("SDWA"). The court primarily relied on the First Circuit's determination in *Mattoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992) that the SDWA foreclosed other federal remedies for an alleged right to "safe and potable water." Relying on its preemption analysis in *Boler*, the district court then dismissed the *Mays* case on the same basis. The cases were consolidated for appeal, and on July 28, 2017, the U.S. Court of Appeals for the Sixth Circuit reversed the district court judgments and remanded the case back to the district court for further proceedings, holding that the residents' constitutional claims under § 1983 were not preempted by the SDWA. Though not addressed by the district court, the State of Michigan, Governor Snyder, MDEQ and MDHHS (collectively, the "State Defendants") argued that the Eleventh Amendment served as a separate and independent jurisdictional bar to the plaintiffs' claims against them. The Sixth Circuit, however, found that the Ex parte Young exception to the Governor's Eleventh Amendment immunity was triggered by the complaint seeking prospective injunctive relief against the Governor, and that officials from the MDEQ were not entitled to absolute immunity.

Complaint, San Antonio Bay Estuarine Waterkeepers v. Formosa Plastics, No. 6:17-CV-00047 (S.D. Tex. July 31, 2017).

San Antonio Bay Estuarine Waterkeepers, an environmental advocacy group, is seeking a $57.45 million penalty against Formosa Plastics Corporation for alleged illegal dumping of plastic pellets into the waters of the southeastern Texas coast. Local residents, along with the advocacy group, filed a complaint in the United States District Court for the Southern District of Texas alleging "significant, chronic, and ongoing" Clean Water Act violations at Lavaca Bay and other area waterways. Specifically, the plaintiffs are alleging violations of § 505(a)(1) of the Clean Water Act, 33 U.S.C. §1365(a)(1). The plaintiffs also seek to enjoin future dumping and an order requiring Formosa to clean up the pollution already generated from the plastic manufacturer's 2,500-acre Point Comfort facility, which is located near Matagorda Bay.

USOR Site PRP Group v. A&M Contractors, No. 14-CV-2441 (S.D. Tex. Aug. 2, 2017).

The Southern District of Texas ruled on August 2, 2017 that the City of Pasadena, Texas is liable under 42 U.S.C. §§ 9601, *et seq.* (the federal "Superfund" statute) and Tex. Health & Safety Code Ann. §§ 361.001, *et seq.* (the Texas Solid Waste Disposal Act) for numerous spills or releases of wastewater at a site where the City had previously operated a wastewater treatment plant. The City conceded that domestic wastewater contains background levels of metals and also admitted that wastewater was spilled and/or released at various times from portions of the USOR Site. However, the City argued that it did not own or operate

the USOR Site during the relevant time period, absolving it of liability under *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d at 760 (5th Cir. 1994). Nevertheless, the court concluded that the City was a "responsible person" under Superfund and rejected the City's argument that *Joslyn* absolved it of liability, stating that, because the facts regarding wastewater spills and releases were undisputed in the case at hand, *Joslyn* was inapplicable as a matter of law.

Tenn. Clean Water Network v. Tenn. Valley Auth., No. 3:15-cv-00424 (M.D. Tenn. Aug. 4, 2017).

On August 4, 2017, the United States District Court for the Middle District of Tennessee ordered the Tennessee Valley Authority ("TVA") to excavate coal ash stored at its Gallatin, Tennessee plant near Nashville and dispose of it in a properly lined landfill. The coal ash had been stored on top of highly porous limestone with numerous existing sinkholes and an associated underground karst flow system, which permitted the waste to migrate into groundwater and to the adjacent and hydrologically connected Cumberland River. The ruling serves as an estimated $2 billion remedy for water pollution authorized under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1319(d). The court determined that the leaking, unlined ash storage ponds should have never been located in "karst terrain immediately adjacent to a river." The court further opined that the only way to remedy the consequences of the previous siting decision "is not to cover over those decades-old mistakes, but to pull them up by their roots." In one month, TVA is required to provide a timeline on how it will address the court's order.

Benoit v. Saint-Gobain Performance Plastics Corp., No.16-cv-00930 (Aug. 2, 2017).

On August 2, 2017, the United States District Court for the Northern District of New York declined to dismiss Torts to Land suits brought by residents of Hoosick Falls, N.Y. against Saint-Gobain Performance Plastics Corporation and Honeywell International Inc. The residents claim that a toxic chemical from a factory tainted their private groundwater wells. The ruling rejected the companies' claims that the plaintiffs in 16 consolidated cases had no cause of action for negligence, trespass, nuisance, and medical monitoring over perfluorooctanoic acid ("PFOA") contamination of their private water wells. PFOA is a chemical used in making stain-resistant carpets, clothing, cookware, fabrics, and other materials. The court did, however, dismiss those claims made by residents who use municipal water. According to the court, private trespass and nuisance theories do not apply when contaminated water is supplied by municipalities because residents using municipal water did not suffer a unique wrong compared to the rest of the community sufficient to sustain a private action for an otherwise public nuisance. The court opined that the question of which claims were viable under New York law could significantly impact the classes to be certified, the scope and focus of discovery, any subsequent motions for summary judgment, and the issues to be presented at trial. As a result, both parties were allowed to file immediate appeals to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1292(b) because the ruling; Involved "a controlling question of law as to which there is substantial ground for difference of opinion."

Complaint, Kupale Ookala, Inc. v. Big Island Dairy, L.L.C., No. 1:17-CV-00305 (D. Haw. June 28, 2017).

On June 28, 2017, community groups Kupale Ookala and Center for Food Safety sued the Idaho-based dairy company Big Island Dairy, LLC in federal district court pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C § 1365(a)(1)(A). Plaintiffs seek declaratory relief, injunctive relief and civil penalties against Defendant for continuously discharging animal urine and feces into streams and ocean waters in and around the community of Ookala, Hawaii. The complaint alleges that Big Island Dairy's improper manure applications and storage practices have caused, and continue to cause, unauthorized discharges of animal waste and pollutants into streams flowing into the Pacific Ocean. Residents of Ookala have witnessed brown murky water that smells of animal feces and that test results confirm contain high levels of dangerous bacteria flowing from the dairy into local waterways, and ultimately into the Pacific Ocean. The dairy has also been observed spraying liquid manure on its crops on windy days and immediately before or during rainfall, which increases runoff and pollution drift.

Air and Waste Cases

Am. Petrol. Inst. v. Envtl. Prot. Agency, 862 F.3d 50 (D.C. Cir. 2017).

In *American Petroleum Institute v. Environmental Protection Agency*, the U.S. Court of Appeals for the D.C. Circuit struck down Environmental Protection Agency ("EPA") guidelines that were meant to limit a recycler's ability to incorporate hazardous materials into consumer products under the guise of "recycling" the hazardous materials, rather than having to properly dispose of them. The decision removed certain criteria that would have required recyclers to demonstrate that the recycled materials being used were "analogous" to the product the materials would be incorporated into. The court based its decision on the fact that the EPA failed to provide a rational basis for the requirement. Environmental groups argued that "sham recycling" puts lower income and minority communities at risk due to their close proximity to hazardous materials and the potential mismanagement of such materials now that regulations have been relaxed.

Chevron Mining v. United States, 863 F.3d 1261 (10th Cir. 2017).

On July 21, 2017, the U.S. Court of Appeals for the Tenth Circuit ruled against the U.S. Department of the Interior and the U.S. Department of Agriculture in an action to determine whether the United States should be held partially liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for the cleanup of a New Mexico site that contained hazardous waste at the time the federal government

owned the land. A person is held liable under CERCLA if that person meets the CERCLA definition of a potentially responsible party ("PRP"). In particular, a party can be held strictly liable as a PRP if the party was an "owner" of property at the time that it was contaminated. The court held that as an "owner" and thus a PRP of the New Mexico site subject to CERCLA, the United States would be held accountable for at least a portion of the cleanup costs that are likely to exceed $1 billion.

Holmquist v. United States, No. 2:17-CV-0046-TOR, 2017 WL 3013259 (E.D. Wash. 2017).

In *Holmquist v. United States*, city councilmembers introduced a resolution that proposed a prohibition on the transport of certain fossil fuels by rail within the City of Spokane, Washington, claiming that such activity violated citizens' rights to a healthy climate. While both parties agreed that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempted the proposed initiatives, the city councilmembers argued that the ICCTA violates their constitutional rights by prohibiting legislation that would curb the deterioration of the climate. The court ultimately ruled against the plaintiffs, holding that the claim of harm was not fairly traceable, and that any relief requested by the plaintiffs would not redress the purported harm.

Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., No. H-10-4969, 2017 WL 2331679 (S.D. Tex. April 26, 2017).

In April 2017, the U.S. District Court for the Southern District of Texas ordered ExxonMobil to pay a nearly $20 million penalty for repeatedly exceeding air pollution limits in its Baytown complex in violation of 30 Texas Administrative Code, Chapter 101. The decision came after the Fifth Circuit remanded the case, holding that the lower court had abused its discretion by denying penalties in the first place. In the first decision, the lower court denied all requests for declaratory judgments, penalties, and injunctive relief, holding that no amount of penalty was appropriate even if all of the alleged violations were actionable. After the lower court issued its alternative decision on remand, ExxonMobil requested that the court reconsider and reduce the $20 million fine, but the request was denied. ExxonMobil will likely appeal the denial.

Juliana v. United States, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017).

Plaintiffs organized by a non-profit organization, Our Children's Trust, filed a lawsuit against the United States, the President, and numerous executive agencies, asserting that these parties violated the plaintiffs' rights to a safe and stable future climate. The plaintiffs in *Juliana* argue that the U.S. government's actions and inactions regarding climate change in recent decades have contributed to a concrete, personalized, and fairly traceable injury that is redressable by the court. Defendants' motion to dismiss and motion for interlocutory appeal were denied by the lower court, and defendants have filed a petition for writ of mandamus with the Ninth Circuit, claiming that immediate relief is necessary to protect the government from a significant intrusion on the separation of powers. Even if the plaintiffs lose, this case may have a notable effect on the future of climate change litigation.

Governmental Immunity Case

West Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12, No. 03-16-008800-CV, 2017 WL 3902625 (Tex. App.—Austin Aug. 29, 2017, no pet. hist.).

On August 29, 2017, the Austin Court of Appeals further clarified the scope of the waiver of governmental immunity set forth in the Local Government Contract Claims Act (the "Act"), Tex. Loc. Gov't Code Ch. 271. The Act waives immunity to a suit for breach of a contract for providing goods or services to the governmental entity. But what happens if the contractual parties provide services to one another?

That was how the plaintiff in the *West Travis County Municipal Utility District v. Travis County Municipal Utility District No. 12* case framed the dispute. The West Travis County Public Utility Agency ("WTCPUA") is a retail and wholesale water provider, which provides treated water to Travis County Municipal Utility District No. 12 ("MUD 12"), a retail water provider, under the terms of the parties' wholesale water agreement (the "Agreement"). MUD 12 objected to WTCPUA's calculation of the wholesale water rates, and sued for breach of the contract. Under the Agreement, WTCPUA provided water to MUD 12 in exchange for payment, so MUD 12's immunity to suit was waived under the Act. But in order to find a waiver of WTCPUA's immunity, MUD 12 needed to point to a service that was provided to WTCPUA under the Agreement's terms.

Among the Agreement's provisions was a requirement that MUD 12 install a "master meter" to meter the flow of water from the WTCPUA system to MUD 12. The Agreement further required MUD 12 to obtain WTCPUA's approval of the meter and then convey the meter to WTCPUA before WTCPUA would begin selling water to MUD 12. MUD 12 argued that the installation and conveyance of the master meter constituted a service to WTCPUA, and that WTCPUA's immunity to its breach-of-contract suit was therefore waived.

The Austin Court of Appeals disagreed.

The court noted that the Agreement did not grant WTCPUA any right to receive a master meter. If MUD 12 had not installed the meter, then the WTCPUA would not have had a claim against MUD 12; the Agreement's terms would not be effective, and WTCPUA would not be obligated to sell water to MUD 12. Hence, the installation of the master meter was a condition precedent to the contract's formation. With no service being provided to WTCPUA under the terms of the Agreement, WTCPUA's immunity was not waived and MUD 12's claim against it was dismissed.

Left unanswered is an important question about the possible damages available if the installation of the master meter were deemed to be a "service" to WTCPUA. WTCPUA argued that

under the Act, the only measure of damages available is the "balance due and owed" on the goods or services provided to the governmental entity. In this case, MUD 12 would only have been able to recover the balance due and owed on the installation of the master meter. Because the Agreement did not require WTCPUA to pay anything for the master meter, MUD 12 would have no damages (and thus no case). In reaching its decision, however, the court expressly refused to reach the question of the damages available under the Act.

Until that question is resolved, the WTCPUA case should be a cautionary tale to governmental entities in drafting their contracts—if selling goods or services, make sure that the contract does not become a "blended" contract whereby the governmental entity is both the buyer and the seller of goods or services under the contract. If that happens, immunity may be waived as to the entire contract. Furthermore, with the court declining to address damages, the waiver could be broad enough to open the governmental entity to the full panoply of direct contract damages (even for things not directly associated with the goods/services received).

If you would like to know more about this case, including the factual background and the parties' legal contentions, please contact James Parker in our Litigation Practice Group at 512-322-5878, who was responsible for the briefing and argument before the Court of Appeals.

Energy and Utility Case

City of the Colony, Tex. v. Pub. Util. Comm'n of Tex., D-1-GN-17-003668 (250th Dist. Ct., Travis County, Tex. July 28, 2017) and D-1-GN-17-004772 (126th Dist. Ct., Travis County, Tex. Aug. 31, 2017).

The City of the Colony ("Colony") has recently filed two petitions in Travis County district courts regarding the Public Utility Commission's ("PUC") orders in PUC Docket No. 45175. In PUC Docket No. 45175, the Colony asked the PUC to reconsider its decision in the Colony's land use dispute with Brazos Electric Cooperative ("Brazos") and Denton County Electric Cooperatives ("CoServ").

This case began in September 2015, when Brazos and CoServ appealed the Colony's zoning ordinance after the city refused to grant the electric cooperatives a special use permit to build a substation on a certain piece of land. The Colony's zoning ordinance prohibits certain land use activities in the property's zone, including substation use.

A hearing on the merits was held in September 2016, and the SOAH ALJ issued a Proposed for Decision ("PFD") in December 2016, finding that the Colony's ordinance violates the Public Utility Regulatory Act because it regulates the services of Brazos and CoServ. The PUC issued an order adopting the PFD on May 4, 2017.

On May 30, 2017, the Colony filed a motion for rehearing that was denied in part and granted in part, but ultimately the PUC's order on rehearing did not alter the outcome of the case. The Colony then filed another motion for rehearing on July 19, 2017 on the PUC's order on the first rehearing. The motion was not taken up by the Commissioners.

Next, on July 28, 2017, the Colony filed a petition for judicial review of the PUC's final order in Docket No. 45175 at Travis County District Court (Cause No. 17-003668). On August 31, 2017, the Colony filed another petition in Travis County District Court, this time for judicial review of the PUC's order denying rehearing in Docket No. 45175 (Cause No. 17-004772). The PUC filed its answer to the first petition, but has not yet filed its response to the second. These matters are ongoing, and we will provide updates in future editions of *The Lone Star Current*.

In the Courts *is prepared by Maris Chambers in the Firm's Districts and Water Practice Groups, Tricia Jackson from the Firm's Air and Waste Practice Group, James Parker in the Firm's Litigation Practice Group, and Thomas Brocato 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 Maris at 512.322.5804 or mchambers@lglawfirm.com, Tricia at 512.322.5825 or tjackson@lglawfirm.com, James at 512.322.5878 or jparker@lglawfirm.com, or Thomas at 512.322.5857 or tbrocato@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Update on Superfund Sites Post-Harvey. As of September 14, 2017, the EPA and the Texas Commission on Environmental Quality ("TCEQ") had completed an assessment of all 17 state and 43 federal Superfund sites in the areas of Texas affected by Hurricane Harvey. EPA deployed an underwater dive team to conduct an additional assessment on the San Jacinto Waste Pits site. Security cameras are being reviewed and repairs are being made, but the team has made no final determinations. Vince Bayou was rumored to have discharged oily leakage; however, an EPA on-scene coordinator conducted an inspection, and no evidence of this type of discharge was found. Responsible parties have been directed to take water samples and remove excess storm waters from the area.

EPA Budget Cuts. On September 5, 2017, the EPA announced that nearly 400 employees have left the agency in recent days, bringing EPA staffing to its lowest levels in almost 30 years. In June, voluntary buyouts were offered to over 1,200 employees as part of President Donald Trump's efforts to fulfill a campaign promise of "tremendous cutting" at the EPA. Nearly one-third of eligible employees took the buyouts, which, coupled with August 31, 2017 retirements, trimmed EPA staff by about 2.5% in less than a week. Several dozen more employees could retire or opt to take the buyout by the end of September.

EPA Administrator Scott Pruitt has said that he is "proud to report that we're reducing the size of government, protecting taxpayer dollars and staying true to our core mission of protecting the environment and American jobs." However, critics question the EPA's ability to meet its regulatory responsibilities as it reduces staffing levels, especially in light of Hurricanes Harvey and Irma. Others question whether or not the buyouts are an effective use of tax money. For more information on EPA budget cuts, see the July 2017 edition of *The Lone Star Current*.

David Ross Nominated as EPA Assistant Administrator for Water. David Ross currently serves as Wisconsin's Assistant Attorney General and Director of the Environmental Protection Unit for the Wisconsin Department of Justice. He previously served as a Senior Assistant Attorney General in Wyoming, where he represented the Wyoming Department of Environmental Quality on water quality matters. In his position as Wisconsin Assistant Attorney General, Mr. Ross manages the Environmental Litigation Unit, which prosecutes violations of state natural resources and environmental laws and defends administrative decisions and rules issued by the Wisconsin Department of Natural Resources. EPA Administrator Scott Pruitt says of Mr. Ross, "David is especially qualified to head EPA's Office of Water and to carry out the Trump Administration's mission of returning power back to the states and advancing regulatory certainty." Mr. Ross's appointment is still pending Senate confirmation, but he has won bipartisan praise from a number of environmental officials.

WOTUS Rule Update. The EPA and U.S. Army Corps of Engineers are extending the comment period on the EPA's proposed rule to withdraw the 2015 Clean Water Rule – known as The "Waters of the U.S." ("WOTUS") rule – and adopt the definition of "waters of the United States" that existed prior to the WOTUS Rule's passage in 2015. In response to stakeholder requests for an extension, the agencies extended the comment period for 30 days from the original August 28, 2017 date to September 27, 2017. Now that the comment period has closed, EPA will publish its revised version of the rule, which is expected to incorporate Justice Scalia's test from the *Rapanos* plurality opinion.

Additionally, the Supreme Court is set to hear oral argument in *National Association of Manufacturers v. Department of Defense* on October 11, 2017 regarding the Sixth Circuit's nationwide stay of the 2015 WOTUS rule. On appeal is the issue of whether district or appellate courts have jurisdiction to hear challenges to WOTUS rulemaking; the WOTUS rule's merits are not otherwise at issue. For more information on the WOTUS rule, see the July 2017 edition of *The Lone Star Current*.

Internal Revenue Service ("IRS")

IRS Definition of "Political Subdivision." The National Association of Clean Water Agencies ("NACWA"), along with a coalition representing the municipal water and wastewater sector, submitted comments to the U.S. Department of the Treasury and IRS on August 7, 2017, focusing on proposed rules that redefine "political subdivision" for the purposes of issuing tax-exempt bonds (Definition of Political Subdivision, 81 Fed. Reg. 8870 (Feb. 23, 2016)). The comments were published in response to a July 10, 2017 notice published by the Treasury Department and the IRS listing

the proposed definition of "political subdivision" among eight regulations they intend to rescind or substantially revise. Under existing regulations, a "political subdivision" is "any division of any state or local governmental unity which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unity." Essentially, this definition considers any public entity with the authority to exercise taxing, eminent domain, or police (regulatory) powers to be able to issue tax-exempt bonds. The proposed rule would create a more restrictive, less clear definition of "political subdivision" and potentially harm access for municipal clean water agencies to funding from tax-exempt bonds. The Treasury proposed the revisions to target special districts that remain privately controlled and politically unaccountable, but qualify as political subdivisions. However, the revised language may disqualify some clean water agencies from their long-standing access to tax-exempt municipal bonds used for lower-cost financing. The coalition's comments urge IRS and the Treasury to rescind or substantially revise the proposed regulations and focus on maintaining the authority of public clean water and stormwater utilities to issue tax-exempt bonds.

EPA Withdrawal of Extension of Deadline for Air Quality Designations. The EPA determined on August 2, 2017 that it would not extend the deadline for the implementation of new ozone air quality standards. The Clean Air Act allows for one-year extensions where the EPA lacks sufficient data to carry out the air quality attainment re-designations. However, environmental advocacy groups were poised to bring a lawsuit opposing such a delay with claims that the existing data is more than sufficient. The new standard for ozone was set for 70 parts per billion in 2015. When a region's ozone emissions exceed this rate, the agency designates the region as a non-attainment zone. Texas has five areas likely to be designated as non-attainment: Dallas-Fort Worth, Houston-Galveston-Brazoria, San Antonio-Bexar County, Hood County, and El Paso County. This means that the State will have to submit to the EPA a State Implementation Plan ("SIP") that details the approach for lowering ozone air pollutants in each non-attainment zone.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Releases Draft Changes to MERA Guidance. On September 15, 2017, the TCEQ released a draft of updates to the Modeling and Effects Review Applicability Guidance Document, commonly referred to as "MERA". The updates are intended to streamline the health impacts review process by removing infrequently used steps. MERA evaluations must be conducted prior to construction of projects involving air contaminants that pose a human health and welfare risk and that do not fall within existing state and national ambient air quality standards. The final guidance document is set to be released at the end of November, and the period to provide questions or comments regarding the draft closed on October 15, 2017.

Draft 2017 TSWQS Out for Comment. TCEQ has released its draft revisions to the 2017 Texas Surface Water Quality Standards ("TSWQS") for comment. The Clean Water Act ("CWA") requires all states to adopt water quality standards for surface water. 33 U.S.C. § 1313. Water quality standards are the basis for establishing effluent limits in wastewater permits, setting instream water quality goals for total maximum daily loads ("TMDLs"), and providing water quality targets used to assess water quality monitoring data. Following the adoption of revised TSWQS by TCEQ, the Governor (or his designee) must submit the officially adopted standards to the EPA Region 6 Administrator for review. The Regional Administrator reviews the TSWQS to determine compliance with the CWA and implementing regulations. TSWQS are not applicable to regulatory actions under the CWA until approved by the EPA. States are also required to review their water quality standards at least once every three years and revise them, if appropriate. The TSWQS were last amended in February 2014, and the EPA approved a portion of the state's revised standards in September 2014. A public hearing was scheduled for October 16, 2017 and the deadline for comments was October 17, 2017.

TCEQ Guidance Documents. In July of 2017, the TCEQ requested comments on its draft issuance of "Guidelines for Preparing a Surface Water Drainage Report for a Municipal Solid Waste Facility and for Demonstrating Erosional Stability During All Phases of Landfill Operation." The guidance document addresses both hydrology/drainage issues and erosional stability during all landfill stages, and provides recommended procedures and suggestions for preparing a surface water drainage report in compliance with 30 Texas Administrative Code ("TAC") Chapter 330. The TCEQ accepted comments on the draft up until July 31st, and it has issued a draft revision on its website. The TCEQ has not yet posted a date for final issuance of this document.

In August 2017, the TCEQ requested comments on its draft issuance of "Guidelines for Preparing a Groundwater Sampling and Analysis Plan." The document is aimed at providing technical advice to owners and operators of municipal solid waste ("MSW") Type I landfills in developing a groundwater sampling and analysis plan for their facility in compliance with 30 TAC Chapter 330 and 40 Code of Federal Regulations ("CFR"), Chapter 258. The TCEQ accepted comments on the draft up until August 31st, and it has issued a draft revision on its website. The agency has not yet posted a date for final issuance of this document.

In September 2017, the TCEQ issued its "Guidance for Liner Construction and Testing for a Municipal Solid Waste Landfill" document. The document provides technical advice regarding the testing and control of various types of liner systems for MSW landfills and is aimed at assisting owners and operators of MSW facilities in complying with 30 TAC Chapter 330 relating to liner system design and operation.

Update on Air Quality Monitoring Post-Harvey. The TCEQ is working to bring its air monitoring systems back online after it pulled much of the equipment into storage to protect it from being

damaged by Hurricane Harvey. Since then, the monitoring network has been made either partially or fully operational in Corpus Christi, Houston, and Beaumont. Investigations into reported releases and response and cleanup activities are ongoing.

Public Utility Commission of Texas ("PUC")

Governor Abbott Appoints DeAnn Walker to Chair of PUC. On September 20, 2017, Governor Greg Abbott appointed DeAnn Walker as a Commissioner of the Public Utility Commission of Texas ("PUC") and named Walker the Chair of the PUC for a term set to expire on September 1, 2021. Walker currently serves as a senior policy advisor to Governor Abbott on matters relating to regulated industries. She previously served as Associate General Counsel and Director of Regulatory Affairs for CenterPoint Energy. A member of the State Bar of Texas, Walker received a Bachelor of Arts from Southern Methodist University and a Juris Doctor from South Texas College of Law. Walker chaired her first open meeting of the PUC on September 28, 2017.

Docket No. 47576, *Application of the City of Lubbock Through Lubbock Power and Light for Authority to Connect a Portion of its System with the Electric Reliability Council of Texas*. On September 1, 2017, the City of Lubbock filed an application with the PUC to connect a portion of Lubbock Power and Light ("LP&L") with the Electric Reliability Council of Texas ("ERCOT"). The LP&L portion is currently connected to the Southwest Power Pool ("SPP") system. LP&L filed this application following a period of study, analysis, and discussion with the PUC, ERCOT, SPP, and other interested parties that dates back to 2015. The PUC opened Project No. 45633 for filings pursuant to this study.

Many of the parties involved in these discussions have already intervened in this Docket, including ERCOT and SPS. The deadline to intervene in this matter is October 25, 2017. The PUC adopted a preliminary order listing the issues to be addressed in this case at its September 28, 2017 open meeting. A prehearing conference was scheduled for October 9, 2017.

Project No. 47552, *Issues Related to the Disaster Resulting from Hurricane Harvey*. The PUC has opened a docket to address issues related to the disaster resulting from Hurricane Harvey. Project No. 47552 was opened on August 28, 2017, after Governor Abbott issued a disaster proclamation for several counties in Texas. The PUC has given its Executive Director the ability to issue cease and desist orders that are necessary to execute disaster recovery efforts. Additionally, the Executive Director may now issue emergency orders, with or without hearing, to compel certain water utilities to provide water and sewer service, to compel retail public utilities to provide emergency interconnections for the provision of temporary water or sewer service, and for other matters. Based on a request to the Governor's office on September 7, 2017, the Governor has temporarily suspended certain rules that would potentially permit water and sewer utilities to disconnect service to residential customers in the counties affected by Harvey or assess late fees on delinquent bills.

The docket has served as a tool for the Executive Director to issue memorandums to utilities and retail electric providers regarding enforcement discretion. Additionally, as recovery efforts continue, electric utilities have been providing and will continue to provide information related to outages and restoration of service to the PUC through this docket.

Docket No. 47163, *Complaint of City of Coleman and Request for a Cease and Desist Order Against Coleman County Electric Cooperative, Inc*. On May 5, 2017, the City of Coleman ("Coleman") filed a complaint and request for a cease and desist order against Coleman County Electric Cooperative, Inc. ("CCEC") at the PUC. Coleman claims that CCEC is wrongfully expanding its electric facilities into Coleman's singly-certificated service area. The PUC referred the matter to the State Office of Administrative Hearings ("SOAH") and a prehearing conference took place on July 20th.

The PUC ordered briefing on four threshold legal and policy issues in this matter: (1) does the Public Utility Regulatory Act ("PURA") and PUC rule on cease and desist orders apply to disputes in certificated-service-area disputes; (2) may equitable defenses, including estoppel or laches, be considered in claims of service in violation of certificate of convenience and necessity ("CCN") and retail competition laws; (3) does any agreement between the parties regarding service to customers that has not been approved by the PUC have any legal relevance under PURA; and (4) does the party complaining that electric service violates PURA bear the burden of persuasion. Coleman, CCEC, and PUC Staff filed briefs on these issues on September 6th and reply briefs on September 14th.

The PUC adopted a preliminary order on these threshold issues, and identified other issues to be addressed, on September 29, 2017.

Docket No. 45866, *Application of LCRA Transmission Services Corporation to Amend a Certificate of Convenience and Necessity for the Round Rock- Leander 138-kV Transmission Line in Williamson County*. On June 6, 2017, the PUC issued an order granting the Lower Colorado River Authority's ("LCRA") application to amend its CCN for a transmission line in Williamson County. In doing so, the PUC rejected the SOAH administrative law judges' ("ALJ") recommended route that had been agreed to by the cities impacted by the line, and instead found that an alternate route best satisfied the routing criteria outlined in PURA and PUC rules. Multiple cities filed motions for rehearing, but the PUC did not change its routing decision.

Parties including Burleson Ranch and the City of Cedar Park have now filed second motions for rehearing. PUC Staff recommended that these motions be denied, but the PUC has not yet issued a ruling.

Project No. 47545, *Rulemaking to Establish Filing Schedule for Electric Utility Pursuant to PURA § 36.157*. This rulemaking project was opened to implement Senate Bill 735, adopted during

the 85th Legislative Session. The proposed rule, 16 Texas Administrative Code ("TAC") § 25.247, establishes rate case filing requirements for both investor-owned and non-investor-owned transmission service providers. The rule requires investor-owned utilities to file comprehensive base-rate reviews within four years of their most recent comprehensive base-rate proceedings, and non-investor-owned utilities to submit applications for interim updates within four years of changing their network transmission-service rates.

The PUC held a workshop on September 26, 2017, for stakeholders to discuss the draft rule language. A rule proposal for publication is expected to be issued in November.

Docket No. 47527, Application of Southwestern Public Service Company for Authority to Change Rates. On August 21, 2017, Southwestern Public Service Company ("SPS") filed an application at the PUC to increase its electric utility base rates by $80,949,614. SPS's request is based on a revenue requirement of $625,344,651 and a return on equity ("ROE") of 10.25%. Several parties have intervened in this proceeding, including the Texas Industrial Energy Consumers, the Alliance of Xcel Municipalities, and the International Brotherhood of Electrical Workers. A preliminary order establishing the issues to be addressed in this case was issued on September 28, 2017 and a hearing on the merits has been scheduled for April 2018.

Docket No. 46936, Application of Southwestern Public Service Company for Approval of Transactions with ESI Energy, LLC and Invenergy Wind Development North America LLC, to Amend a Certificate of Convenience and Necessity for Wind Generation Projects and Associated Facilities in Hale County, Texas and Roosevelt County, New Mexico, and for Related Approvals. On March 21, 2017, SPS filed an application to amend a CCN to include two wind generation facilities. SPS seeks to develop the wind facilities to take advantage of federal production tax credits associated with the facilities. In this docket, SPS is also proposing to enter a 30-year power purchase agreement with Bonita Wind Energy, LLC for an additional 230 megawatts of wind generation output and is seeking cost recovery for the projects. SPS's proposal is unusual because SPS states in this application that the project is not necessary for reliability, but rather to provide customer cost savings. SPS claims the new wind facilities, estimated to cost about $4.7 billion, will result in approximately $2.8 billion in customer savings from avoided fuel and energy costs and production tax credit savings. In response to a request from the SOAH ALJ, the PUC issued an order on a certified issue concluding that construction work in progress is the only mechanism permitting recovery of costs before their inclusion in the rate base. Numerous parties have intervened in this proceeding and conducted discovery about the project's purported cost savings. Intervenor testimony was due on October 2nd, and a hearing on the merits is scheduled for November 6-17, 2017.

Railroad Commission of Texas ("RRC")

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 Railroad Commission ("RRC"). The Atmos Cities Steering Committee ("ACSC") intervened and played an active role during the litigation of this case. ACSC filed testimony on March 22, and participated in the hearing on the merits April 19-21.

The ALJ issued a proposal for decision ("PFD") on June 16, 2017, recommending that the RRC grant APT an increase in annual revenues of $30.6 million and an 11.5% ROE. Parties filed exceptions to the PFD on July 11, and replies to exceptions on July 20. All parties who filed exceptions argued that the PFD erred in its ROE finding—intervenors arguing the RRC should have set the ROE significantly lower since APT is less risky than the interstate pipeline companies to which it compared itself, and APT arguing that the RRC abandoned precedent by changing its method for calculating ROE. The RRC issued a Final Order adopting the PFD on August 1, 2017. Parties then filed motions for rehearing that were subsequently denied on September 20, 2017.

Agency Highlights *is prepared by Maris Chambers in the Firm's Districts and Water Practice Groups, Tricia Jackson in the Firm's Air and Waste Practice Group, and Thomas Brocato 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 Maris at 512.322.5804 or mchambers@lglawfirm.com, Tricia at 512.322.5825 or tjackson@lglawfirm.com, or Thomas at 512.322.5857 or tbrocato@lglawfirm.com.*

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