



THE LONE STAR CURRENT

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

PREVIEW OF THE REGULAR SESSION OF THE 88TH TEXAS LEGISLATURE

by Ty H. Embrey and Madison L. Huerta

On January 10, 2023, newly elected State Representatives and State Senators from across Texas will travel to Austin and gavel-in to kick off the 88th Texas Legislature. While this has been the practice of our state's elected leaders since 1846, every legislative session brings new challenges. This year is no different. On the heels of a Regular Session in 2021 defined by the COVID-19 pandemic and Winter Storm Uri, Texans have high expectations for lawmakers as they return for what we all hope will be a more "regular" Regular Session.

The make-up of the Texas Legislature did not change significantly after a general election with few surprises. Republicans have a majority in both the Texas House of Representatives (86–64) and the Texas Senate (19–12) and hold each statewide office. The statewide officers elected to a four-year term in November 2022 are:

- Governor – Greg Abbott
- Lieutenant Governor – Dan Patrick
- Attorney General – Ken Paxton
- Comptroller – Glenn Hegar
- Land Commissioner – Dawn Buckingham
- Agriculture Commissioner – Sid Miller
- Railroad Commissioner – Wayne Christian

With Governor Abbott and Lieutenant Governor Patrick, the complete leadership for the Legislature will be established upon

election of the Speaker of the Texas House of Representatives. Incumbent Speaker, Republican Dade Phelan of Beaumont, is running for the Speaker position again and will face at least one challenger in the race for Speaker, Republican State Representative Tony Tinderholt. State Representative Tinderholt has stated he is running to end the traditional practice of Speakers appointing members from both parties to serve as chairpersons of House committees. The Speaker will be elected by Members of the Texas House of Representatives on the first day of session.

Legislative Priorities

While we wait for our newly elected leaders to be sworn in, Governor Abbott and Republican leadership have already expressed their intent to prioritize issues familiar to Texans such as school choice, abortion, and border security. The Legislature will also face the pressing issues of the state of the electric grid in the aftermath of Winter Storm Uri. During the 2021 Regular Session, the Legislature passed Senate Bill 2 and Senate Bill 3 aimed at improving the power grid and restructuring the grid's overseeing agency – the Electric Reliability Council of Texas or ERCOT. Over the legislative interim period, both House and Senate Committees have received status updates from the Public Utility Commission ("PUC") and ERCOT. While agency leaders assure lawmakers that the grid is equipped to handle high demand, there is a continued debate as to how much reserve capacity the state

should have on hand and who should pay for it. This is part of the broader ongoing discussion of redesigning the Texas electric market.

Another main focus of legislators this Regular Session will be how to spend the state's budget and unprecedented budget surplus. In total, it is estimated lawmakers will have \$149.07 billion in general funds which is higher than the \$112.5 billion lawmakers had available to work with during the previous legislative session. This is in addition to the \$13.6 billion Texas has in its savings account, known as the Economic Stabilization Fund or "rainy day" fund. In addition to its general funds and the rainy day fund, Comptroller Glenn Hegar has estimated Texas will have an unprecedented \$27 billion budget surplus

88th Legislature continued on page 4

IN THIS ISSUE

Firm News	p. 2
Municipal Corner	p. 3
Electric Market Redesign Efforts Continue at PUC and ERCOT	
<i>Roslyn M. Dubberstein</i>	p. 5
Ask Sarah	
<i>Sarah T. Glaser and Jessica A. Maynard</i>	p. 6
In the Courts	p. 7
Agency Highlights	p. 9
Listen in with Lloyd Gosselink	p.13



THE LONE STAR CURRENT

Published by
Lloyd Gosselink

Rochelle & Townsend, P.C.

816 Congress Avenue, Suite 1900

Austin, Texas 78701

512.322.5800 p

512.472.0532 f

lglawfirm.com

.....
Sara R. Thornton

Managing Editor

sthorton@lglawfirm.com

Jeanne A. Rials

Project Editor

All written materials in this newsletter

Copyrighted ©2023 by Lloyd Gosselink

Rochelle & Townsend, P.C.

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

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

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

To receive an electronic version of The Lone Star Current via e-mail, please contact Jeanne Rials at 512.322.5833 or jrials@lglawfirm.com. You can also access The Lone Star Current on the Firm's website at www.lglawfirm.com.



FIRM NEWS



We are at once happy and sad to announce the retirement of **Lambeth Townsend**. He has been an outstanding addition to our firm for more than 34 years and a true inspiration for all of us. His contributions were integral to our success and continuity. It is difficult if not impossible to summarize Lambeth's achievements over this time, but it is important to highlight some accomplishments.

In 1989, Lambeth was recruited to join Lloyd Gosselink during its early years as a boutique environmental law firm. He spearheaded the creation and served as the original leader of the Energy and Utilities Practice Group ("EUPG"). This allowed him to bring and share his expertise in Utility Law to provide more services to our clients. During his many years as the head of the evolving EUPG, he represented municipally-owned utilities, electric cooperatives, and water and wastewater utilities in all aspects of their business and regulation. Before joining the firm, Lambeth was General Counsel for the PUC of Texas (1987-1989) and Assistant Attorney General for the State of Texas (1977-1984) where he worked in the Energy Division and the Environmental Protection Division. He was indispensable in shaping Lloyd Gosselink into the firm it is today and for that, we will be forever grateful.

It is no secret that Lambeth is an avid globetrotter and after retirement, he is looking forward to spending more time traveling the world with his family. He has already visited many continents, but

still aims to explore Australia and Asia. He plans to check off a few of the *1000 Places to See Before You Die*, and we are excited to see him achieve this dream.

On behalf of everyone at Lloyd Gosselink, we would like to wish Lambeth the best of luck in retirement and many new adventures in the coming years.



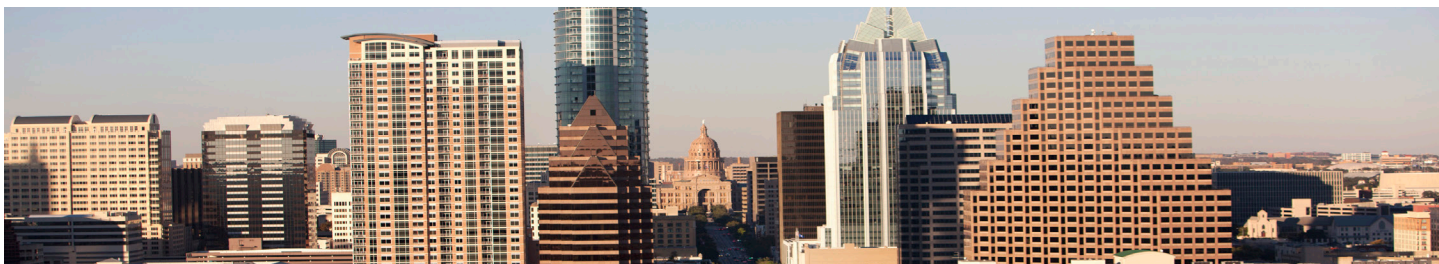
With mixed emotions, we announce the retirement of **Sheila Gladstone**. Sheila practiced employment law for 35 years, and about 15 years ago, she joined Lloyd Gosselink to start up and chair our Employment Law Practice Group. Sheila has been devoted to her clients and will miss helping them navigate a myriad of interesting employment issues. In 2022, she was awarded outstanding achievement awards from the Travis County Women Lawyer's Association and the Texas Probation Association. She is confident her partner, Sarah Glaser, will continue her legacy in the leadership of the Employment Law Practice Group and excellent and engaged representation of its clients.

As Sheila enters this next stage of life, she looks forward to finishing the remodel of her and her husband Stephan's "empty nester" home in Austin's Hyde Park, getting a dog, learning French, traveling, and being able to grocery shop on weekdays when it's not so crowded. She'll still be available as needed in 2023 to help with the transition.

News continued on page 13



MUNICIPAL CORNER



A commissioners court possesses implied authority to utilize recycling programs for discarding routine county waste. Tex. Att’y Gen. Op. No. KP-420 (2022).

The Cherokee County Attorney requested a Texas Attorney General Opinion regarding the authority of a county to dispose of salvage property, specifically old culverts, under section 263.152 of the Local Government Code. The Attorney General determined that whether culverts are considered routinely discarded waste is a fact question that cannot be resolved in an Attorney General opinion. However, the opinion provides general guidance regarding a county’s legal authority to dispose of property.

The opinion advises that a commissioners court has implied authority to utilize recycling programs in disposing of routinely discarded county waste. More specifically, Section 263.152 of the Local Government Code authorizes a county to periodically sell the county’s surplus or salvage property by competitive bid or auction. If a county attempts to sell salvage property by competitive bidding or auction but receives no bids, then the county may dispose of the property through certain recycling programs. Notably, a county is not precluded from utilizing recycling programs in circumstances that are not specified in the statute.

Further, the opinion provides that Chapter 263 of the Local Government Code does not expressly govern a commissioners court’s authority to dispose of a county’s routinely discarded waste, nor does any other statute. Instead, the Texas Legislature tasked commissioners courts with certain duties and responsibilities with respect to landfills and other solid waste disposal in the county. Based on this authority, to the extent necessary

to accomplish its assigned duties, a commissioners court possesses implied authority to utilize recycling programs for the disposition of routinely discarded county waste, subject to other applicable law.

Machine-generation methods of numbering ballots may comply with Texas Election Code. Tex. Att’y Gen. Op. No. KP-422 (2022).

The Honorable Matthew A. Mills, Hood County Attorney requested a Texas Attorney General opinion regarding the procedure for numbering election ballots and a commissioners court’s authority to mandate a voting system to an elections administrator. In light of recently purchased new voting equipment from Hart InterCivic, Inc., Hood County sought guidance as to (1) whether the machine-generation method of numbering ballots complies with the Texas Election Code, (2) which officials are authorized to select the method for numbering ballots, and (3) whether a jurisdiction using a voting system for an election may number split ballot batches in certain instances.

The opinion advises that the machine-generation method of numbering ballots complies with Section 52.062 of the Election Code. Chapter 52 of the Election Code expressly authorizes the Secretary of State to “prescribe the form and content of a ballot for an election using a voting system, including a voting system that uses direct recording electronic voting machines or ballot marking devices, to conform to the formatting requirements of the system.” Because the statute’s wording does not require nor rule out any particular method of printing numbers on a ballot, a machine-generation method of numbering ballots does not contradict Chapter 52.

Further, under the Election Code, a commissioners court has the authority to adopt a particular voting system and the elections administrator has the duty of preparing ballots. The county clerk is typically responsible for preparing the official ballot when an election is ordered. However, in Hood County, the election administrator performs the duties and functions of the county clerk. Therefore, it is the elections administrator’s responsibility to prepare the official ballot, including selecting the ballot numbering method. Because the statutes do not vest ballot-preparation or supervisory authority in any other entity, the elections administrator has sole authority to select the numbering method.

Finally, the Attorney General determined that whether a jurisdiction using a voting system may number split ballot batches is a fact question beyond the scope of the opinion. However, the opinion notes that, pursuant to Section 52.075 of the Election Code, there must be a connection between any ballot form or content modification and the formatting requirements of the voting system.

Texas Attorney General determines what services a notary public may provide and the fees a notary public may charge under state law. Tex. Att’y Gen. Op. No. KP-423 (2022).

State Representative Briscoe Cain requested a Texas Attorney General Opinion pertaining to the online notarization process. In response, the Attorney General advises (1) the law does not prohibit a notary public performing an online notarization from including additional information, (2) a notary public may charge a \$5.00 fee for identification verification and document storage, and (3) a notary public must obtain the consent

of the person whose identity is being established before releasing a record of an online notarization.

The law does not prohibit a notary public performing an online notarization from including additional information as long as it does not interfere with the notary's obligations under Subsections 406.108(b)(1) and 406.109(d) of the Government Code or the Texas Secretary of State's rules. Therefore, in addition to an electronic seal, a notary performing an online notarization may add information such as a barcode used to identify a document within the notary's storage.

Additionally, an online notary may charge \$5.00 for identification verification and document storage pursuant to Section 406.111 of the Government Code if the fee would not cause the \$25.00 maximum fee for online notarization to be exceeded. However, the opinion advises, a court is unlikely to conclude that a catch-all fee in Subsection 406.024(a)(11) for "notarial acts not provided for" was intended to encompass components of the online notarization process such as identify verification and document storage.

Lastly, the opinion advises that any release of an audio visual recording containing the presentation of an identification card

or credential would require the removal of biometric information as well as the entire image of the identification card or credential. If not, a notary public must obtain the consent of the person whose identity is being established before releasing a record of an online notarization containing those items, whether by secure email or otherwise.

Madison Huerta is an Associate in the Firm's Governmental Relations, Water, and Districts Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Madison at 512.322.5825 or mhuerta@lglawfirm.com.

88th Legislature continued from page 1

generated from oil and gas production taxes collected by the state, among other sources.

Both Governor Abbott and Lieutenant Governor Patrick have stated the budget surplus should be allocated in some form towards continuing to lower property taxes. Incumbent Speaker Phelan has stated he believes the budget windfall represents an opportunity to significantly upgrade the state's aging and increasingly inadequate infrastructure. Comptroller Hegar has recommended using the surplus to fund water infrastructure, road infrastructure, and broadband internet connectivity. State agencies struggling with retaining employees, such as the Texas Commission on Environmental Quality ("TCEQ") and PUC, intend to ask the Legislature to allocate some of this surplus to increase salaries for employees. Regardless of where the surplus is allocated, one thing is certain: the Legislature will have tough decisions to make during the budget process.

Environmental Issues

Over the interim period, committees in both the Texas House of Representatives and Texas Senate held hearings to discuss water, wastewater, and utility issues around Texas. These committees include the Senate Committee on Water, Agriculture, and Rural Affairs and the Senate Committee on Natural Resources and Economic Development, as well as the House Committee on Natural Resources and the House Committee on Environmental Regulation. Each committee heard expert and public testimony on issues related to water utility infrastructure, water supply sources, groundwater management and protection, state and regional flood planning, and polluted well site cleanup, among other water and wastewater issues. During the Regular Session, we can expect the committees to continue these conversations and legislators to file legislation to address these issues. Additionally, the Texas Legislature is focused on how to position Texas to secure federal infrastructure funds to help address outdated and eroding infrastructure.

Texas Sunset Commission Recommendations

This Regular Session is an important session for agencies that regulate environmental and utility matters, such as TCEQ,

PUC, and ERCOT. These state agencies are up for review by the Texas Sunset Advisory Commission (the "Commission"). The Commission – made up of five State Senators, five State Representatives, and two members of the public – is tasked with reviewing state agencies and programs and recommending if the state agencies should continue to exist and what improvements should be made to the agencies. Ultimately, the Commission determined TCEQ, PUC, and ERCOT should continue to operate and recommended both amendments to Texas statute and directives for better agency management.

Due to the changing dynamics of the state's electric grid and industry, the Commission's recommendations for PUC focus on its operational needs rather than market design. The Commission determined PUC is "woefully under-resourced given its critical responsibilities and work," and needs additional funding to support its data analytics team and additional engineering expertise. Regarding TCEQ, the Commission made recommendations focused on (1) implementing transparent policies and procedures, (2) monitoring and enforcement, (3) protecting the state's scarce natural resources, and (4) effectively representing the public interest.

To increase transparency and accessibility, the Commission recommended TCEQ post all permit applications and materials on its website; develop Spanish language versions of its online complaint form; and hold virtual public meetings as needed. The Commission also recommended TCEQ develop a guidance document regarding who is considered an "affected person" and hold a public vote on what is an acceptable level of health-based risk factors to use in developing toxicity factors.

On the monitoring and enforcement front, the Commission recommended increasing administrative penalties for all violations with a current cap of \$25,000 to \$40,000, updating the compliance history rating formula, and reclassifying recordkeeping violations based on potential risk and severity. The Commission also recommended giving TCEQ authority to suspend facility compliance history ratings under exigent circumstances. Additionally, to allow for alternative ways to address enforcement issues, the Commission recommended TCEQ create a program

for qualifying facilities to receive training instead of enforcement actions for minor violations.

Other notable recommendations include requiring entities with temporary or open-ended permits to confirm their operations status annually, evaluating use of advisory committees to provide more public involvement, and modifying the nuisance complaint approach to better use investigative resources.

Lloyd Gosselink at the Legislature

Over 1,500 bills have been filed since bill filing began on Monday, November 14, 2022, setting up the framework for what promises to be a busy legislative session. As bills are filed, Lloyd Gosselink will continue to monitor and track all of the key pieces of legislation. During the Regular Session, Lloyd Gosselink will

participate in the legislative process to ensure the interests of our clients are represented at the Texas Legislature.

More than 175 years later, the Regular Session for the Texas Legislature still provides an opportunity for Texans across the state to participate in the lawmaking process. Lloyd Gosselink is proud to be a part of that process.

Ty Embrey is Chair of the Firm's Governmental Relations Practice Group and a member of the Firm's Water, Districts, and Air and Waste Practice Groups. Madison Huerta is an Associate in the Firm's Governmental Relations, Water, and Districts Practice Groups. If you have any questions concerning Legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com, or Madison at 512.322.5825 or mhuerta@lglawfirm.com.

ELECTRIC MARKET REDESIGN EFFORTS CONTINUE AT PUC AND ERCOT

by Roslyn M. Dubberstein

Background

Since Winter Storm Uri in February 2021, the Public Utility Commission of Texas ("PUC") and Texas's independent system operator, the Electric Reliability Council of Texas ("ERCOT"), have been laser-focused on evaluating and implementing reforms to the Texas electricity market. ERCOT is regulated by PUC and the Texas Legislature to oversee the power grid, which entails maintaining system reliability and facilitating competitive retail and wholesale markets. In addition to agency attention, numerous stakeholders and legislators are focusing on the future of the market. The proposals being thrown into the ring will have immense impacts on costs and reliability—these developments are crucial for ratepayer pocketbooks and Texas's ability to keep the lights on.

The Texas electric market operates as an energy-only market, which means that power providers are paid for their actual production of electricity. This differs from a capacity market wherein power providers are paid simply to build and own generation. In the Texas energy-only market, buyers, such as Retail Electric Providers, contract with generators for a long-term supply of electricity at a fixed price. Given the operational difficulty during Winter Storm Uri, the Texas Legislature passed Senate Bill 3, an omnibus energy reform bill, during the 87th Legislative Session. As a result of the Legislature's directives,

PUC opened a docket in summer 2021 to review wholesale electric market design (Docket No. 52373). PUC broke the market redesign process out into two separate phases. Phase I focused on reliability reforms, such as establishing a firm fuel product and modifying the Operating Reserve Demand Curve.

Current Phase II Developments

As part of Phase II, PUC contracted with San-Francisco-based energy consulting firm Energy and Environmental Economics, Inc. ("E3") to provide consulting services related to market redesign and reliability. On November 10, 2022, after six months of analysis and collaboration with PUC, E3 issued a final report proposing several market structures and ultimately recommending one specific structure—the Forward Reliability Market ("FRM") design. The key component in providing multiple design options was to analyze each structure's ability to provide dispatchable generation during extreme weather events.

The FRM design is a forward-looking model built to allocate "reliability credits" to generators based on a generator's ability to serve load during an anticipated period of high reliability risk. Based on this forecast, ERCOT would determine the number of reliability credits necessary to sustain reliability during no more than one system-wide outage event per decade. The FRM design would cost approximately

\$460 million annually and would result in an additional 5,630 MW of natural gas capacity on the market.

PUC Chairman Peter Lake disagrees with the E3 Report recommendation and instead promotes another model from the Report—the Performance Credit Mechanism ("PCM"). The PCM model would hold a "retroactive settlement process" at the end of an established compliance period and would reward generators with "performance credits" based on the generator's performance during the periods of highest reliability risk in the preceding compliance period. Compared to a predictive model like the FRM design, the PCM would be based on proven generator capacity and performance. The PCM is also projected to cost around \$460 million annually and result in an additional 5,630 MW of natural gas capacity on the market. As of mid-December, it had not been confirmed whether the other four PUC commissioners agree with Chairman Lake's preference for the PCM.

Legislative & Stakeholder Assessment of E3 Report

Notably, the E3 Report has received immense skepticism from lawmakers. Both the Senate Business and Commerce Committee and the House State Affairs Committee held hearings after issuance of the E3 Report. Several members of both committees expressed concern that the E3

Report failed to incorporate the February 2021 freeze in the study. Chairman Schwertner of the Senate Business and Commerce Committee emphasized that none of the proposals require generators to invest in new dispatchable generation, which could be incongruent with the Legislature's directives to procure ancillary or reliability services on a competitive basis. Particularly important are the impacts the proposals in the E3 Report could have on the nature of the Texas market—the PCM or the FRM design would both create a capacity market, which is likely to impose disproportionate costs on consumers.

Several industry stakeholders testified during the November and December hearings and echoed the legislators' doubts. Carrie Bivens, the Independent Market Monitor for the ERCOT market, pointed out that the E3 Report overstates

the amount of thermal generation that may need to be replaced in the next four years. Katie Coleman, representative for the Texas Association of Manufacturers, testified that the PCM could far exceed \$460 million annually, and could instead top \$5 billion annually. Cathy Webking, General Counsel for the Texas Association of Marketers, refuted Chairman Lake's estimate that the PCM would take two to three years to implement. Rather, Ms. Webking noted that the PCM model seems to assume certain ERCOT systems are operational when in fact they are years away from completion.

Interplay with Sunset Review

Phase II of the market redesign process is coinciding with the Sunset Commission's review of PUC, ERCOT, and the Office of Public Utility Counsel ("OPUC"). Sunset Staff issued a report in mid-November finding that "PUC is woefully under-

resourced given its critical responsibilities" and emphasizing the need for clearer directives between PUC and ERCOT. The Sunset Commission, made up of members from the Texas Senate and House of Representatives and a few members of the public, held a hearing on December 7, 2022, wherein Commission members pressed testifying witnesses on the best means for improving PUC—particularly with regard to the agency's relationship with ERCOT. Needless to say, market redesign, PUC, and ERCOT will be key areas of focus during the 88th Legislative Session, which commences on January 10, 2023.

Roslyn Dubberstein is an Associate in the Firm's Energy and Utility Practice Group. If you have any questions or would like additional information related to this article or other matters, please contact Roslyn at 512.322.5802 or rdubberstein@lglawfirm.com.



ASK SARAH

Dear Sarah,

We recently had a holiday party where an employee exhibited some bad behaviors, and we are concerned about our employees' safety during other off-duty events in the future. We have a policy against harassment in the workplace, but we are not sure if that policy also applies to other off-duty events like conferences. Does the anti-harassment policy apply to bad behavior at holiday parties and other off-duty events, and how should we address and respond to these issues in the future?

*Sincerely,
To Party or Not to Party*

Dear To Party or Not to Party,

Holiday parties and other employer-sponsored events are an extension of the workplace, and employers are responsible for employee behaviors at these events. Therefore, your anti-harassment policies and other employee conduct policies apply during these events. If an employee exhibits bad behavior (such as harassment, bullying, or intoxication), you should address the employee in accordance with your established policies and procedures. Texas law now requires immediate action upon receipt of a sexual harassment complaint, so you should begin addressing the complaint as soon as it is received.

Employer-sponsored parties and events are great for employee morale and engagement, but employers should follow best practices leading up to and during these events. Some best practices include limiting the event to a few hours with a clear end time, providing rides or ride credits for employees to

get home safely, reminding employees in writing of relevant employee conduct policies, limiting alcohol consumption, monitoring behaviors during the event, having a plan to address bad behavior, and planning non alcohol-related activities.

Employers can also be responsible for employee behavior at conferences and other work-related professional events. If you receive a complaint about an employee's behavior at a work-sponsored conference, you should investigate and respond appropriately. Additionally, many conference organizers create anti-harassment policies and/or standards of conduct for the conference that you should review with employees prior to attendance at the conference, as violation of those standards may impact an employee's ability to return the following year, among other consequences.

Finally, do not forget that off-duty harassment, either in person (i.e., at events outside the workplace that are not sponsored or controlled by the employer) or on social media, should be treated the same—immediate investigation and if necessary, appropriate corrective action. We assist employers with working through these issues, including conducting investigations and addressing the findings, so please call us if you need help with any aspect of addressing and responding to employee bad behavior.

"Ask Sarah" is prepared by Sarah Glaser, Chair of the Firm's Employment Law Practice Group, and Jessi Maynard, an Associate in 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 Sarah at 512.322.5881 or sglaser@lglawfirm.com, or Jessi at 512.322.5807 or jmaynard@lglawfirm.com.



IN THE COURTS



Water Cases

Tex. Comm'n on Env'tl. Quality v. Save Our Springs All., Inc., No. 08-20-00239-CV, 2022 WL 17659907 (Tex. App.—El Paso Dec. 13, 2022, no pet. h.).

This case involves an application for a Texas Pollution Discharge Elimination System permit. TCEQ issued the draft permit and after a hearing with Save our Springs Alliance, Inc. ("SOS"), the permit was issued. SOS challenged this decision in district court, claiming that TCEQ did not follow a proper antidegradation review, and the permit would allow a substantial increase in phosphorous and nitrogen which would result in a substantial decrease in water quality in the receiving waters.

An antidegradation review involves a nutrient screening to determine if the discharge will degrade the receiving waters, but there are no specific numeric standards for limiting certain nutrients. The standard instead looks at whether the amounts of nutrients in the discharge would lower the water quality in the receiving water or impact its existing uses. TCEQ approved of the draft permit under this standard, but the district court agreed with SOS, finding that TCEQ did not demonstrate enough supporting information to show that the water quality would not be substantially impacted. On appeal, the court found that TCEQ did rely on sufficient information, and that SOS was arguing for TCEQ to apply more stringent standards than were required but failed to show where TCEQ erred in applying the standards as written. The court further held that it was beyond their jurisdiction to require a more stringent standard, as that would amount to rewriting the existing standard.

City of Schertz v. Tex. Comm'n on Env'tl. Quality, 653 S.W.3d 468, (Tex. App.—Amarillo 2022, no pet.).

At issue in this case is whether regulations designating a regional sewer authority as the entity responsible for developing a regional sewage system reserve the entirety of the watershed for the authority's exclusive use. TCEQ issued an application authorizing a special utility district to build a wastewater treatment plant ("WWTP"), and a regional sewer authority challenged the issuance of this permit, arguing that the proposed WWTP would discharge in the Cibolo Creek regional area, defined as the area of the Cibolo Creek watershed that is "in the vicinity" of the named surrounding cities. In granting the permit, TCEQ found that while the discharge was in the Cibolo Creek watershed and the extraterritorial jurisdiction of the city, it was not in the vicinity of all of the cities listed in the definition of the regional area. Because TCEQ found no discharge within the regional area, it issued the permit.

The regional sewer authority appealed TCEQ's decision to grant the permit in district court, and the district court found for TCEQ. On appeal, the court again affirmed TCEQ's issuance of the permit, stating that TCEQ regionalization policies were not violated because the discharge was not "in the vicinity" of all of the named cities. The court based this decision on the fact that there was no existing WWTP within three miles of the proposed WWTP, no city had a WWTP in the area, and the proposed WWTP was more than five miles from an existing facility.

Litigation Cases

JDH Pac., Inc. v. Precision-Hayes Int'l, Inc., No. 14-21-00027-CV, 2021 WL 2656774, (Tex. App. June 29, 2021), review denied,

No. 21-1032, 2022 WL 15527766 (Tex. Oct. 28, 2022).

In *JDH Pacific, Inc. v. Precision-Hayes International, Inc.*, Texas Supreme Court Justice Evan Young, in a concurring opinion, determined that a ministerial error made at the trial court level should not result in a denial of jurisdiction where such a denial would prejudice the injured party.

In this case, Precision-Hayes International, Inc. ("PHI") sued JDH Pacific, Inc. ("JDH") for breach of contract. The case was originally filed in state court, but was removed to federal court where JDH successfully moved to compel arbitration. JDH then returned to state court seeking writs of garnishment from PHI's bank to facilitate its claim in having to compel arbitration. JDH contended to the Texas Supreme Court that it attempted to apply for its writs of garnishment through a "new and independent action," however the "new" application was filed under the same case number as PHI's previously removed action. PHI argued that this jurisdictional mistake of filing under a case that was removed to federal court, and had undisputedly not been remanded to state court, meant that the court lacked jurisdiction over JDH's application for writs of garnishment.

The Houston Court of Appeals concluded that the district court's order granting JDH's requested writs of garnishment was void for want of jurisdiction and dismissed the appeal for lack of jurisdiction. JDH sought review of that jurisdictional determination.

In a concurring opinion on denial for petition of review, Justice Young determined that if JDH's applications for writs of garnishment were misfiled in a wrong or unavailable docket number,

such a docketing error would not defeat jurisdiction on its own. In the words of the Justice Young: “[i]n short the age in which mere docketing errors carry fatal jurisdictional consequences has come to an end.” However, Justice Young determined that there was no irreparable harm that would prejudice JDH in the Court of Appeals decision, as JDH could simply refile in an unmistakably new docket number. Additionally, such action may be more appropriate after the presumably still pending arbitration was resolved.

Justice Young noted that, although the lack of prejudice makes this case an unsuitable vehicle for adding further clarity to our law, there may come another case in which such a jurisdictional mistake does prejudice a litigant and in which the underlying dispute is not bound up in the complexities of this case. In such a case, Justice Young noted that he would vote to grant the petition for review.

Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Water Irrigation Dist. No. 1, 627 S.W.3d 529 (Tex. App.—Corpus Christi—Edinburg 2021, pet. granted).

The Supreme Court of Texas recently granted review of *Hidalgo County Water Improvement District No. 3 v. Hidalgo County Water Irrigation District No. 1*. The Court will hear oral arguments in January 2023. The ultimate decision will determine whether court-created common law immunity applies in eminent domain cases, displacing the longstanding paramount public purpose doctrine’s application to cases like this in which the Legislature has permitted two condemning authorities to use the same land. Hidalgo County Water Improvement District No. 3 (the “Improvement District”) sought to condemn an easement for a water pipeline across a canal owned by Hidalgo County Water Irrigation District No. 1 (the “Irrigation District”). The Improvement District filed a condemnation action, and the trial court appointed three special commissioners who awarded \$1900 in compensation for the easement. The Irrigation District filed a plea to the jurisdiction, which the trial court denied. The Corpus Christi Court of Appeals affirmed the trial court’s decision.

In its petition to the Texas Supreme Court, the Improvement District argued that the Court of Appeals failed to apply the paramount public purpose doctrine. Under this doctrine, a first-in-time entity may prohibit the second use if it can demonstrate that the second proposed use would destroy the first and that the first use is of paramount public purpose. The purpose of this doctrine is to maximize public benefit. Instead, the Court of Appeals only considered if the Irrigation District was immune from eminent domain actions and essentially concluding that immunity trumps the paramount public purpose doctrine.

With the Texas Supreme Court set to hear the case, the Court will be able to resolve widespread confusion among the lower courts about whether immunity applies in condemnation actions.

Transcript of Oral Argument Sackett v. Env’tl. Prot. Agency, No. 21-454 (U.S. argued Oct. 3, 2022).

On October 3, 2022, the United States Supreme Court heard oral arguments in the case of *Sackett v. EPA*. The decision has yet to be announced, but the decision could dramatically reduce the number of wetlands and other waters across the United States that are protected under the Clean Water Act.

The dispute between the Sacketts and the EPA began in 2007 after the Sacketts purchased a parcel of land that was subject to the Clean Water Act protections. In 2012, the Court permitted the Sacketts to litigate their challenge to an EPA compliance order concerning the fill of wetlands on their land in federal court, during which EPA withdrew its compliance order. The U.S. Court of Appeals for the Ninth Circuit held that the EPA’s withdrawal of the compliance order did not render the Sacketts’ challenge moot and that EPA does have jurisdiction over their property under the Clean Water Act.

In hearing the case on appeal, the Ninth Circuit cited case precedent in determining jurisdiction over wetlands. A narrow interpretation of the Clean Water Act could reduce the number of waters that enjoy its protection. The issue now before the Court is whether the Ninth Circuit

set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7).

Utility Case

Brazos Electric Power Cooperative and ERCOT Settlement Update.

On November 14, 2022, Chief U.S. Bankruptcy Judge David Jones issued an order approving a settlement agreement between Brazos Electric Power Cooperative, Inc. (“Brazos”) and ERCOT regarding outstanding Winter Storm Uri related costs. This dispute has been ongoing since 2021 when ERCOT capped electricity prices at \$9,000 per megawatt hour during Winter Storm Uri. As a result, Brazos incurred \$2.1 billion in energy fees and subsequently filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Texas on March 1, 2021. In its filing, Brazos alleged that ERCOT violated the terms of their market participant contract by charging \$9,000 per megawatt hour and Brazos owed ERCOT \$770 million rather than \$2.1 billion. ERCOT responded that it did not violate Brazos’s market participant contract since it was following PUC’s emergency order to implement scarcity prices.

Brazos and ERCOT reached a settlement agreement whereby Brazos must pay ERCOT roughly \$1.9 billion. Moreover, under the approved settlement agreement, ERCOT will reimburse eligible market participants in a manner of the participant’s choice: (1) an earlier discounted payment or (2) full payment over thirty years. Brazos will begin payments to ERCOT in January 2023.

“In the Courts” is prepared by Lora Naismith in the Firm’s Water Practice Group; Wyatt Conoly in the Firm’s Litigation Practice Group; and Samantha Miller and Rick Arnett in the Firm’s Energy and Utility Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Lora at 512.322.5850 or lnaismith@lglawfirm.com, or Wyatt at 512.322.5805 or wconoly@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.



AGENCY HIGHLIGHTS



United States Environmental Protection Agency (“EPA”)

Final Rule Codifying WOTUS Definition Announced. On December 30, 2022, EPA and U.S. Army Corps of Engineers (“USACE”) announced the final “Revised Definition of ‘Waters of the United States’” rule. The revised Clean Water Act definition of “waters of the United States” (“WOTUS”) will go into effect 60 days after it is published in the Federal Register. The revised definition aligns with past policies that have become known as the “1986 regulations,” when the last major update to CWA jurisdiction occurred, and includes updates accounting for recent Supreme Court decisions. It is the goal of EPA and USACE that the new definition eliminate the confusion left by the Obama and Trump Administrations’ changes to WOTUS and avoid continuing litigation from previous rules and appeals. The revised definition accounts for recent Supreme Court cases by codifying those decisions into law, including the *Rapanos* plurality that resulted in two separate jurisdictional standards—Justice Scalia’s narrow “relatively permanent and continuous surface connection” test and Justice Kennedy’s broader “significant nexus” standard. In the final rule, one of the two standards must be met for a waterbody to be considered a “water of the United States.” The rule also takes into consideration the best available science and public comments received to establish a definition supportive of public health, environmental protection, agriculture, and economic growth. EPA and USACE have chosen to move forward with the revised definition despite calls for a hold on the new WOTUS rule until the ongoing *Sackett v. EPA* case contemplating jurisdictional standards for wetlands is decided. The Pre-Publication Final Rule Notice of the revised definition is available at: <https://www.epa.gov/wotus/revising-definition-waters-united-states>.

PFAS Effluent Limits in State NPDES Permits. House lawmakers have urged EPA to place strong per- and polyfluoroalkyl substances (“PFAS”) safeguards in upcoming guidance to states that would reduce PFAS in wastewater discharge permits and push for the requirement of technology-based effluent limits on a case-by-case basis in the permits. In an October 11, 2022 letter to the EPA Administrator, lawmakers cited the difficulty in removing PFAS contamination once it is in the environment, evidence of PFAS-related health risks, and extremely long persistence as the basis for requiring limits. The upcoming guidance, once issued to state permitting authorities, would apply to 47 states with the authority to issue Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permits, having greater applicability than guidance issued in

April 2022 that only applied to the three states where EPA is the permitting authority—Massachusetts, New Hampshire, and New Mexico. The safeguards proposed by the lawmakers include: (1) obligating suspected or known sources of PFAS to disclose PFAS pollution as part of their existing NPDES permit; (2) requiring the incorporation of technology-based effluent limits on a case-by-case basis in NPDES permits for PFAS dischargers; and (3) requiring water works to evaluate PFAS introductions to their systems and ensure industrial users are pretreating. Released on December 5, 2022, the new guidance recommends that states use the most current methods for sampling and analysis in their NPDES programs to identify known or suspected sources of PFAS as well as to implement technology-based limits on PFAS discharges. Some states, such as Michigan, have already begun to use their state administered NPDES permits to reduce sources of PFAS before entering surface waters.

EPA proposes a new hydrofluorocarbons (“HFCs”) rule. EPA published a proposed rule on November 3, 2022 that would continue EPA’s implementation of the American Innovation and Manufacturing Act’s provisions to phase down HFCs by: (1) determining the process for allocating HFC production and allowances for 2024 through 2028; (2) amending the consumption baseline; (3) codifying how allowances must be expended for import of regulated substances; and (4) imposing obligations related to import notifications and recordkeeping. The proposed rule affects industries that produce, import, export, destroy, use as feedstock or process agent, reclaim, or recycle HFCs. The proposed rule specifically lists approximately 30 non-exhaustive industries by North American Industry Classification Systems that may be affected. The comment period closed on December 19, 2022.

Deadlines Announced for the Lead and Copper Rule. The upcoming lead and copper rule rewrite is expected to be proposed by EPA by the end of 2023 with final action by the end of 2024. The Lead and Copper Rule Improvements is intended to strengthen the Trump-era Lead and Copper Rule Revision. These deadlines, included in EPA’s Final Strategy to Reduce Lead Exposure and Disparities in U.S. Communities, was the first time EPA has offered deadlines for the agency to complete actions on pending lead policy. The release, posted on October 27, 2022, laid out a government-wide approach for curbing an array of lead exposures, and included plans to complete the current review of the lead national ambient air quality standard in 2026 and complete several other source-specific lead rules in the next

two years, including secondary lead smelters, lead acid battery manufacturing, primary copper smelters, and large municipal waste combustors.

EPA issues a final rule reclassifying Dallas-Fort Worth (“DFW”) and Houston-Galveston-Brazoria (“HGB”) as “severe nonattainment areas” under the 2008 ozone standard.

Effective November 7, 2022, DFW’s and HGB’s 2008 8-hour ozone classification was reclassified from “serious nonattainment” to “severe nonattainment.” Due to this reclassification, the major source threshold for volatile organic compounds and nitrogen oxide emissions changed from 50 tons per year (“tpy”) to 25 tpy and emissions offsets must be increased from 1.2 to 1.3. Any sources over 25 tpy must obtain a FOP. Additionally, the Clean Air Act will prohibit the sale of conventional gasoline and require that federal reformulated gasoline be sold in these areas beginning November 7, 2023. The new attainment date is July 20, 2027.

EPA issues an amendment to the National Emission Standards for Hazardous Pollutants (“NESHAP”) rule.

The amendment removes exemptions from the rule for site remediation activities performed under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) as remedial action or a non-time-critical removal actions and as corrective actions at treatment, storage, and disposal facilities under the Resource Conservation and Recovery Act (“RCRA”). The previous exemptions were determined based on EPA’s conclusion that the requirements under CERCLA and RCRA were “functionally equivalent” to the NESHAP requirements. However, EPA did not determine whether the CERCLA and RCRA rules were at least as stringent as the NESHAP rules. After ongoing court proceedings and EPA’s reconsideration of these exemptions, EPA proposed to remove these exemptions entirely. The rule was effective beginning December 22, 2022 and the compliance date for existing sources is 18 months after the effective date.

EPA’s Wastewater Lagoons Action Plan. The first-ever Lagoon Wastewater Treatment Action Plan (the “Plan”) has been released by EPA, announcing nearly \$2 million in research grants to accelerate innovation in alternative wastewater treatment technologies for lagoon and pond systems of small communities. The resources provided by the Plan will help improve public health and waterway protections for rural and Tribal communities. The Plan outlines critical actions that EPA will implement through 2026 to assist these communities with wastewater treatment systems by providing financial and technical assistance tools, including those to help underserved communities with access to the Biden administration’s Bipartisan Infrastructure Law funding. Michigan Technological University, in Houghton, Michigan, and West Virginia University, in Morgantown, West Virginia, will each be receiving a funding award. Their research will focus on a floating treatment wetland system in a lagoon and technology options to remove nutrients from lagoon systems in conjunction with a decision support tool to determine the cost-effectiveness of such technologies, respectively. The Plan is available at: <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockkey=P1015XQR.txt>.

Texas Commission on Environmental Quality (“TCEQ”)

New Interim TCEQ Executive Director. On December 14, 2022, it was announced that Toby Baker would be leaving his position at TCEQ to join the Governor’s Office as deputy chief of staff. On December 15, 2022, Erin Chancellor began serving as Interim Executive Director. Chancellor previously served as TCEQ’s Director of the Office of Legal Services.

2024 MS4 General Permit Renewal. TCEQ is in the process of renewing the TPDES Phase II Municipal Separate Storm Sewer System (“MS4”) General Permit TX040000. The current general permit, which took effect in 2019, is set to expire in 2024, and TCEQ is planning to make updates to the permit and application process. A stakeholder meeting was held in September to discuss the plans and process of renewal and to receive oral public comments. The biggest proposed change to the 2024 general permit will be the replacement of the current two-step general permit with a comprehensive general permit that streamlines the current application process. Stormwater Management Programs (“SWMP”), although still required by the permit, will no longer need to be submitted for technical review, which will also serve to eliminate the need for public notices and public comment periods. The comprehensive general permit will also incorporate an electronic application and annual reporting system to further streamline the process. A recording of the stakeholder meeting can be viewed at: <https://www.youtube.com/watch?v=4gWZb0eHVou>.

Texas Nonpoint Source Management Program Approved by EPA.

The 2022 Texas Nonpoint Source Management Program, developed jointly by TCEQ and the Texas State Soil and Water Conservation Board, has been approved. The most recent revision of the program was adopted by TCEQ Commissioners on December 15, 2021, and subsequently approved by EPA on August 29, 2022, after being submitted by the Texas Governor’s Office. The program, first developed in 2008, is the state’s comprehensive strategy for addressing nonpoint source pollution. The 2022 revision aims to incorporate EPA’s eight components of an effective program, establish long and short-term goals for the program, provide coordination of nonpoint source related programs, and prioritizes assessment, planning, and implementation activities in priority watersheds and aquifers. The plan is available for download at: https://www.tceq.texas.gov/downloads/water-quality/nonpoint/plans-reports/2022-nps-management_program_sfr-68.pdf.

TCEQ Air Permits Division adds Title V Federal Operating Permit (“FOP”) project submission capabilities to the State of Texas Environmental Electronic Reporting System (“STEERS”).

All FOP applications submitted as of January 1, 2023 must be submitted through STEERS. The Responsible Official or Duly Authorized Representative should submit and certify the project without submitting a separate OP-CR01 certification form.

TCEQ issues guidance to provide a directory of commercial management facilities. The guidance document was drafted in

response to TCEQ updating its list of Commercial Management Facilities for Hazardous and Nonhazardous Industrial Solid Waste in October 2022. The guidance provides a directory of those facilities by TCEQ Region and consists of facility contact information, type of facility, and waste types accepted. The guidance is particularly beneficial to waste generators, who are responsible for determining which facility to utilize. The guidance shows that the Lubbock, El Paso, San Angelo, Austin, and Laredo Regions do not have any Industrial and Hazardous Waste (“IHW”) management facilities, and generators in those areas will need to look to other regions. Though separate resources, TCEQ also launched an IHW Facility Viewer on its Geographic Data Viewer page which may be helpful to the same industries utilizing the guidance.

TCEQ requires a new Public Involvement Plan (“PIP”) Form.

A PIP form must be completed for applications for certain air, waste, and water permits and registrations filed after November 1, 2022 and must include data from EPA’s Environmental Justice tool if two triggers are met. The first trigger is if the applicant is applying for a specific type of facility or action, including a new industrial hazardous or industrial solid waste permit, or adding class 1 waste to a waste stream, as well as other actions specified by TCEQ. The second trigger is if all of the following three are true: (1) public notice is required; (2) either the activity proposed typically has significant public interest when located in the proposed area or past permitting actions for the location received significant public interest; and (3) the proposed facility is located in the Austin / Round Rock / Georgetown Municipal Statistical Area (“MSA”), San Antonio / New Braunfels / Pearsall MSA, Dallas / Fort Worth MSA, Midland / Odessa / San Angelo MSA, Amarillo / Pampa / Borger MSA, Houston / Woodlands MSA, any county located along the Texas / Mexico border, or any other area designated by TCEQ.

TCEQ proposes amendments to 30 Texas Administrative Code (“TAC”) Chapter 113, Subchapter D, Division 1 to update emissions guidelines for existing municipal solid waste (“MSW”) landfills. In 2016, EPA issued new emissions guidelines in its federal plan for MSW landfills. In states without an approved state plan, the federal plan must be followed and administered by EPA. The proposed changes to 30 TAC Chapter 113 would update Texas’s state plan in compliance with EPA’s 2016 amendments so that MSW landfills in Texas may follow the state plan and be subject to TCEQ’s jurisdiction rather than EPA’s. The amendments would mimic EPA rules with two exceptions; TCEQ proposes to include an alternate applicability date to EPA’s standard applicability date and to include a requirement for landfills subject to 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, to provide an annual report on non-methane organic compound emissions. An alternate applicability date was utilized in the previously compliant state plan and was approved by EPA at that time. The proposed rule will be considered by the TCEQ Commissioners at the January 11, 2023 TCEQ Agenda. The comment period is proposed to be from January 27, 2023 to February 28, 2023, if the TCEQ Commissioners approve the proposed rule for publication.

Electric Reliability Council of Texas (“ERCOT”)

ERCOT Appoints VP of Public Affairs. On November 7, 2022, Robert Black assumed his role as ERCOT’s Vice President (“VP”) of Public Affairs. As the VP of Public Affairs, Mr. Black is responsible for ERCOT’s government affairs, customer support, and external communications. Prior to joining ERCOT, Mr. Black served as VP of External Affairs at AEP Texas, as a senior media advisor for Governor Greg Abbott’s 2014 campaign, and as Governor Rick Perry’s Press Secretary and Communications Director.

ERCOT Bylaw Change. ERCOT has recently approved changes to its bylaws to eliminate the right of corporate members to vote on future proposed amendments while preserving the rights of corporate members to comment on any such proposal and to propose amendments themselves. The corporate members or stakeholders are made up of buyers and sellers of electricity and have invested large amounts of capital in the ERCOT market. These corporate members are therefore subject to legitimate risks of loss of capital. Consequently, losing the ability to vote on future proposed amendments is of great concern to these members. Comments on the proposed changes were filed, many of which opposed the elimination of the corporate members’ right to vote. However, the modifications ERCOT made in response to comments did not reflect the concern regarding corporate members’ right to vote.

On November 8, 2022, the ERCOT Board requested PUC’s input. Chairman Lake filed a memo in agreement with the modified bylaws, stating that the legislature delegated governance authority to the Board to revise its bylaws. All Commissioners were in support of Chairman Lake’s memo. The Board adopted the modified bylaws at its December 20, 2022 meeting.

Public Utility Commission of Texas (“PUC”)

ADER Pilot Project Governing Document Approved. PUC recently established the Aggregated Distributed Energy Resource (“ADER”) Task Force to assist ERCOT’s development of the ADER Pilot Project. ERCOT defines an ADER as a “resource consisting of multiple premises connected at the distribution system level that has the ability in aggregate to respond to ERCOT dispatch instructions.” On November 3, 2022, PUC adopted ADER’s governing document to serve as a framework for the first phase of the Pilot Project.

According to the governing document, the Pilot Project will assess manners in which ADERs can promote reliability, incentivize investment, support better load management during emergencies, and reduce transmission and distribution investments. ERCOT will still be involved by conducting studies to analyze different ADER dispatch and pricing schemes and evaluate an ADER’s ability to provide primary frequency response and ancillary services.

Amendments made to 16 Texas Administrative Code (“TAC”) § 25.101. As previously discussed in *The Lone Star Current*

published in October 2022, the Commission had filed a proposal for publication of amendments to 16 TAC § 25.101. Comments were soon filed and considered, and at the PUC Open Meeting on November 30, 2022, the Commission approved the amendments. The amendments include:

- establishment of a congestion cost savings test for evaluating economic transmission projects;
- requiring the Commission to consider historical load, forecasted load growth, and additional load seeking interconnection when evaluating the need for additional ERCOT reliability transmission projects;
- providing exemptions to the certificate of convenience and necessity requirements for certain transmission projects; and
- requiring ERCOT to conduct a biennial assessment of the ERCOT power grid's reliability and resiliency in extreme weather scenarios.

An order adopting the amendments was filed on December 7, 2022. You can find further information on the PUC Interchange under Docket Number 53403.

Water Customer Protection Rules Reviewed, PUC's Review Soon to Follow. On October 20, 2022, an order was filed adopting 16 TAC § 24.173 and 16 TAC § 24.364, each of which relate to late fees and disconnections for water customers during an extreme weather emergency. Specifically, these rules will prohibit disconnections and late fees for nonpayment during an extreme weather emergency, require retail public utilities to offer payment schedules for bills due during an extreme weather emergency, and adopt a civil penalty classification system for use by courts. These rules were created to implement requirements of Senate Bill 3 which was passed in response to Winter Storm Uri.

PUC Undergoes Review by Sunset Advisory Committee. In 2013, PUC was given the authority over water and wastewater bills and fees regulations. Consequently, PUC has become underfunded and understaffed because the agency spends a disproportionate amount of its time on water and wastewater regulation compared to the funding it receives. PUC estimates it spends approximately 60 percent of its time on average on water and wastewater regulation.

The Sunset Advisory Commission has considered the issues pertaining to PUC funding, which could lead to the ability to hire more staff, as well as improving its data management and analysis, regulatory rules and processes, and guidance to these utilities. On January 11, 2023, the Commission will vote on final recommendations which will then go to Texas Legislature to form the basis of legislation.

Update on PUC Rulemaking Projects. As of the end of 2022, only a few items remain on the PUC Staff's 2022 rulemaking calendar. However, the 2023 rulemaking calendar is in early stages and can be found under Docket No. 54455. As of December 9, 2022, one project, review of market entrant requirements (Docket No. 52796), will be proposed for adoption in 2023.

Texas Railroad Commission ("RRC")

RRC Amends Gas Facilities Rules. Last year, as part of the implementation of Senate Bill 3 and House Bill 3648 from the Legislature, RRC proposed 16 TAC §3.65. The rule specifies how agencies designate certain gas facilities as "critical" which is particularly important when it comes to the power grid because natural gas suppliers fuel many electric generators, and failures by the gas industry were identified as a major contributing factor behind rolling outages in 2021. Although originally created in 2021, the rule has been updated and these changes took effect on November 21, 2022. The changes include:

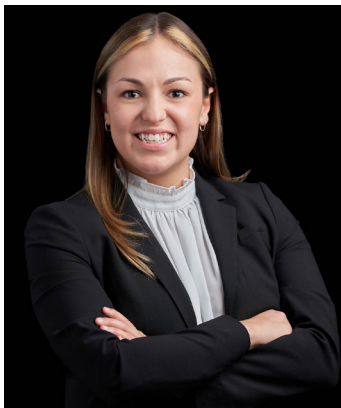
- further clarification of the process that gas facilities must follow when requesting critical designations;
- further clarification of how the agency makes such designations;
- adopted amendments to provide more certainty regarding the definition of "energy emergency"; more specifically, the Commission adopted amendments to define an event with "potential to result in firm load shed" as when the reliability coordinator of a power region in Texas issues an Emergency Alert Level 1 or 2;
- adopted amendments to the list of critical gas suppliers to exclude gas wells producing an average of 250 Mcf of natural gas per day or less and oil leases producing an average of 500 Mcf of natural gas per day or less; and
- adopted amendments clarifying that certain facilities may request an exception unless the facility is included on the electricity supply chain map.

Lawmakers and RRC Oppose the Gas Desk Proposal. Brad Jones, the then-interim director of ERCOT, proposed the idea that ERCOT would monitor the natural gas sector in real time through the gas desk. The purpose of the gas desk would be to identify grid choke points where a gas supply distribution could knock out power generation. The gas desk proposal was discussed at the September 13, 2022 joint legislative hearing consisting of the House State Affairs and Energy Resources Committees, where it received significant pushback. RRC commissioner Christi Craddick, various lawmakers, and gas industry representatives opposed the proposal.

"Agency Highlights" is prepared by Chloe Daniels in the Firm's Water and Districts Practice Groups; Mattie Isturiz in the Firm's Air and Waste Practice Group; and Samantha Miller and Rick Arnett 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 Chloe at 512.322.5814 or chloe.daniels@lglawfirm.com, or Mattie at 512.322.5804 or misturiz@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.



Samantha Miller has joined the Firm's Energy and Utility Practice Group. Samantha's practice focuses on administrative law in the area of public utility regulation. She represents municipalities and utilities before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and State Office of Administrative Hearings. Prior to joining the Firm, Samantha clerked at Lloyd Gosselink and for the Environmental Division of Harris County Attorney's Office. While in law school, she participated in the Moot Court program at South Texas College of Law. Samantha received her doctor of jurisprudence from South Texas College of Law and her bachelor's in environmental studies from Texas A&M University.



Madison Huerta has joined the Firm's Governmental Relations, Water, and Districts Practice Groups. Madison's practice focuses on governmental and water-related legal and policy issues, including statutory and regulatory compliance, permitting, water

rights, water resource management and development, and certificates of convenience and necessity. She represents clients before various state agencies and at the Texas Capitol, and assists in the governance and operation of local government entities. Madison received her doctor of jurisprudence from Southern Methodist University Dedman School of Law and her bachelor's from the University of Texas at Austin.



Richard Arnett has joined the Firm's Energy and Utility Practice Group. Rick's practice focuses on administrative law in the area of public utility regulation. He assists municipalities and utilities in matters before the Public Utility

Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings. Before law school, he worked as a field geologist at a geotechnical engineering firm that specializes in renewable energy projects. Rick received doctor of jurisprudence from University of Denver Sturm College of Law and his bachelor's in Geology at the University of Colorado at Boulder. During law school, he was a member of the University of Denver Water Law Review and clerked at the Texas Parks & Wildlife Division and with private law firms.

Sarah Glaser will discuss "Workplace Law and Legal Liabilities" at the New Chiefs Development Program on January 12 in Huntsville.

Sarah Glaser will be presenting "Harassment Issues in the Workplace and Family and Medical Leave Act (FMLA)" at the Texas State University/CPM Track 1 on February 9 in Arlington.

Sarah Glaser will present "Document, Document, Document (How to Be Your Lawyer's Favorite Client)" at the West Texas Area Chief's Conference on February 27 and 28 in Fredericksburg.



Lloyd Gosselink Rochelle & Townsend, P.C. has launched its fourth season of *Listen In With Lloyd Gosselink: A Texas Law Firm*, featuring various topics/attorneys throughout the Firm's practice groups. You can listen to the previous seasons by visiting lg.buzzsprout.com or our website at lglawfirm.com. You can follow us on [Twitter](https://twitter.com), [LinkedIn](https://www.linkedin.com), and [Facebook](https://www.facebook.com) to be notified when the latest episodes are released.

Let us know topics of interest to you by sending your requests to editor@lglawfirm.com.

The remaining lineup for Season 4:

- Employment Law Stories | Sheila Gladstone
- The Associate Perspective: Working at LG | Cole Ruiz and Wyatt Conoly
- PFAS Update | James Muela



**816 Congress Avenue
Suite 1900
Austin, Texas 78701**