Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 26, NO. 2 APRIL 2021

THE LONE STAR CURRENT

A Publication of Lloyd Gosselink Rochelle & Townsend, P.C., for the Benefit of Its Clients & Friends

HISTORIC WINTER STORM PROMPTS WIDSPREAD OUTAGES

by Taylor Denison, Chris Brewster, and R.A. ("Jake") Dyer

Winter Storm Uri, which hit Texas February 15 through February 19, left more than four million Texans without power for days, prompted the resignations and terminations of top energy officials, and may have implications for the future of the Texas energy market over all.

The controlled outages began early on Monday, February 15, and within hours it was clear that Texas was experiencing its most severe energy crisis in at least a decade. ERCOT announced Sunday night that it had set a winter record for power demand, reaching 69,150 megawatts between 6 and 7 pm. By Monday morning, more than 30,000 megawatts of power generation had been forced off the system. By Tuesday morning, more than 43 million Texans were without power, even as temperatures in many areas dropped into the single digits. The outages were not short-lived: by Wednesday, more than 27 million Texans remained without power, and many Texans continued without power into Thursday.

Winter Storm Uri was rare in both its scope and intensity. The National Weather Service issued winter storm warnings for all 254 Texas counties. In addition to losing power, residents across the state lost water service, and many of those with water were issued boil water notices because sanitation systems had failed.

The operator of the state's primary power grid, the Electric Reliability Council of Texas (ERCOT) scrambled to manage the crisis, working to keep power in balance while simultaneously dealing with a surge in electricity use and a loss of a significant part of the state's generation fleet. Both thermal and renewable energy units went offline. An ERCOT official reported that 16 gigawatts of renewable energy generation went offline—as well as 30 gigawatts of capacity from thermal sources, including gas, coal, and nuclear energy sources. Gas lines failed, wind turbines froze, and even a nuclear unit in South Texas tripped offline. ERCOT officials said they had no choice but to call the outages in order to avoid long-term, catastrophic damage to the grid. ERCOT stated that without the outages, a supply-and-demand imbalance could have spiraled out of control, causing a "black start event" which could have left the state without power for weeks or longer.

In the aftermath of the outages, the political impact has begun in Austin. Governor Greg Abbott called for a legislative investigation into ERCOT, declaring it a "legislative emergency." He also called for the resignations of top ERCOT officials. Senate and House leaders likewise announced committee hearings into ERCOT and the blackouts. In the Senate, the Business and Commerce Committee, chaired by Kelly Hancock, conducted its first hearing on February 25. In the House, the State Affairs and House Energy Resources Committees conducted a joint hearing on the same day. The State Affairs and Energy Resources Committees are chaired by Reps. Chris Paddie and Craig Goldman, respectively. Industry leaders from every facet of the energy field testified over the course of several days of hearings, prompting policy debates in both the House and Senate regarding our current energy-only market, the concept of deregulated markets, the reliability of conventional versus renewable generation, and many other topics. Throughout the next month, additional hearings were held by the Senate Committee on Jurisprudence and Senate Committee on Business and Commerce, as well as the House Committee on State Affairs and the House Committee on Energy Resources. The deadline

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Lloyd Gosselink Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other political subdivisions.

The Lone Star Current reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

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FIRM NEWS

Happy Retirement!

Georgia N. Crump and **Geoffrey M. Gay**, both former Energy and Utility Practice Group chairs, have retired from Lloyd Gosselink. Between them, Ms. Crump and Mr. Gay have more than 80 years legal experience, represented hundreds of cities and litigated or negotiated utility cases valued at more than $1 billion collectively.

In recognition of their long years of service, we present this quick look back at their careers and accomplishments.

Georgia N. Crump was born in 1953, in Clarksville, Texas, and during her youth resided in various parts of the U.S. and overseas. She received her law degree from Baylor University in 1978 and the State Bar licensed her to practice in Texas during that same year. Ms. Crump began her legal career as an assistant City Attorney for the City of McAllen, later worked as City Attorney for Edinburg, spent some years in private practice, and came to Lloyd Gosselink in 1989.

Throughout her award-winning career, Ms. Crump represented both individuals and coalitions of municipalities at the Railroad Commission and the Public Utility Commission, as well as municipalities and privately-owned water and wastewater utilities at the Texas Commission on Environmental Quality. She assisted municipalities in gas and electric franchise negotiations and renewals, and represented them in statewide gas and electric rate cases. She also drafted a cable regulation city ordinance used statewide.

Ms. Crump also represented landowners at the PUC in cases relating to the routing of transmission lines for Competitive Renewable Energy Zone projects. She has represented municipalities in gas rate proceedings at the Railroad Commission, and separately represented electric cooperatives, municipally owned utilities and municipalities in various dockets and rule-making proceedings at the PUC.

Ms. Crump has won numerous honors and awards, including from the Texas City Attorneys Association, the International Municipal Lawyers Association, National Association of Telecommunications Officers and Advisors, and the Texas Association of Telecommunications Officers and Advisors.

Ms. Crump lives in Austin, with her husband Robert.

Geoffrey M. Gay, a Texas native, was born in December 1951, received his undergraduate degree from Atlanta's Emory University, a Masters from Houston's Rice University, and his law degree from the University of Houston. In 1977 the State Bar licensed Mr. Gay to practice in Texas.

Mr. Gay spent the first years of his career in public service, beginning with a position at the Fort Worth-based West Texas Legal Services, an organization that provides legal representation for the indigent. In 1983 he accepted a position with the Texas Attorney General's office, where he represented state agencies in utility cases, including the AT&T/Southwestern Bell divesture case. In 1986, then-Gov. Mark White named him director of the Office of Public Utility Counsel, where Mr. Gay handled the last statewide rate cases for AT&T and Southwestern Bell prior to telecommunications divestiture. He also handled the first case to consider cost overruns at a Texas nuclear plant.

In 2001, shortly after coming to Lloyd Gosselink, Mr. Gay helped negotiate a far-reaching settlement under which the state's largest electric utility agreed to surrender potentially billions of dollars in regulatory claims that otherwise would have been charged to ratepayers. He also played an integral, founding role for two organizations that later would combine to become the Texas Coalition for Affordable Power, one of the state's largest municipal aggregation groups.

Mr. Gay served as the general counsel for the Texas Coalition for Affordable Power until his retirement. He also served as general counsel for the Oncor Cities Steering Committee, and the Atmos Cities Steering Committee. The ACSC has been involved in every major rate case brought by the Atmos gas utility and its predecessor utilities over the last three decades, and Mr. Gay, as the ACSC general counsel, played an important role in nearly all of those cases.

Mr. Gay now resides in Virginia, with his wife Susan.

Taylor P. Denison has joined the Firm's Energy and Utility Practice Group as an Associate. Her practice focuses on administrative law in the area of public utility regulation. Taylor represents municipalities and utilities before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings. Prior to joining the Firm, Taylor worked as an attorney at the Public Utility Commission of Texas, where she represented PUC Staff in a wide variety of contested case matters.

Taylor received her B.S. in Corporate Communication, Business Foundations at the University of Texas at Austin and her J.D., *cum laude*, from Texas A&M University School of Law.

Robyn F. Katz has joined the Firm's Energy and Utility Practice Group as an Associate. Her practice focuses on administrative law in the area of public utility regulation. Robyn represents municipalities and utilities before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings. Prior to joining the Firm, Robyn served as City Attorney for various Central Texas cities, and General Counsel for two large economic development corporations. Robyn has extensive experience advising municipalities on matters involving the Open Meetings Act, Public Information Act, and the Local Government Code.

Robyn received her B.S., *cum laude*, from the University of Michigan, her M.Ed. from the University of Texas, and her J.D. from Texas Tech University School of Law.

James Muela has joined the Firm's Water, Districts, Government Relations, Appellate, and Litigation Practice Groups as a new Associate. He assists clients with matters relating to certificates of convenience and necessity, water supply, water quality, and water rights in addition to providing general counsel services.

James received his B.A. in International Relations at Trinity University and his J.D. from Baylor Law School.

Sheila Gladstone will present "Top Ten Employment Law Hot Topics for 2021" for the Society of CPAs on May 10 at the Austin Sheraton.

Maris Chambers will be discussing "Nuisance Odor Issues" for a WEAT Webinar on May 11.

Sheila Gladstone will be presenting "Fair Labor Standards Act, Overview and Update" at the Texas City Attorneys Association on June 17 virtually.

Maris Chambers will present "CCN Update" at the TCAA Summer Conference on June 18 virtually.

Listen In With Lloyd Gosselink: A Texas Law Firm, is launching the second season of its podcast. Season Two will include seven new episodes, each featuring attorneys from our various practice groups discussing recent developments in the law relevant to our clients.

Episode one was released on March 31, 2021. Season Two will feature a variety of topics, including a discussion about implementing a workplace COVID-19 vaccination policy and related employment law considerations, federal policy updates in the new administration, ethical approaches in governance, and more. You can listen to Season Two by visiting lg.buzzsprout.com or on our website at lglawfirm.com.

The podcast is available and on-demand through your favorite streaming platforms and all your smart devices. To listen to a recap of Season One, or if you missed any of the episodes last year, you can search for the podcast or find it directly on our website, lglawfirm.com.

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MUNICIPAL CORNER

Neither the separation of powers provision of article II, section 1 of the Constitution, nor the dual-officeholding prohibition in article XVI, section 40, nor the common-law incompatibility doctrine preclude a deputy sheriff from simultaneously serving as a city councilmember. Tex. Att'y Gen. Op. KP-0352 (2021).

The Honorable Stephen L. Mitchell, County Attorney for Culberson County, requested an opinion by the Attorney General ("AG") to determine whether a deputy sheriff may simultaneously serve as an elected alderman of a Type-A general-law city. The AG opined that neither the separation of powers provision of article II, section 1 of the Constitution, nor the dual-officeholding prohibition in article XVI, section 40, nor the common-law incompatibility doctrine preclude a deputy sheriff from simultaneously serving as a city councilmember.

The AG first discusses the separation of powers provision, referencing its previous Letter Advisory 112 that concluded the separation of powers doctrine of article II, section 1 of the Texas Constitution precludes one person from simultaneously serving as deputy sheriff and city councilmember. Tex. Att'y Gen. LA-112 (1975) at 2. However, the AG cites its subsequent opinions calling the letter advisory into question, in part because "the language of article II, section 1 might be construed as applying only to state level offices, and not to offices of political subdivisions." Tex. Att'y Gen. Op. No. JM—213 (1984) at 4. The AG notes that the Supreme Court has since resolved the question, holding that the separation of powers doctrine in article II, section 1 of the Texas Constitution "only guarantees the separation of the state legislative, executive, and judicial branches of government." *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 72 (Tex. 2000). The AG thus concludes that article II, section 1 of the Constitution does not apply to local government and does not prevent a deputy sheriff from simultaneously serving as a member of a city council.

The AG next evaluates the dual-officeholding prohibition of article XVI, section 40 of the Texas Constitution, which provides in pertinent part that, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." TEX. CONST. art. XVI, § 40(a). The AG cites precedent from the Texas Court of Criminal Appeals, wherein the Court held the distinguishing factor of a public "office" subject to article XVI, section 40, is whether the person exercises a sovereign function of the government "largely independent of the control of others." *State ex. rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) (orig. proceeding). The AG then notes the Local Government Code, which provides that "a deputy sheriff acts at the direction and pleasure of the sheriff." TEX. LOC. GOV'T CODE § 85.003(c). Based on this and a handful of its previous opinions, the AG explains that a deputy sheriff does not hold a public office for purposes of article XVI, section 40 because the deputy does not exercise a sovereign function largely independent of the control of others. *See* Tex. Att'y Gen. Op. Nos. KP-0189 (2018) at 2, GA-0470 (2006) at 4, GA-0402 (2006) at 1. Accordingly, and consistent with its previous opinions, the AG concludes article XVI, section 40 does not preclude a person from simultaneously holding the positions of deputy sheriff and city councilmember. Tex. Att'y Gen. Op. No. KP-0189 (2018) at 2.

The AG lastly cautions as to the potential applicability of the common-law incompatibility doctrine, which prevents one person from simultaneously holding two public offices with inconsistent or conflicting duties. See *Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928); *Thomas v. Abernathy Cnty. Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgm't adopted). However, similar to the constitutional prohibition on dual officeholding, the AG explains that the common-law doctrine of incompatibility only prevents a person from holding two positions when each of those positions actually constitutes an office. See *Thomas*, 290 S.W. at 152–53. Taking this and relying again on its previous opinions, the AG concludes the common-law doctrine of incompatibility does not apply because a deputy sheriff is not considered to hold an office. *See* Tex. Att'y Gen. Op. Nos. KP-0189 (2018) at 2; GA-0470 (2006) at 4, GA-0402 (2006) at 1.

This opinion provides helpful guidance to municipalities regarding the extent to which one person may simultaneously serve in two or more governmental positions. The opinion clarifies that article II, section 1 of the Texas Constitution does not apply to local government and the prohibitions from article XVI, section 40 and the common-law incompatibility doctrine only apply to an "office," meaning the position in question exercises a sovereign function largely independent of the control of others.

"Municipal Corner" *is prepared by Reid Barnes. Reid is an Associate in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these or other matters, please contact Reid at 512.322.5811 or rbarnes@lglawfirm.com.*

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for filing bills during the 87th Legislative Session was March 12. House lawmakers filed more than 4,500 bills and Senate lawmakers filed more than 2,100 bills. Among those bills are approximately 400 relating to energy or utility matters, which is three to four times the number during a typical session.

Winter Storm Uri has also prompted the resignations of top regulators. The Public Utility Commission's (PUC) Chairman, DeAnn Walker, resigned on March 1 after facing harsh criticism in the aftermath of the winter weather event. One week later, on March 8, 2021, Commissioner Shelly Botkin resigned. Commissioner Arthur D'Andrea was then chosen by Governor Greg Abbott to replace Walker as Chairman. On March 17, less than two weeks after being promoted to Chairman, D'Andrea resigned. D'Andrea's resignation will be effective upon the appointment of his replacement. Then, on April 1, Governor Abbott announced the nomination of Will McAdams, president of the Associated Builders and Contractors (ABC), to one of the open PUC Commissioner positions. The appointment must be confirmed by the state Senate.

In addition to the PUC resignations, ERCOT also saw turnover in the aftermath of the winter storm. On February 23, four Unaffiliated Directors resigned from ERCOT and one Unaffiliated Director candidate withdrew his application. All five members resided out of state. Governor Greg Abbott welcomed the resignations, issuing a statement the same day. Since then, four additional board members have resigned. In addition to the multiple Board resignations, the ERCOT Board voted on March 3, 2021 to terminate the employment of ERCOT CEO Bill Magness, effective May 3, 2021.

Financial ramifications from the storm have also been set in motion. Carrie Bivens, with Potomac Economics, which acts as the Independent Market Monitor (IMM) for the ERCOT market, testified in Senate Jurisprudence discussing the IMM's recommendations. The IMM issued letters to the PUC on March 1 and March 4, recommending the PUC to direct ERCOT: 1) to reprice all day-ahead ancillary services (AS) clearing prices to cap them at the System-Wide Offer Cap; 2) to invoke the "failure to provide" settlement treatment for all AS that were not provided in real time; and 3) to correct the real-time energy prices to remove the inappropriate pricing intervention. The IMM's recommendations led to a debate among key elected officials, culminating in a press conference by Lt. Gov. Dan Patrick in which he urged Gov. Greg Abbott or the PUC to address the repricing issue. Most members of the Texas Senate wrote a letter to then PUC Chairman D'Andrea, urging him to correct ERCOT prices during the 32-hour period. D'Andrea testified in both House State Affairs and Senate Jurisprudence, stating that he would not order the repricing because he did not agree with the IMM's recommendation. He also stated he believes repricing would be illegal because ERCOT rules only allow for repricing due to operator mistake, and that repricing whole-sale energy and AS prices would harm various entities that had done a good job hedging for the winter weather and winterizing. In legislative hearings and witness testimony, it has become clear that market participants and lawmakers come down on different sides of the repricing debate. So far, repricing has not been ordered, although several bills addressing the issue have been filed.

Taylor Denison is an Associate in the Firm's Energy and Utility Practice Group. Chris Brewster is a Principal in the Firm's Energy and Utility Practice Group. R.A. ("Jake") Dyer is a Policy Analyst for the Energy and Utility Practice Group. If you would like additional information or have questions about this article or other matters, please contact Taylor at 512.322.5874 or tdenison@lglawfirm.com, Chris at 512.322.5831 or cbrewster@lglawfirm.com, or Jake at 512.322.5898 or jdyer@lglawfirm.com.

NEW LEAD AND COPPER RULE: UPDATES AND IMPACTS FOR PUBLIC WATER SYSTEMS

by Nathan Vassar, Lauren Thomas, and Justin Cias

A set of drinking water rules that could impose significant operational and cost requirements on public water systems remains pending, as the administration change has caused the Lead and Copper Rule ("LCR") to undergo additional analysis. The much-publicized Lead and Copper Rule Revisions ("LCRR") will remain on hold now, at least for a few more months. These updates, once adopted, will modify the Lead and Copper Rule ("LCR"), which is targeted at reducing the risk of human exposure to lead and copper in drinking water supplies. The LCRR began in the years following the Flint, Michigan Water Crisis, and the Trump Administration unveiled the LCRR in 2019. Shortly before the end of President Trump's term, EPA published the LCRR with an effective date of March 16, 2021. However, EPA has since delayed the effective date of the rule until June 17, 2021, and intends to open an additional comment period during that time. A discussion of several key changes of the LCR may assist PWSs in anticipating new requirements when the rule goes final (recognizing that additional updates are likely).

The first key change made to the LCR requires public water systems ("PWS") to create lead service line ("LSL") inventories. The LCR requires all PWSs to identify which LSLs across the distribution system are composed of lead – with the initial inventory complete by January 2024 (although there is potential for this to be extended to September 2024). The purpose of this change is to have PWSs identify whether their service lines are one of the four following categories: "lead," "non-lead," "galvanized requiring replacement," or "status unknown." For LSLs categorized as "status unknown," such LSLs are considered by default to be lead material. PWSs with services lines classified as needing replacement must submit a service line replacement plan

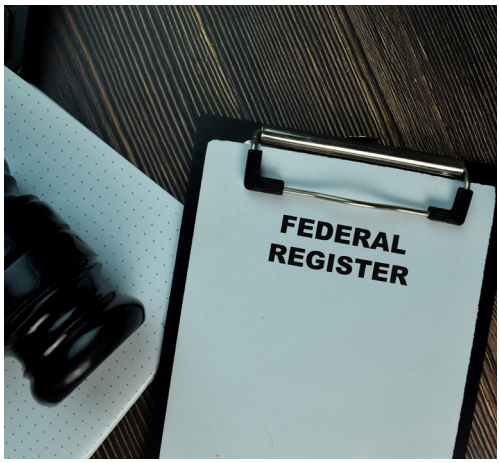
to the state regulator by January 2024. Furthermore, PWSs serving a set number of people must maintain a minimum of a three percent annual replacement rate for their LSLs, or take certain actions to remedy their replacement rate if they fail to meet the three percent minimum.

Another important update to the LCR is the new lead trigger level for PWSs. The lead trigger level is defined as the amount of lead found in water from a PWS, measured in micrograms per Liter (µg/L). The new trigger level is 10 µg/L, chosen as a reasonable concentration level that falls below the highest level, or action level, (15 µg/L) and above the minimum level (5 µg/L) where PWSs are required to begin taking action to address lead in the water supply.

Notice/public outreach is another critical change to the LCR. In event of an exceedance of the lead trigger level, small PWSs (serving less than 10,000 people) that are using point-of-use devices must report to homeowners and building managers within 24 hours of receiving results indicating a lead trigger level exceedance. Also, the LCRR modifies the language used to communicate health effects in all public education materials.
Another LCR change of interest to PWSs is their coordination with school and day care facilities to test and report at those locations. As a result of the LCRR, PWSs are required to conduct lead monitoring at elementary schools and child care facilities they serve at a rate of 20% of the facilities annually. The LCRR requires PWSs to submit annual reports to the state. These reports now include a certification that the PWS completed notification and sampling requirements above a minimum of 20% of all elementary schools and child care facilities that the PWS serves annually; a certification that the PWS delivered health risk information to the schools and facilities they serve; and a certification that the results were provided to the schools, facilities, and state health departments.

At this point, LCR reform is anticipated, even though it is under additional scrutiny. Unlike other regulatory updates, the LCRR reflects revisions that have garnered bipartisan support, even as some of the implementation details remain subject to change. For a copy of the LCRR, visit: https://www.federalregister.gov/documents/2021/01/15/2020-28691/national-primary-drinking-water-regulations-lead-and-copper-rule-revisions.

Nathan Vassar is a Principal in the Firm's Water Practice Group. Nathan assists political subdivisions, communities, and utilities with water supply development, environmental permitting, and enforcement matters with both state and federal regulators. Lauren Thomas is an Associate in the Firm's Water Practice Group. Lauren assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. Justin Cias is a law clerk at the Firm and is a student at Texas A&M University School of Law. If you would like additional information or have questions about this article, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com, or Lauren at 512.322.5850 or lthomas@lglawfirm.com.



FAIR LABOR STANDARDS ACT: AN OVERVIEW OF THE BASIC PROVISIONS AND RECENT DEVELOPMENTS

by Sheila Gladstone, Sarah Glaser, and Emily Linn

The Fair Labor Standards Act ("FLSA") is a federal employment law that establishes many of the workplace wage and hour standards employers should be familiar with, including minimum wage, overtime pay, record keeping requirements related to tracking hours worked, and child labor standards. There are also special rules that apply to public employers, including guidance on fire and police activities, volunteer work, and the offering of compensatory time instead of cash overtime payment.

The Department of Labor's ("DOL") Wage and Hour Division ("WHD") administers the FLSA and frequently issues regulations and other guidance for employers on how to comply with the wage and hour rules. Over the last year, there have been a number of updates from the DOL, which we will outline below. Notably, the most recent rules coming out of the DOL, including final rules clarifying the test for independent contractor classification, revisions to the tipped employee regulations and an updated rule on joint employer status have either been revised or rescinded by the new Biden Administration.

Before we discuss the current status of the new rules and other guidance, we first want to remind employers of the basic provisions of the FLSA.

Overview of the Fair Labor Standards Act

Federal Minimum Wage

The FLSA established a federal minimum wage, which is currently set at $7.25/hr. This is a floor, meaning that states and other local entities can adopt a higher minimum wage, though Texas has not. There is a separate minimum wage for tipped employees. Tipped employees must be paid at least $2.13/hr in direct wages; however, their total pay when taking into account a tip credit must still equal the $7.25/hr federal minimum.

Recently, there has been a legislative push to increase the minimum wage, including through the Raise the Wage Act of 2021 and in a House version of the American Rescue Plan Act. While the final version of the stimulus package did not include any increase, the Biden Administration and Democratic lawmakers have indicated they will continue to push for an increased minimum wage.

Overtime Pay

The FLSA requires that covered, non-exempt employees be paid overtime pay at time and a half, for hours worked over 40 hours in any seven-day work week (with some work period differences for police, fire, and hospital staff). Employers should define their seven-day work period in writing, preferably in an employment manual or other personnel policies. Employers should also clearly indicate whether an employee can flex their time within the work week, and for public sector employees, whether they will offer compensatory time, rather than cash overtime pay.

When classifying workers as either exempt or non-exempt from overtime requirements, an employer must first determine whether an employee is paid on a salaried, and not hourly basis, and meets the salary minimum to be considered exempt under the FLSA's executive, administrative and professional exemptions, also known collectively as the "white collar exemptions." For a discussion about the latest white collar exemption salary minimum, see below.

Employees earning more than the minimum salary must also meet a duties test in order to be classified as exempt.

- To qualify for the **executive exemption**, the person must manage the enterprise or a department within the enterprise, must regularly supervise 2+ employees, and have the authority to hire or fire other employees (or their recommendations as to hiring/firing are given particular weight).
- To qualify for the **administrative exemption**, the worker's primary duty must be the performance of non-manual work directly related to the management or general operations of the employer, and the employee must exercise discretion and independent judgment on matters of significance.
- There are two types of **professional exemptions**, the learned professional and creative professional. To qualify for the learned professional employee exemption, the person's primary duty must be performing work requiring advanced knowledge, defined as work predominantly intellectual in character and requiring consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and must be customarily acquired by prolonged, specialized instruction. To qualify for the creative professional employee exemption, the person's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized artistic or creative field.

Notably, the 'white collar' exemptions do not apply to employees who perform manual labor or other repetitive tasks with their bodies, or to most police, fire fighters, paramedics or other first responders (even if the employee is high ranking, titles aren't enough to guarantee exemption; rather, the position must truly be a policy-making desk job). Foremen who primarily do the non-exempt work of those they supervise are not exempt.

There are several other types of exemptions, including a computer employee exemption and an outside sales exemption, each of which come with their own list of primary duties that must be met to qualify.

There is also a highly compensated employee exemption ("HCE"), which states that employees whose total compensation is more than a prescribed minimum threshold are considered exempt from the FLSA if they perform at least one of the duties of any of the white collar exemptions described above. The salary minimum for HCEs was recently updated. See below for the latest numbers.

Recordkeeping and Posting Requirements

Under the FLSA, employers are responsible for keeping accurate timekeeping and pay records of all non-exempt employees. Further, employers must display official posters outlining the provisions of the FLSA in a conspicuous place in all their establishments. Employers can download FLSA posters and other required notices, along with guidance regarding the same, here.

Child Labor Rules

The FLSA includes workplace protections for minors. The FLSA regulations outline the number of hours that youth under 16 years of age can work, including prohibiting work during school hours, and includes a list of hazardous job duties prohibited for young workers. The Texas Workforce Commission ("TWC") has issued additional rules about child labor that employers should be cognizant of if they are employing workers who are under 18 years old.

New FLSA Rules and Guidance

Below is a summary of some of the DOL's latest wage and hour rules and guidance.

New Guidance on Volunteer Time (effective Mar. 14, 2019).

In March 2019, the DOL issued an opinion letter on volunteer time (and whether the time should be included in hours worked for the purposes of calculating overtime pay). The DOL has indicated that it is okay to not pay employees for volunteer work representing the employer outside of work hours, so long as several conditions are met:

- The volunteer work must be truly optional, with no pressure to participate and no employment

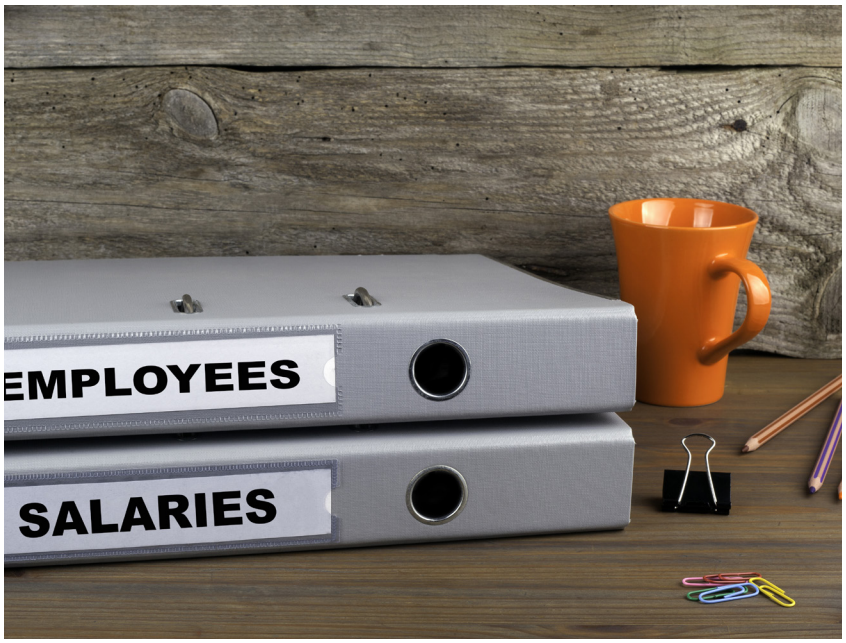
consequences for employees who choose not to volunteer.
- The volunteer work must not be of the same nature as the work the employee is employed to perform. For example, a payroll employee who volunteers to cut the checks for vendors and contractors used to staff a charity event, would be performing volunteer work identical to her normal job functions for the employer.
- The volunteer work must be for a civic or charitable purpose.
- An employee cannot waive or otherwise volunteer to work overtime.

Minimum Salary for Exempt Employees (effective Jan. 1, 2020).

On January 1, 2020, the DOL's final rule became effective, updating the minimum earning thresholds for white collar and highly compensated overtime exemptions. The rule increased the minimum salary threshold for the white collar exemptions to **$35,568 a year ($684 per week)**, and for the Highly Compensated Employee ("HCE") exemption the minimum was increased to **$107,432 per year**.

Calculating Regular Rate of Pay for Overtime Calculation (effective January 15, 2020).

Last year, the DOL clarified that certain employee perks and benefits are not included in the regular rate of pay when calculating overtime rate, including:



- Nominal non-cash gifts (e.g., coffee, snacks, coffee cups, t-shirts, raffle prizes).
- "Perks" and conveniences for the employee (e.g., on-site massages, recreational facilities, wellness programs, tuition payments).
- Discretionary bonuses not based on some pre-established, objective criteria.
- Payments for time not worked (e.g., paid time off, on-call pay, etc.).
- Reimbursements for business expenses.
- Retirement and insurance plan contributions.

See additional guidance to assist employers in calculating an employee's regular rate of pay here.

Proposed Independent Contractor Rule Rescinded

On January 7, 2021, the DOL published a final rule clarifying the standard for employee versus independent contractor status under the FLSA. As a reminder, the FLSA provisions only apply to employees, not independent contractors. The standard was more lenient for employees to classify workers as independent contractors excluded from the FLSA. The rule was set to take effect on March 8, 2021; however, pursuant to President Biden's regulatory freeze, the final rule was delayed and the DOL has since announced that it plans to rescind the rule.

In its place, we anticipate a more stringent independent contractor test, possibly similar to California's "ABC" test, which has been adopted in some iteration by almost two-thirds of the states. The "ABC" test requires that in order to be classified as an independent contractor, the worker must meet all three of the following factors:

- The worker is free from control or direction in the performance of the work;
- The work is done outside the usual course of the company's business and is done off the premises of the business; and
- The worker is customarily engaged in an independent trade, occupation, profession, or business.

March 2020 Joint Employer Status Rule Rescinded

On March 16, 2020, the DOL's final rule revising and updating regulations interpreting joint employer status under the FLSA went into effect. As a reminder, entities that meet the joint employer test are jointly and severally liable to employees for any FLSA violations. The new rule established a four-factor balancing test for deciding whether two entities were considered joint employers. The DOL has rescinded this new rule, and in its place, we anticipate a new joint employer rule which will likely adopt a more expansive definition of joint employer status.

This article was prepared by Lloyd Gosselink's Employment Law Practice Group: Sheila Gladstone, Sarah Glaser, and Emily Linn. If you would like more information, please contact Sheila at 512.970.5815 or sgladstone@lglawfirm.com, Sarah at 512.221.6585 or sglaser@lglawfirm.com, or Emily at 214.755.9433 or elinn@lglawfirm.com.

ASK SHEILA

Dear Sheila,

We are receiving numerous notices of unemployment claims from the Texas Workforce Commission that are on behalf of employees who are still working here. I am the owner of my company, and we just got one for me! They all state "permanent layoff" as the reason for termination. What is going on? How should we respond? What is the TWC doing about these fraudulent claims?

Sincerely, Still Employed

Dear Still Employed,

Thousands of employers across Texas and the US have received these recently. One of my clients just got seven in one day, including for the HR Director himself. Another, an owner of a company, got one for himself. A representative of the TWC called the fraudulent claims coming in a "tidal wave" and says that the TWC currently has over 70,000 pending fraud/ID theft investigations going on right now. Times of crisis, like the pandemic, cause this type of fraud to grow, especially with the increased payments from the federal stimulus programs.

Employers need to respond to these claims, with a statement such as: "This individual is still working here, and we believe this is a fraudulent claim, as the individual has stated to us that he/she did not file a claim for unemployment." On the Employer Response Form, be sure to check the "still employed" box.

Further, the TWC has requested that both employers and employees report fraud on its on-line portal in addition to responding to the claim. The TWC is proactively conducting fraud audits, but also states:

> In addition to audits, TWC has become aware of the fraudulent activity through reports of individuals or businesses receiving correspondence from TWC when no claim has been filed and the individuals are employed. The agency encourages anyone who suspects potential fraudulent activity involving UI accounts to report it through the TWC UI fraud submission portal found on the TWC homepage. If you encounter difficulties with the portal, please email TWC.fraud@twc.state.tx.us or leave a message at the TWC Fraud Hotline at 800-252-3642.

Finally, consider advising the employee to check their credit report for identity theft in other areas.

The TWC is taking steps to try to mitigate this problem in the future, and it is a top priority going forward. State leadership is concerned, as many state agency heads and elected officials have received notices from the TWC that they have filed unemployment claims when they did not. The TWC's Executive Director recently stated that the TWC recognizes the problem and is implementing new software and algorithms for earlier detection of fraudulent activity. Further, the TWC has recently begun using a new system for requiring claimants involved in pending identity theft investigations to confirm their identities using an on-line portal.

Bottom line, the TWC uses a decades-old system that is vulnerable. Funding has been approved for a completely new system built from scratch, as soon as government contracting procedures will allow. Also, the recently-passed federal American Rescue Plan Act allocates substantial funding to states to battle fraud. In the meantime, remain vigilant to possible fraud and report any claims using the guidance above.

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

IN THE COURTS

Water Cases

Optimus Steel, LLC v. U.S. Army Corps of Engineers, 1:20-CV-00374, 2020 WL 5881828 (E.D. Tex. Oct. 4, 2020).

The dispute in this case concerned a permit issued by the U.S. Army Corps of Engineers ("Corps") for the construction of JSSP's Southern Star Pipeline ("Pipeline"), a proposed fourteen-mile gas pipeline between Beaumont and Port Neches. After failed negotiations between JSSP and Optimus Steel ("Optimus"), JSSP filed a condemnation suit and was awarded an easement over Optimus's property. The pipeline would cross Optimus's property for approximately 0.86 miles, which

constitutes roughly fifteen percent of the Pipeline's total length.

JSSP's construction activities required a Corps-issued permit to discharge dredged or fill material into navigable waters of the United States under the Clean Water Act ("CWA"). In its evaluation of the permit application, the Corps assessed whether the project would jeopardize the existence of an endangered species or destroy or modify a designated critical habitat under the Endangered Species Act ("ESA"), and conducted an Environmental Assessment ("EA") as required by the National Environmental Protection Act ("NEPA") to determine if the project would significantly affect the quality of the human environment.

After completing its EA, the Corps issued a Finding of No Significant Impact ("FONSI") and, with respect to the ESA, a "no effect" determination. Accordingly, it issued JSSP a Nationwide Permit 12 ("NWP-12"), a generalized CWA permit that authorizes the discharge of dredged or fill material during construction.

Optimus sued the Corps and JSSP in the United States District Court for the Eastern District of Texas seeking a preliminary injunction to stop the construction of the Pipeline, alleging that the Pipeline's construction violated the CWA, ESA, and NEPA. To determine whether a preliminary injunction was warranted, the Court applied the *Winter* test, which requires the party seeking a preliminary injunction to prove: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disservice the public interest.

Applying the first factor, the Court first dismissed the ESA and NEPA claims due to Optimus's lack of standing. The Court found that Optimus's loss would be purely economic and, therefore, did not fall within the "zone of interest" of either Act, which both only cover environmental injuries.

However, the Court found that it did have standing under the CWA. Optimus asserted that the Corp's issuance of NWP-12 violated the "one-half acre rule," which provides that the Corps may issue a NWP-12 only if the utility line construction does not result in the loss of greater than one half acre of waters for each "single and complete project." Specifically, Optimus alleged that the "conversion" of wetlands from "one type to another" constituted wetland loss for purposes of a NWP-12. The Court dismissed this argument, finding that the wetland loss in the aggregate was 0.25 acres and, therefore, Optimus was unlikely to succeed on the merits.

Optimus also asserted that the Corps' definition of "single and complete project" for purposes of a NWP-12 violated the CWA. The Court held that Optimus was unlikely to succeed on the merits because the Corps' interpretation is reasonable and did not conflict with Congress's environmental objectives.

The Court then held that, because the Corps already issued a FONSI and "no effect" regarding the Pipeline's environmental impact, there was not a substantial threat of irreparable harm. Further, because Optimus received monetary compensation for the Pipeline easement, it did not suffer irreparable economic harm either. Finally, the Court found that the balance of harm and public interest weighed in favor of JSSP because (1) an injunction would enjoin the construction of a 160 million dollar pipeline that was substantially complete; and (2) the Pipeline supports the public's interest in regulatory efficiency and the promotion of "private investments in the Nation's energy infrastructure." Since Optimus did not meet any of the four *Winter* factors, the Court denied its motion for a preliminary injunction.

MSC Gleannloch LLC v. Harris Cty. Water Control and Improvement Dist. No. 119, 14-19-00157-CV, 2020 WL 6278477 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020).

This utility dispute concerned a water supply and waste disposal service agreement between MSC Gleannloch and Harris County Water Control and Improvement District No. 119 ("District"). In 2008, Gleanloch Storage LLC entered into an agreement with the District that had a five-year term and included a provision that stipulated the contract would be binding on successors and assigns. However, the agreement also provided that it could not be assigned. In 2012, both parties renewed the contract but incorporated a twenty-year term and struck the "shall not be assigned" language.

In 2018, Gleanloch Storage sold the Property to MSC Gleannloch ("MSC") and assigned MSC all of its rights under the 2012 agreement. Later that year, the District notified MSC that it would terminate water supply and waste disposal services unless it entered into a new agreement with different terms.

Accordingly, MSC filed a breach of contract action against the District and sought a temporary injunction enjoining the District from terminating its water and wastewater services. After the trial court denied MSC's application for a temporary injunction without an evidentiary hearing, both parties entered into an agreement that reflected their intent to abide by the 2012 agreement. Nonetheless, because it believed the District was still violating other rights within the 2012 agreement, MSC filed an interlocutory appeal asserting that the trial court abused its discretion by denying the temporary injunction without an evidentiary hearing.

Appellate courts generally cannot consider evidence that was not before the trial court; however, since the issue on appeal was whether the controversy was moot, the appellate court considered the most recent agreement. Because the agreement stipulated that the District would continue to provide services to MSC, the Court found that it eliminated any live controversy and, therefore, "rendered moot the very thing [MSC] urged the trial court to enjoin." Accordingly, it dismissed MSC's claim.

Mosaic Baybrook One, L.P. v. Simien, 01-18-01049-CV, 2020 WL 5637499 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020).

This dispute involves the certification of a class action in a controversy regarding a landowner's water and sewer service rates. Paul Simien leased an apartment

managed by Mosaic Residential, Inc. ("Mosaic"). Mosaic regularly incorporated fees associated with law enforcement, fire protection, and emergency medical services into the "water/sewer base fee" it charged its tenants. Accordingly, Simien sued Mosaic for damages and attorney's fees alleging that Mosaic violated Public Utility Commission ("PUC") rules by bundling unrelated charges into the water/sewer base fee.

Pursuant to 16 Tex. Admin. Code section 24.281(a), "[c]harges billed to tenants for… allocated utility service may only include bills for water or wastewater from the retail public utility." Further, at the time of the suit, Tex. Water Code section 13.505 provided that, if an apartment owner or manager knowingly violates a PUC rule regarding utility costs, the tenant "may recover three times the amount of any overcharge, a civil penalty equal to one month's rent, reasonable attorney's fees, and court costs from the owner or condominium manager."

Several months after Simien filed suit, the legislature amended section 13.505 by conferring exclusive jurisdiction over section 13.505 claims to the PUC and removing all penalty provisions other than the recoverable court costs. While Mosaic asserted that the amendment applied retroactively and stripped the trial court of jurisdiction, the trial court granted Simien's summary-judgment motion that Mosaic violated the Texas Water Code and PUC rules as a matter of law. Further, it granted Simien's motion for class certification.

In response, Mosaic filed an interlocutory appeal asserting that the trial court abused its discretion by certifying the class. Specifically, Mosaic alleged that (1) the trial court erroneously granted a partial summary judgment that Mosaic violated PUC rules; (2) the amendments to section 13.505 retroactively apply; (3) the trial court failed to address the elements of Mosaic's defense to Simien's section 13.505 claim; and (4) the trial court erroneously concluded that Simien was an adequate class representative.

The Court of Appeals did not address Mosaic's first two claims because they related to orders for which interlocutory appeals are not permitted. However, the Court did have the authority to review the trial court's decision to certify the class. Regarding Mosaic's third claim, the Court found that the trial court addressed Mosaic's defenses in the partial summary judgment ruling and, therefore, the record reflected that the trial court considered the defenses in deciding whether to certify the class. Finally, the Court dismissed Mosaic's assertion that Simien was not an adequate class representative due to previous false testimony. For these reasons, it affirmed the trial court's class-certification order.

City of Magnolia v. Magnolia Bible Church, 03-19-00631-CV, 2020 WL 7414730 (Tex. App. Dec. 18, 2020).

This dispute involves a city ordinance that established new water rates and surcharges on non-profit entities and a corresponding Expedited Declaratory Judgment Act ("EDJA") lawsuit. In March 2018, the City of Magnolia adopted an ordinance that established a new category of water user, titled "Institutional/Non-Profit/Tax-Exempt accounts." Under the ordinance, churches, schools, parks, and certain governmental facilities were placed in the newly established category and were responsible for a fifty percent surcharge to the in-city water rate and other fees.

In response, Magnolia Bible Church, Magnolia's First Baptist Church, and Believers Fellowship (collectively, "Churches") notified the City that they would bring legal action if the ordinance was not reversed. Accordingly, in November 2018, the City filed suit in Travis County District Court under the EDJA for declaratory judgment regarding the legality of the ordinance. As required by the EDJA, the City published notice of its suit in the *Austin American Statesman* and the *Houston Chronicle*. After the City amended its EDJA petition in January 2019 and republished notice of the suit, the Attorney General found that the ordinance was legal and valid. In neither instance did the City directly notify the Churches.

In response to the ordinance, the Churches sued the City under the Uniform Declaratory Judgments Act ("UDJA") seeking declaratory judgment that the ordinance was void. After the City notified the Churches of the final judgment in the EDJA suit, the Churches filed a motion for a new trial alleging that the City's mode of notification violated their due process rights. The district court held that, because the City failed to provide the Churches with individual notice, the EDJA suit deprived them of due process, and granted the Churches' motion for a new trial. After the City filed an interlocutory appeal asserting that a new trial was not warranted, a divided Court of Appeals affirmed the district court's ruling with three separate opinions including one dissent.

Justice Triana stated that the only issue on appeal was the district court's jurisdiction. She rejected the City's assertion that, because the intent of the EDJA was to expedite declaratory judgments, the Act preempted Tex. R. Civ. P. Rule 329 with respect to the time allowed for the filing of a motion for a new trial. Finding that EDJA did not conflict with Rule 329, she held that the district court had jurisdiction and did not address any other issues.

Justice Rose recognized that notice by publication ordinarily satisfies due process in an EDJA suit; however, due to the "particular and unique circumstances of [the] case," he held that notice by publication was insufficient. After first observing that a public entity ordinarily invokes the EDJA for a declaration concerning its right to impose a tax through an ordinance that affects the public generally, he found this case distinguishable due to his characterization of the Churches' claims as "private rights" and the City's knowledge of those claims. Justice Rose did not attempt to explain how this was different from any other case that involves an affected individual who speaks in opposition to a tax proposal prior to its adoption. He based his decision in part that the Churches sent the City several letters notifying it of their interest in litigating the validity of the ordinance. For these reasons, he found that the Churches' due process rights were violated and affirmed the district court's ruling.

Litigation Cases

Supreme Court specifies APA's arbitrary-and-capricious standard requires that agency action be "reasonable and reasonably explained."

In *Federal Communications Commission v. Prometheus Radio Project*, broadcasters and advocacy groups filed (now consolidated) petitions for review of a decision by the Federal Communications Commission to repeal its newspaper/broadcast and radio/television cross-ownership rules and modify its local television ownership rule. No. 19-1231, 2021 WL 1215716 (U.S. Apr. 1, 2021). In a 2017 Order, the FCC concluded that three of its ownership rules no longer served the public interest. The FCC therefore repealed two of those rules and modified the third.

In conducting its public-interest analysis, the FCC considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets. The FCC concluded that the three rules were no longer necessary, and that changing the rules was not likely to harm minority and female ownership. Petitioners alleged that the FCC's decision was arbitrary and capricious under the Administrative Procedure Act.

The Third Circuit vacated the Order. The appeals court did not dispute the FCC's conclusion that those three ownership rules no longer promoted the agency's public interest goals of competition, localism, and viewpoint diversity but held that the record did not support the FCC's conclusion that the rule changes would "have minimal effect" on minority and female ownership. The FCC appealed and was granted *certiorari* by the Supreme Court.

Importantly, this case sets out a new standard for APA review under the arbitrary-and-capricious standard, which is likely to be adopted by state courts including Texas. Under the arbitrary-and-capricious standard, a court ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. On *certiorari*, the Court articulated that the FCC's Order was "reasonable and reasonably explained" as to meet the APA's deferential arbitrary-and-capricious standard; holding that *APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained*. After review of the efforts undertaken by the FCC and data analyzed prior to adopting the Order, the Court held that FCC's predictive judgment was not arbitrary and capricious, reversing the judgment of the Court of Appeals.

Local Government Contract Claims Act waiver found despite no money due or owed by City.

In *City of McKinney v. KLA Int'l Sports Mgmt., LLC* the City of McKinney ("City") entered into an agreement with KLA International Sports, LLC ("KLA") to develop and improve youth soccer fields. 05-20-00659-CV, 2021 WL 389096 at *1 (Tex. App.—Dallas Feb. 4, 2021). Under the agreement, KLA agreed to replace, rehabilitate, and maintain three of the City's fields in exchange for a license that entitled KLA to prioritize "recreational" use of the fields. The agreement required KLA's work to be complete within 180 days after construction commenced.

In 2020, the City issued KLA a notice of default, alleging timeliness and construction deficiencies, and eventually directed KLA to stop construction and vacate the fields. KLA sued the City for breach of contract seeking injunctive relief, damages, attorney's fees, and specific performance. In response, the City asserted it was entitled to governmental immunity. The trial court denied the City's plea to the jurisdiction on immunity grounds. The City then appealed.

Because the Texas Tort Claims Act provides that functions related to "recreational facilities" are "governmental functions," the Court of Appeals determined that the City engaged in a governmental function when it issued KLA a license in exchange for the maintenance of the City owned soccer fields. Thus, the City did not engage in a proprietary function and was immune from suit absent a statutory waiver.

However, the Texas Local Government Contract Claims Act waives immunity for suits claiming a breach of a written contract that states the essential terms of the agreement to provide the governmental entity goods or services. The City argued that because no money was due or owed under the contract and KLA only agreed to improve the fields, the contract was not a contract to provide goods or services and the waiver did not apply. The Court rejected this argument and found that KLA rendered services by improving, rehabilitating, and maintaining the soccer fields, and thus the chapter 271 waiver applied—affirming the trial court's order denying the City's plea to the jurisdiction.

Nonuse of floodgate sees City prevail on negligence, immunity grounds.

In *City of Brownsville v. Rattray*, 13-19-00556-CV, 2020 WL 6118473, (Tex. App.—Corpus Christi Oct. 15, 2020, pet. filed), homeowners in the Quail Hollow subdivision ("homeowners") sued the city of Brownsville ("City") for flood damages resulting from the alleged misuse of the City's stormwater system consisting of a series of drainage ditches, resacas, and other bodies of water, which are controlled by multiple motor-driven gates and pumps. 13-19-00556-CV, 2020 WL 6118473 at *1 (Tex. App.—Corpus Christi Oct. 15, 2020). On August 31, 2015, to prevent water flow towards Quail Hollow after heavy rainfall, the City closed one of its stormwater gates. As a result of the rainfall event, the homeowners experienced flooding and alleged it was the result of water accumulated because the gate was closed. In its plea to the jurisdiction, the City argued, among other things, that it was immune from suit because the "misuse of motor-driven equipment" immunity waiver provided by Texas Civil Practice and Remedies Code section 101.021(1) did not apply. The trial court denied the City's plea to the jurisdiction and the City appealed.

Under the Texas Tort Claims Act, a governmental unit who negligently causes property damage, personal injuries, or death while acting in the scope of its employment is not entitled to immunity if (1) the damage resulted from the operation or use of motor-driven equipment; and

(2) if the employee would be liable under Texas law.

On appeal the court held that because the City closed the gate to prevent flooding and there was no flooding at the time of the closure, the City did not act negligently. Further, the homeowners' claims centered largely on the nonuse of the gate and pumps, alleging had the gate been opened they would have not been flooded. Therefore, the court further held that because the specific act of negligence was the failure to use motor-driven equipment, the waiver did not apply and the City was entitled to governmental immunity.

Finally, the court found that the City's nonuse of the equipment did not actually cause the homeowners' injuries, but merely "created a condition" that made flooding possible. Because the "waiver of immunity is a limited one," the court narrowly construed the causation requirement and found that the storm ultimately caused the homeowners' damages. For these reasons, the court reversed the trial court's denial of the City's plea to the jurisdiction.

Air and Waste Cases

New Jersey v. EPA, No. 08-1065 (D.C. Cir. Mar. 5, 2021).

On March 5, 2021, the U.S. Court of Appeals for the D.C. Circuit rejected New Jersey's challenge to EPA's 2007 New Source Review (NSR) rule on emissions record-keeping. NSR requires large facilities to undergo a permitting process for new construction if such construction could result in significant emission increases. New Jersey claimed that the rule was too lenient, allowing for data manipulation, because the 2007 rule required that facilities only keep extensive records if the projected emissions before and after new construction met a specific threshold—50 percent. New Jersey argued that this allowed companies to circumvent NSR permitting requirements because the companies would be able to decide, themselves, whether they breached the 50 percent threshold.

Ultimately, the D.C. Circuit Court was not persuaded by New Jersey's arguments and found that EPA offered a rational basis for setting a minimum emissions threshold for reporting requirements, which was, therefore, not arbitrary or capricious under the Clean Air Act. Accordingly, the court struck down New Jersey's challenge.

American Lung Health Association and American Public Health Association v. EPA, No. 19-1140 (D.C. Cir. Jan. 19, 2021).

On January 19, 2021, the U.S. Court of Appeals for the District of Columbia Circuit struck down the EPA's Affordable Clean Energy (ACE) rule, which was issued in 2019 in order to replace the Obama Administration's Clean Power Plan. The ACE rule was designed to relax carbon reduction requirements for power plants by allowing the states to choose standards of performance for power plants. However, the D.C. Circuit Court ultimately found that the rule "hinged on a fundamental misconstruction of Section 7411(d) of the Clean Air Act" because the statute calls for both federal and state cooperation in regulating existing sources. The court's decision to strike down the ACE rule now shifts the onus back on EPA to issue a new rule under the Biden Administration. While EPA works on a new rule to regulate power plants, the agency has requested that the court freeze the mandate vacating the ACE rule so the rule can stay intact until EPA issues a replacement rule.

"In the Courts" *is prepared by Cole Ruiz, an Associate in the Firm's Water Practice Group; Lindsay Killeen, an Associate in the Firm's Litigation Practice Group; and Sam Ballard, an Associate in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Cole at 512.322.5887 or cruiz@lglawfirm.com, Lindsay at 512.322.5891 or lkilleen@lglawfirm.com, or Sam at 512.322.5825 or sballard@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

Michael Regan Confirmed as EPA Administrator. On March 10, 2021, the U.S. Senate confirmed Michael Regan as EPA Administrator. Regan previously served as an environmental advocate with the Environmental Defense Fund and served as the Secretary of the North Carolina Department of Environmental Quality. During the confirmation process, Regan indicated that his priorities include regulating per- and polyfluoroalkyl substances (PFAS), addressing environmental justice issues, reducing greenhouse gas emissions, and tackling climate change.

EPA approves TCEQ takeover of oil and gas wastewater permitting. On January 15, 2021, EPA approved TCEQ's request to administer the National Pollutant Discharge Elimination System ("NPDES") program for oil and gas wastewater. The program—

which covers discharges from produced water, hydrostatic test water, and gas plant effluent—previously fell under the jurisdiction of the Texas Railroad Commission. Texas legislators initiated this transfer of authority in 2019 when they passed House Bill 2771, which authorizes TCEQ to issue permits for the discharge of certain oil and gas effluents into waters in the state. TCEQ began accepting individual permit applications under this program in early January 2021. Additionally, TCEQ issued a general permit for hydrostatic test water, and it anticipates that two more general permits will be available in late summer 2021.

EPA announces a final determination to regulate PFOS and PFOA under the SDWA. On March 3, 2021, EPA published a final determination to regulate perfluorooctanesulfonic acid ("PFOS") and perfluorooctanoic acid ("PFOA") under the Safe Drinking Water Act ("SDWA"). In making its final determination to regulate PFOS and PFOA, EPA concluded that (1) both chemicals may cause adverse health effects; (2) both chemicals are known to occur, or there is a substantial likelihood that they will occur, in public water systems with a frequency and at levels of public health concern; and (3) regulation of both chemicals presents a meaningful opportunity for health risk reduction for persons served by public water systems.

EPA must propose National Primary Drinking Water Regulations ("NPDWRs") for PFOS and PFOA within 24 months of proposal, and it must then take action on the final regulations within 18 months of the proposals. EPA noted that although the SDWA does not require additional regulatory determinations until 2026, EPA "is committing to making regulatory determinations in advance of the next SDWA deadline for additional PFAS." Accordingly, public water systems should remain alert for additional PFAS-related regulatory determinations.

EPA delays the effective date of the Lead and Copper Rule Revisions; proposes additional delays. On March 12, 2021, EPA published a final rule to move the effective date of the Lead and Copper Rule Revisions from March 16, 2021 to June 17, 2021. On the same day, EPA also published a proposed rule seeking to delay the effective date until December 16, 2021 and to extend the rule's deadline for compliance to September 16, 2024. These proposed delays seek to give EPA "sufficient time . . . to complete its review of the rule" and to give drinking water systems "adequate time to take actions needed to assure compliance." EPA is accepting comments on the proposed delays until April 12, 2021.

EPA Plans to Issue Landfill Emissions Guidelines Rule in May 2021. EPA's long-delayed landfill emissions guidelines ("EG") rule may not be delayed for much longer. The 2016 EG rule is aimed at regulating air emissions from existing landfills. EPA had previously delayed implementation of the federal plan and delayed approval of state plans. On March 4, 2021, EPA filed an unopposed motion in the U.S. Court of Appeals for the D.C. Circuit, asking the court to vacate the earlier EPA rule that delayed implementation of the EG rules. EPA's motion indicates that "EPA intends to issue a federal plan by May 2021 for any state that does not have an approved state plan."

EPA Issues Final Authorization of Texas's Hazardous Waste Management Program Revision. On March 5, 2021, EPA issued a Final Authorization of the State of Texas hazardous waste program. In December 2018, Texas had submitted a final complete program revision application seeking authorization of its program revision. EPA has now approved of those revisions after confirming that the program revisions satisfied all requirements needed to qualify for a final authorization.

With this final authorization, a facility in Texas subject to the Resource Conservation and Recovery Act ("RCRA") will now have to comply with the authorized state requirements instead of the equivalent federal requirements. Additionally, such facilities will have to comply with any applicable federal requirements issued by the EPA for which the state has not received authorization. The State of Texas will continue to have enforcement responsibilities under its state hazardous waste program for violations of its program, but the EPA retains its authority to:

- Conduct inspections and require monitoring, tests, analyses, or reports;
- enforce RCRA requirements and suspend or revoke permits; and
- take enforcement actions after notice to and consultation with the State.

EPA Updates Audit Policy FAQs In Order to Promote Voluntary Self-Disclosure. On February 5, 2021, EPA released an updated Frequently Asked Questions guidance document titled, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Self-Policing Audit Policy*. This guidance document supersedes 1997 and 2015 guidance and FAQ documents concerning EPA's audit policy.

This new guidance document does not substantively change EPA's audit policy, but rather reaffirms EPA's policy of encouraging voluntary environmental compliance audits and prompt disclosure and correction of federal violations. The incentives for self-disclosure, according to EPA, are significant penalty reductions, no recommendations for criminal prosecution, and no routine requests for audit reports that might trigger enforcement investigations.

The guidance document confirms that regulated entities may state that they "may have" a violation rather than affirmatively admitting to a violation. However, to qualify for 100% mitigation of "gravity-based" penalties, regulated entities must meet the Audit Policy's conditions, including: (1) discovering the potential violations during a systemic, and voluntary, compliance audit; (2) disclosing the potential violations to EPA within 21 days of discovery; (3) correcting/remediating the potential violations within 60 days of discovery; and (4) committing to take steps to prevent recurrence of the potential violations.

The guidance document also states that between 1995 and 2020, for roughly 28,000 self-disclosing facilities, EPA denied Audit Policy penalty mitigation less than 12 times.

This guidance has no effect on TCEQ's separate audit policy.

United States Department of Justice ("DOJ")

DOJ withdraws Trump-era policy memos. On February 4, 2021, Deputy Assistant Attorney General Jean E. Williams issued a memorandum formally withdrawing nine environmental policy memos made under the Trump Administration. The memo cites Executive Order 13,990—which directs federal agencies to review regulations and actions that conflict with the Biden Administration's climate change goals—as the reason for withdrawing the policies. The nine withdrawn policies include several enforcement discretion memos, as well as several memos outlining the previous administration's policy of banning Supplemental Environmental Projects ("SEPs") in civil settlements. Additionally, the DOJ rescinded a memo from July 2020 that announced a policy to "strongly disfavor" any Clean Water Act enforcement actions when a state has "already initiated or concluded its own civil or administrative proceeding."

Texas Commission on Environmental Quality ("TCEQ")

TCEQ's New Penalty Policy Revisions Go into Effect. On January 28, 2021, TCEQ's penalty policy revisions went into effect. The penalty policy was last revised on April 1, 2014. The new policy will apply to violations discovered during investigations conducted on or after January 28, 2021 and that occurred or began on or after September 1, 2011.

The revisions generally increase penalty amounts and the number of violation events for actual releases of pollutants. The new penalty policy is available on TCEQ's website and can be accessed here.

TCEQ Proposes Alternative Language Rulemaking. On March 26, 2021, TCEQ published notice of a proposed rulemaking in the *Texas Register*, which seeks to add new section 30 Texas Administration Code ("TAC") § 39.426 in order to impose additional alternative language requirements on many permit applications. Under the proposed rulemaking, the TCEQ Executive Director may also determine that alternative language notice is necessary on a case-by-case basis in order to provide notice and meaningful access to affected communities.

Specifically, the proposed rulemaking requires that applicants provide an alternative language version of the summary of the application that is required by 30 TAC § 39.405(k). In addition, the proposed rulemaking requires applicants to provide notice of public meeting in an alternative language and to provide for interpretive services in the same alternative language at the public meeting if certain conditions are met.

Furthermore, the proposed rulemaking requires the TCEQ Executive Director to provide a written response to comments in the alternative language and also requires that any written responses to requests for reconsideration or hearing requests submitted by the Executive Director, Office of Public Interest Counsel, or applicant be provided in the alternative language.

TCEQ is holding virtual public hearings on this proposed rulemaking on April 20 and April 22. The written comment period closes on April 26, 2021.

TCEQ Adopts Final Rule to Clarify Exemptions Under New Recycling Rules. On March 10, 2021, the TCEQ Commissioners approved a final rule to repeal and replace 30 Texas Administrative Code §§ 328.203 and 328.204 concerning Waste Minimization and Recycling. Sections 328.203 and 328.204 comprise TCEQ's new governmental entity recycling rules, which went into effect on July 2, 2020.

The final rule is aimed at restructuring the rules to provide additional clarity to Chapter 328; specifically, clarifying the recycling rule exemptions by reordering the rules.

TCEQ Streamlined Pre-Injection Unit Permitting. TCEQ's amended pre-injection unit (PIU) permitting rules went into effect on January 7, 2021 in order to streamline the permitting process for PIUs. More specifically, the rules under Title 30 of the Texas Administrative Code (TAC), Chapter 331, Underground Injection Control, have been amended and repealed to remove the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial injection wells. PIUs associated with nonhazardous, noncommercial injection wells will continue to be regulated under 30 TAC § 331.5 (Prevention of Pollution, 30 TAC § 331.47 (Pond Lining), TCEQ's industrial solid waste and municipal hazardous waste rules in 30 TAC Ch. 335, and TCEQ's radioactive substance rules in 30 TAC Ch. 336.

Public Utility Commission of Texas ("PUC")

PUC Chairman Walker Resigns, Followed by Remaining Two Commissioners, Botkin and D'Andrea. The PUC's Chairman, DeAnn Walker, resigned on March 1, 2021. Chairman Walker faced criticism in the aftermath of the winter weather event, with several lawmakers calling for her resignation following her testimony in legislative hearings. Lt. Gov. Dan Patrick also called for Walker to resign. Walker's resignation letter states that she believes it is in the best interest of the state and that she accepts her role in the situation. Walker also called on other groups, including gas companies, the Railroad Commission, electric generators, transmission and distribution utilities, electric cooperatives, municipally owned utilities, ERCOT, and the Legislature, who she said "all had responsibility to foresee what could have happened and failed to take the necessary steps for the past ten years to address issues that each of them could have addressed."

One week later, on March 8, 2021, Commissioner Shelly Botkin resigned, leaving only Commissioner Arthur D'Andrea. D'Andrea was chosen by Governor Greg Abbott to replace Walker as Chairman. On March 17, less than two weeks after being promoted to Chairman, D'Andrea resigned. Governor Abbott issued a statement on D'Andrea's resignation, saying, "Tonight, I asked for and accepted the resignation of PUC Commissioner Arthur D'Andrea. I will be naming a replacement in the coming days who will have the responsibility of charting a new and fresh course for

the agency. Texans deserve to have trust and confidence in the Public Utility Commission, and this action is one of many steps that will be taken to achieve that goal." D'Andrea's resignation will be effective upon the appointment of his replacement.

Governor Abbott announced on April 1 the nomination of Will McAdams, president of the Associated Builders and Contractors ("ABC"), to one of the open PUC Commissioner positions. "Will McAdams will bring a fresh perspective and outstanding leadership to the Public Utility Commission of Texas," Abbott said. "Will is committed to charting a new course for the commission and restoring trust with Texans. I am confident that he will lead the agency with integrity and transparency and I urge the Senate to confirm Will's appointment." The appointment must be confirmed by the state Senate.

Parties Reach Unanimous Settlement in TNMP's Merger with Avangrid and NM Green Holdings; Requires Final PUC Approval. As we have previously reported, on November 20, 2020, TNMP, NM Green Holdings, Inc. ("Green Holdings"), and Avangrid, Inc. ("Avangrid") (collectively, Joint Applicants) filed their Joint Report and Application for Regulatory Approvals with the PUC in Docket No. 51547, detailing TNMP's proposed new ownership. The hearing on the merits was scheduled for March 24 – 26, 2021, but was cancelled when the parties reached a unanimous agreement. On March 30, 2021, the Joint Applicants filed a Unanimous Stipulation and Agreement on behalf of all parties including Staff of the PUC, the Office of the Public Utility Counsel, Cities Served by Texas-New Mexico Power Company, the Alliance for Retail Markets, the Texas Energy Association for Marketers, Texas Industrial Energy Consumers, and Walmart Inc. If approved by the Commission, Green Holdings, a subsidiary of Avangrid, will be merged into PNM Resources, Inc. ("PNMR"), TNMP's indirect parent company. Avangrid will then contribute 100 percent of its interest in PNMR to Avangrid Networks, Inc. ("Avangrid Networks"). Avangrid's subsidiary, TNP Enterprises, Inc. (TNPE), will then transfer its 100 percent ownership interest in TNMP to a newly created special purpose entity, TNMP Holdings, which will be owned by TNPE. If approved, TNMP will still be a subsidiary of PNMR, but will also be an indirect subsidiary of Avangrid Networks and Avangrid. The Joint Applicants agreed to a number of regulatory commitments, including payment of a $16.2 million rate credit to electric delivery rates payable over three years following closing of the transaction. The transaction now awaits final Commission order approving the unanimously agreed to terms.

TNMP's Advanced Meter System Update Approved by PUC. As we have previously reported, on October 2, 2020, Texas-New Mexico Power Company ("TNMP") filed a request at the PUC for approval to change the deployed advanced meter technology in its previously approved Advanced Metering System (AMS) Deployment Plan (Docket No. 51387). TNMP intends to upgrade the communication technology for 68% of its AMS meters in certain areas from cellular to radio frequency mesh (RF Mesh) because its current AT&T cellular 3G network will be completely decommissioned in February 2022.

On November 9, 2020, PUC Staff recommended approval of TNMP's application. On November 17, 2020, TNMP and PUC Staff filed a Joint Notice of Approval and Proposed Order, with Cities being unopposed to the filing. On January 14, 2021, the PUC issued a final order, approving TNMP's request to change its deployed advanced meter technology.

Companies Begin to File Annual Safety Reports Under 16 Texas Administrative Code § 25.97(f). Several electric utilities have started to file their annual safety reports under 16 Texas Administrative Code ("TAC") § 25.97(f). This section of the PUC's rules implements the reporting requirements in Public Utility Regulatory Act ("PURA") § 38.102, which was enacted after the passage of House Bill 4150, also known as the "William Thomas Heath Power Line Safety Act," in 2019. Legislation was driven by the death of three boy scouts in 2017 when a boat they were sailing on came into contact with a power line and electrocuted them. 16 TAC § 25.97(f) requires electric utilities, including municipally owned utilities and electric cooperatives that own or operate overhead transmission or distribution assets, to report to the PUC annually before May 1 regarding certain information related to those facilities.

For utilities that own or operate overhead transmission facilities greater than 60 kilovolts, the report must include:

- the number of identified occurrences of noncompliance with PURA § 38.004 regarding vertical clearance requirements of the National Electrical Safety Code (NESC) for overhead transmission facilities;
- whether the utility has actual knowledge that any portion of the utility's transmission system is not in compliance with PURA § 38.004 regarding vertical clearance requirements of the NESC for overhead transmission facilities; and
- whether the utility has actual knowledge of any violations of easement agreements with the United States Army Corps of Engineers relating to PURA § 38.004 regarding the vertical clearance requirements of the NESC for overhead transmission facilities.

For utilities that own or operate overhead transmission facilities greater than 60 kilovolts or distribution facilities greater than 1 kilovolt, the report must include:

- the number of fatalities or injuries of individuals other than employees, contractors, or other persons qualified to work in proximity to overhead high voltage lines involving transmission or distribution assets related to noncompliance with the requirements of PURA § 38.004; and
- a description of corrective actions taken or planned to prevent the reoccurrence of fatalities or injuries.

Utilities are also required under other sections of the rule to submit annual employee training reports and five-year reports regarding compliance requirements. The PUC is required to make

the reports publicly available by September 1 each year.

PUC Issues Executive Orders in Response to Massive Blackouts. The PUC issued a number of executive orders in the days following the winter weather event, including a ban on utility disconnections, an adjustment to wholesale power prices, and a green light to lift important financial rules in the wholesale energy market. The PUC's emergency actions mark its all-hands-on-deck approach to the blackouts, now considered the state's most severe energy crisis in at least a decade.

The PUC has issued four executive orders so far, and more may be on the way. A summary of those orders is provided below:

- On February 16, the PUC signed an order directed to the Electric Reliability Council of Texas (ERCOT). Filed in PUC Docket No. 51617, the order instructed ERCOT to account for "load shed" or forced outages in the determination of certain prices in the wholesale energy market. According to the PUC, system-wide prices in that segment were clearing as low as $1,200 per megawatt hour on February 16, although they should have closed closer to the $9,000 system-wide offer cap because of the grid emergency. "The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market," the order stated.
- On February 17, the PUC issued an executive order to limit the duration of rotating outages for individual customers to no more than 12 hours. However, the order applied only to customers of investor-owned utilities under PUC jurisdiction—namely Oncor, AEP, CenterPoint, and TNMP. The February 17 order can be found in PUC Docket No. 51812.
- On February 21, the PUC placed a moratorium on the disconnection of retail electric customers for non-payment. As with the February 17 order, the moratorium applied only to customers within the PUC's direct jurisdiction. The order also required retail electric providers to continue offering deferred payment plans to customers. The order can be found in PUC Docket No. 51812.
- Also on February 21, the PUC authorized ERCOT to deviate from its regular market rules "to protect the overall integrity of the financial electric market." The order allowed ERCOT to take various actions at its own discretion, including:
    1. Deviating from deadlines relating to financial settlements and invoice payments;
    2. Using available funds—including undistributed congestion revenue right auction revenues—to cover short-paying invoice recipients;
    3. Relaxing credit requirements to provide short-term market-participant liquidity; and
    4. Suspending breach notifications to certain market participants for failure to make payouts or provide financial security.

The order required ERCOT to report to the PUC twice each day of any action it takes, beginning on February 22. This order also can be found in PUC Docket No. 51812.

PUC Opens Projects in Wake of Winter Storm. In response to the February winter weather event, the PUC has opened a number of projects to assess areas of improvement. Below is a list of the projects currently open.

- 50664 – Issues Related to the State of Disaster for Coronavirus Disease 2019
- 51617 – Orders Directing ERCOT to Take Action and Granting Exception (Filed on Feb. 16)
- 51812 – Issues Related to the State of Disaster for the February 2021 Winter Weather Event (Filed on Feb. 16)
- 51825 – Investigation Regarding the February 2021 Winter Weather Event (Filed on Feb. 22)
- 51830 – Review of Wholesale-Indexed Products for Compliance with Customer Protection Rules for Retail Electric Service (Filed on Feb. 23)
- 51838 – Petition for Emergency Relief of Freepoint Commodities LLC for Waiver of ERCOT Nodal Protocols (Filed on Feb. 25)
- 51839 – Electric-Gas Coordination (Filed on Feb. 26)
- 51840 – Rulemaking to Establish Weatherization Standards (Filed on Feb. 26)
- 51841 – Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans (Filed on Feb. 26)
- 51871 – Review of the ERCOT Scarcity Pricing Mechanism (Filed on Mar. 5)
- 51888 – Review of Critical Load Standards and Processes (Filed on Mar. 10)
- 51889 – Review of Communication for the Electric Market (Filed on Mar. 10)

At the PUC's March 12, 2021 Open Meeting, Deputy Executive Director Connie Corona explained the eight major categories that will form the "road map" for the Commission moving forward:

1. **Generation Weatherization and Emergency Operations.** Led by the PUC's Infrastructure Division, the review will include an examination of weatherization and emergency operations standards for power generation facilities as well as the content and processes for review and certification of emergency operations plans.
2. **Essential Generation Load.** Also guided by the Infrastructure Division, this effort will seek to establish standards and processes to protect load that provides an essential service to electric generation and weigh the necessity of additional generation resiliency measures.
3. **Essential Customer Load and Load Shed.** In this project, the agency's Market Analysis Division will examine the standards and processes related to critical customer load and procedures related to emergency load shed.
4. **ERCOT Operations.** The Market Analysis Division will also lead this review of ERCOT's forecasting and planning processes with the goal of establishing standards for

ERCOT designation of emergency conditions.

5. **Communications and Governance.** The Executive Director's office will lead a review of communications standards and expectations among utilities, ERCOT, the Commission, and the public with an eye to identifying improvements for Commission communications to the Legislature and the public. The effort is also intended to identify potential improvements to ERCOT governance structure, bylaws, and stakeholder process.
6. **Market Settlements.** The Market Analysis Division will also examine ERCOT settlements and market uplift processes.
7. **Wholesale Market Design.** The Market Analysis Division will review and identify potential improvements to the rules and protocols of the ERCOT wholesale electric market, with an emphasis on how energy and ancillary services are priced.
8. **Retail Market Design.** The PUC's Customer Protection Division will lead a review of the Commission's customer protection rules, with emphasis on disclosures for certain electric product types and potential customer protections specific to emergency conditions.

The testimony and memoranda that will be filed to address these categories can be found in the projects listed above.

ERCOT Board Members Resign, Terminate CEO. On February 23, four Unaffiliated Directors resigned from the Electric Reliability Council of Texas, Inc. ("ERCOT"), including Sally Talberg, Board Chair; Peter Cramton, Board Vice Chair; Terry Bulger, Finance and Audit Committee Chair; and Raymond Hepper, Human Resources and Governance Committee Chair. In addition, Craig Ivey, who had applied for the sole prior Unaffiliated Director vacancy on the Board, withdrew as an Unaffiliated Director candidate. All five members resided out of state.

Governor Greg Abbott welcomed the resignations, issuing a statement the same day. The Governor said, "When Texans were in desperate need of electricity, ERCOT failed to do its job and Texans were left shivering in their homes without power. ERCOT leadership made assurances that Texas' power infrastructure was prepared for the winter storm, but those assurances proved to be devastatingly false. The lack of preparedness and transparency at ERCOT is unacceptable, and I welcome these resignations. The State of Texas will continue to investigate ERCOT and uncover the full picture of what went wrong, and we will ensure that the disastrous events of last week are never repeated."

Since then, four additional board members have resigned, including Vanessa Anesetti-Parra, IREP Market Segment Director, who also lives out of state; Randal Miller, IREP Segment Alternate; Clifton Karnei, Cooperative Market Segment Director; and Jackie Sargent, Municipal Market Segment Director and General Manager of Austin Energy.

In addition to the multiple Board resignations, the ERCOT Board voted on March 3, 2021 to terminate the employment of ERCOT CEO Bill Magness, effective May 3, 2021.

ERCOT filed a notice with the PUC on March 10, 2021 in Docket No. 51878, informing the Commission of the vacancies and describing the processes (pursuant to PURA, Commission rules, and ERCOT governing documents) by which the different types of Board members must be replaced, including Market Segment Directors, *ex officio* Directors, and Unaffiliated Directors. The notice also informed the Commission that due to the current Board composition, ERCOT is not able to fulfill certain statutory, regulatory and governing document requirements, some for an immediate time and some possibly for an indefinite time.

PUC Hires Director of ERCOT Accountability. On March 11, 2021, the PUC named Adrianne Brandt the agency's new Director of ERCOT Accountability, and hired Brad Jones, former ERCOT COO, to assist her. Brandt was an Army intelligence analyst, and also held analyst roles at Dell, the PUC, Austin Energy and CPS Energy. The pair is charged with enhancing the PUC's oversight of ERCOT, the grid operator and market manager.

Oncor Makes Compliance Filings. Pursuant to the PUC's orders in Docket No. 47675, Oncor filed its 2020 Annual Compliance Report and its March 2021 Semi-Annual Interest-Rate Savings Report on March 9, 2021. In Docket No. 47675, the PUC approved a transaction in which Sempra Energy acquired an 80.03% interest in Oncor indirectly held by Energy Future Holdings Corp. The Revised Stipulation Agreement entered into by Oncor, Sempra Energy, Commission Staff, and all the intervening parties in the proceeding required Oncor to file annual reports regarding its compliance with certain regulatory commitments, and detailing any interest rate savings and determining a calculation of the credit. The two filings made by Oncor on March 9, 2021 fulfill the company's requirements. The filings can be found in Docket Nos. 48119 and 51881.

TUSF Update. As we have previously reported, the PUC has authority under PURA § 56.023(p) and (r) and 16 Texas Administrative Code ("TAC") § 26.409 to determine whether TUSF support should be eliminated for certain recipients. PUC Staff has been reviewing several eligible telecommunications providers ("ETPs") as to whether their TUSF support should be eliminated, applying the following criteria: (1) the total number of access lines in the exchange served by competitive ETPs receiving TUSF support; (2) the number of competitors providing comparable service in the exchange; and (3) whether continuing the TUSF support is in the public interest.

In Docket Nos. 51281 and 51283, PUC Staff initially recommended eliminating TUSF funding for the Falfurrias Wire Center and Lyford Wire Center, respectively, but the Administrative Law Judge requested briefing on whether the PUC only has jurisdiction to review these wire centers. After the PUC Staff briefed this issue, the ALJ ruled that (1) the review required by 16 TAC § 26.409(d) is a preliminary step that is necessary to determine whether an exchange is eligible for review under PURA §56.023(r); but that (2) under PURA § 56.023(r), the PUC only has authority to review

and take action if the per-line TUSF support in an exchange is identified as eligible for review and there is an ETP within the exchange that is receiving support for the remaining lines. As such, the ALJ ruled that the PUC does not have authority to act on Staff's application for review. Staff has recently withdrawn its applications in both of these dockets.

In the remaining dockets, the PUC has issued a proposed order in Docket No. 51282 discontinuing TUSF funding for Jackson 04T Wire Center. In Docket Nos. 51284 (McDade Wire Center), 51285 (Paige Wire Center), 51287 (Telephone Wire Center), and 51288 (Wallis Wire Center), the PUC has issued proposed orders continuing TUSF funding for those ETPs. In Docket No. 51286 (Santa Rosa Wire Center), the PUC received information from VTX Communications, LLC that, due to new information, the number of access lines in this wire center has not decreased at least 505% since 2016. The ALJ has asked for a supplemental recommendation from Staff or a withdrawal of the application by April 12. Docket No. 51289 has remained still since Staff made a recommendation in November 2020 to discontinue TUSF funding. Most, if not all, of these dockets will be finalized in April.

PUC Issues Proposed Order on Remand of CPS Energy against AT&T Texas and Time Warner Cable. In February, the PUC finally issued a Proposed Order on Remand of Docket No. 36633 (Petition of CPS Energy for Enforcement against AT&T Texas and Time Warner Cable Regarding Pole Attachments). This Order on Remand will supersede the PUC's February 1, 2013 Order on Rehearing in Docket No. 36633 in accordance with the Final Judgment on Remand entered on March 13, 2020 by the District Court of Travis County, Texas, 250th Judicial District in Cause No. D-1-GN-13-001238.

The Proposed Order draws on the Order on Rehearing from 2013 and revises it to comport with the rulings of the Travis County District Court, the Third Court of Appeals, and the Supreme Court of Texas. The Final Judgment on Remand issued by the Travis County District Court found the following:

1. The PUC's conclusion that it has jurisdiction to review and modify each input of a municipally owned utility, including defaults and rebuttable presumptions, used to calculate the maximum pole attachment rate, is affirmed.
2. The PUC's findings and conclusions that the Federal Communication Commission's ("FCC's") default rate of return was the appropriate input for test years 2005 through 2009 (billing years 2006 through 2010) is affirmed.
3. The PUC's decision adopting a rate of return other than the FCC's default rate of return of 11.25% for test year 2004 (billing year 2005) is reversed.
4. The PUC's conclusion that Section 54.204(b) of PURA applies to this proceeding is affirmed.
5. The PUC's decision using an average of three attaching entities in its calculation of the pole attachment rate for test years 2004 through 2009 (billing years 2005 through 2010) rather than the FCC's rebuttable presumption of five attaching entities is affirmed.
6. The PUC's conclusion that CPS Energy violated Section 54.204(b) of PURA because it offered different rates and terms to AT&T and TWC from September 7, 2005 through 2010 is affirmed.
7. The PUC's conclusion that CPS Energy violated Section 54.204(c) of PURA after December 31, 2006 is reversed.
8. The PUC lacked jurisdiction to make determinations regarding the existence of, or PURA's effect on, disputed private pole attachment agreements, or whether there was a breach of contract. The PUC also lacked jurisdiction to determine whether discrimination under PURA necessarily caused harm. The PUC's findings of fact and conclusions of law regarding these issues are reversed. These findings and conclusions, including the narrative portions of the order upon which such findings and conclusions are based, are unnecessary to the PUC's order. Their absence does not affect the order, and they shall be deleted.
9. The PUC's Order on Rehearing in Docket No. 36633 is otherwise affirmed.

The Proposed Order is lengthy in its discussions of the procedural history and the remaining issues for review. CPS Energy filed exceptions to the Proposed Order, stating that it finds the Proposed Order substantively correct but asking that the PUC add more language regarding the Travis County District Court's 2020 Final Judgment. The PUC's advising office issued a memorandum stating that it would not make any of CPS's proposed changes. The PUC was supposed to take up the Proposed Order at the March 18 Open Meeting, but the meeting was cancelled.

Railroad Commission of Texas ("RRC")

TGS and CenterPoint Gas Make GRIP Filings. On February 11, 2021, Texas Gas Service Company made an Interim Rate Adjustment or "GRIP" filing with the RRC for its customers within the Central-Gulf Coast Service Area. The Company is seeking recovery of $89,645,970 in invested capital. This translates into an annual rate increase of $10,714,728 on a system-wide basis. The current filing will increase rates to residential customers by $2.38 per month. This will increase the current residential customer charge from $16.00 to $18.38 per month. The increase is currently scheduled to go into effect for meter reads beginning on April 12, 2021.

On March 4, 2021, CenterPoint Gas made Interim Rate Adjustment or "GRIP" filings with the RRC for its customers within the Houston, Texas Coast, South Texas, and East Texas Divisions. Increases in all divisions are scheduled to go into effect on May 3, 2021.

- For cities in the Houston Division, the Company is seeking recovery of $153,689,801 in invested capital. The current filing will increase rates to residential customers by $.99 per month. This will increase the current residential customer charge from $17.39 to $18.38 per month.
- For cities in the Texas Coast Division, the Company is

seeking recovery of $45,065,113 in invested capital. The current filing will increase rates to residential customers by $.88 per month. This will increase the current residential customer charge from $17.77 to $18.65 per month.

- For cities in the South Texas Division, the Company is seeking recovery of $44,723,636 in invested capital. The current filing will increase rates to residential customers by $2.33 per month. This will increase the current residential customer charge from $22.59 to $24.92 per month.
- For cities in the East Texas Division, the Company is seeking recovery of $44,335,398 in invested capital. The current filing will increase rates to residential customers by $2.39 per month. This will increase the current residential customer charge from $18.00 to $20.39 per month.

Winter Storm Spurs RRC Action. The RRC took action during the February winter storm by issuing an Emergency Order modifying its curtailment priority order. The RRC said its "Emergency Order is necessary to protect human needs customers" around the state and that the "existing regulations and Orders of the Commission do not sufficiently address the specific conditions of this emergency." The Emergency Order modified the priority one category to include Local Distribution Companies (LDCs) which serve human needs customers, in addition to residences, hospitals, schools, churches and other human needs customers. The Emergency Order also changed the priority two category to include electric generation facilities which serve human needs customers. The modified curtailment priority list was in effect from February 12 to February 19.

The RRC also gave notice to Local Distribution Companies, authorizing them to record in a regulatory asset account any and all "extraordinary expenses" related to securing natural gas during the winter weather event, including the cost of gas and transportation of gas supply. Due to demand for natural gas, LDCs had to pay extraordinarily high prices in the market for natural gas and may be subjected to other high expenses as a result. The LDCs will be able to seek future recovery of those expenses in order to partially reduce the rate impact on customers.

Atmos Makes GRIP Filings. On February 26, Atmos Energy Corporation, Mid-Tex Division made an Interim Rate Adjustment or "GRIP" filing with the RRC for its customers within the Atmos Texas Municipalities Coalition ("ATM Cities"). The Company is seeking recovery of the difference between the values of invested capital for the Mid-Tex Division's system as of December 31, 2020 and the value of the invested capital for the Mid-Tex Division's system as of December 31, 2019. The current filing will increase rates to residential customers by $4.55 per month. This will increase the current residential customer charge from $26.45 to $31.00 per month. The increase is currently scheduled to go into effect for meter reads beginning on April 27.

On February 26, Atmos Energy Corporation, West Texas Division's Environs made an Interim Rate Adjustment or "GRIP" filing with the RRC for its customers within the unincorporated areas served by Atmos's West Texas Division. The Company is seeking recovery of additional capital investment incurred from January 1, 2020 through December 31, 2020. The current filing will increase rates to residential customers by $3.34 per month. This will increase the current residential customer charge from $21.46 to $24.80 per month. The increase is currently scheduled to go into effect for meter reads beginning on April 27.

On February 26, Atmos Energy Corporation, West Texas Division's Triangle Distribution System made an Interim Rate Adjustment or "GRIP" filing with the RRC for its customers within the City of Hereford and the City of Lubbock. The Company is seeking recovery of additional capital investment incurred from April 1, 2019 through December 31, 2020. The current filing will increase rates by $0.02464 per month. This will increase the current City Gate / Transportation Service charge from $0.38152 per MMBtu to $0.40616 per MMBtu per month. The increase is currently scheduled to go into effect for meter reads beginning on April 27.

On February 12, Atmos Energy Corporation, Atmos Pipeline-Texas made an Interim Rate Adjustment or "GRIP" filing with RRC for its Rate CGS and Rate PT customers. The Company is seeking recovery of the difference between the value of the invested capital for the Atmos Pipeline's system as of December 31, 2020 and the value of the invested capital for Atmos Pipeline's system as of December 31, 2019. The current filing will increase rates to CGS – Mid-Tex customers and CGS – Other customers by $1.19325 per MMBtu of MDQ, and to Rate PT customers by $0.74745 per MMBtu of MDQ. The increase is currently scheduled to go into effect for meter reads beginning on April 13, 2021.

Atmos Makes Third Rider DARR Filing. On January 15, 2021, Atmos Energy Corporation, Mid-Tex Division submitted with the RRC its third filing under the current Rider DARR – Dallas Annual Rate Review Mechanism tariff. The DARR filing represents a requested increase in annual revenue of $17.0 million for the City of Dallas, which represents a monthly increase of 8.16%, or $5.09, for the average residential customer.

"Agency Highlights" *is prepared by Lauren Thomas in the Firm's Water Practice Group; Sam Ballard in the Firm's Air and Waste Practice Group; and Taylor Denison in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these agencies or other matters, please contact Lauren at 512.322.5850 or lthomas@lglawfirm.com, Sam at 512.322.5825 or sballard@lglawfirm.com, or Taylor at 512.322.5874 or tdenison@lglawfirm.com.*

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