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TEXAS SUPREME COURT TO DETERMINE ERCOT'S WINTER STORM URI'S LIABILITY

by Rick Arnett

On January 9, 2023, the Texas Supreme Court heard oral arguments in *Electric Reliability Council of Texas, Inc. v. CPS Energy*, 648 S.W.3d 520 (Tex. App.—San Antonio 2021, pet. granted) and *Panda Power Generation Infrastructure Fund, LLC v. Electric Reliability Council of Texas, Inc.*, 641 S.W.3d 893 (Tex. App.—Dallas 2022, pet. granted). City Public Service Energy ("CPS Energy"), San Antonio's municipally-owned utility provider, and Panda Power Generation Infrastructure Fund, LLC ("Panda") brought unrelated lawsuits against the Electric Reliability Council of Texas ("ERCOT"). In both lawsuits, ERCOT claimed sovereign immunity and asserted that the Public Utility Commission of Texas ("PUC") has exclusive jurisdiction over the various claims.

The Texas Supreme Court took up both cases on the same day to decide whether ERCOT is a governmental entity entitled to sovereign immunity and if PUC has exclusive jurisdiction over ERCOT-related claims. Put differently, the Court will soon decide whether ERCOT is liable for Winter Storm Uri-related events, including roughly 200 property damage, personal injury, and wrongful death lawsuits brought by victims of the storm. On a broader level, the Court will further clarify what entities, absent express statutory delegation, are a "governmental unit" entitled to sovereign immunity and further define the scope of PUC's exclusive jurisdiction. As such, both cases have far-reaching implications for Texas, its agencies, and its citizens.

I. CPS Energy

CPS Energy directly relates to Winter Storm Uri and its impact on the ERCOT market. In response to Winter Storm Uri-related bankruptcies, ERCOT "uplifted" insolvent market participants' default amounts to non-defaulting entities including CPS Energy. CPS Energy subsequently sued ERCOT for breach of contract, negligence, gross negligence, negligence *per se*, and breach of fiduciary duty.

A. The San Antonio Court of Appeals found that ERCOT is a governmental unit and, therefore, entitled to sovereign immunity.

The San Antonio Court of Appeals determined that because ERCOT is "an entity that operates as part of a larger governmental system" and "derive[s] [its authority]…from laws passed by the legislature under the constitution," it is a "governmental unit" for purposes of sovereign immunity. To reach its conclusion, the court opined that ERCOT Protocols "have the force and effect of statutes," ERCOT is subject to the Sunset Act and is therefore statutorily defined as a state agency, and ERCOT's "certification arose out of a legislative delegation of authority to the PUC." Moreover, the court found that CPS Energy's claims fall within PUC's exclusive jurisdiction and, therefore, CPS Energy failed to exhaust its administrative remedies before suing ERCOT in district court.

B. The Texas Supreme Court focused on ERCOT's autonomy.

At the Texas Supreme Court, CPS Energy counsel focused on the sovereign immunity issue. Counsel emphasized that the legislature has never granted ERCOT, as a private entity, sovereign immunity and the court should not determine this "policy laden" issue. Moreover, Counsel asserted that a private entity is not entitled to sovereign immunity merely because it serves a public service and is subject to heavy regulation.

The Court questioned CPS Energy's underlying assumption that ERCOT

ERCOT continued on page 4

IN THIS ISSUE

Firm News	p. 2
Municipal Corner	p. 3
Taking Advantage of the Fair Market Value Methodology for Ratemaking Purposes in Water/ Sewer System Acquisitions *David Klein and Chloe Daniels*	p. 5
Third Court of Appeals Decides Public Utility Commission Exceeded Autority During Winter Storm Uri *Wyatt Conoly and Samantha Miller*	p. 6
Ask Sarah *Sarah T. Glaser an*	p. 8
In the Courts	p. 9
Agency Highlights	p.12

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

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

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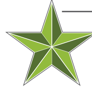

FIRM NEWS

David Klein will be presenting a "Land Development Update - Water/Wastewater CCNs and District Annexations" at the Texas Municipal Utilities Association Utility Leadship and Management Conference on April 19 in Round Rock.

Nathan Vassar will be presenting the "Top Five Legislative Regulatory Developments" at the Texas Municipal Utilities Association Utility Leadship and Management Conference on April 19 in Round Rock.

Sarah Glaser will be presenting "Personnel Policy Updates for 2023" at the CenTex SHRM Annual Conference on April 28 in Killeen.

Jamie Mauldin and Roslyn Dubberstein will be giving a "Utility Regulatory Update" at the Texas City Attorneys Association Summer Conference on June 15 in San Antonio.

Sarah Glaser will discuss the "Dos and Don'ts of Hiring" at the Texas Workforce Commission Conference for Employers on June 22 in San Antonio.

Sarah Glaser will be presenting "Discrimination and Retaliation" at the Texas Municipal League Fundamentals of Employment Law for Cities Workshop on June 23 in Austin.

Lloyd Gosselink Rochelle & Townsend, P.C. is is about to launch 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, LinkedIn, and Facebook to be notified when the latest episodes are released.

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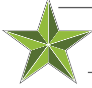
The projected lineup for Season 4 is below:

- The Associate Perspective: Working at LG | Cole Ruiz and Wyatt Conoly
- PFAS: Contamination and Concerns | James Muela
- More to be announced soon



MUNICIPAL CORNER

Chapter 176 of the Local Government Code requires a local government officer to file a specified disclosure form when contracting with a vendor if the vendor has a business or family relationship with the officer. Tex. Att'y Gen. Op. No. KP-428 (2023).

The Hale County Attorney requested a Texas Attorney General Opinion regarding whether the employment of a law firm of an attorney who is the son-in-law of the city manager constitutes a conflict-of-interest under Chapter 176 of the Local Government Code. The Attorney General determined that Chapter 176 of the Local Government Code does not prohibit a contract between a local government entity and a vendor, such as a law firm, when a business or family relationship exists, but the local government office and the vendor must file a specified disclosure form.

In the City of Petersburg, the City Manager contracted with a local law firm where his son-in-law was an associate. The opinion advises that the City Manager was a "local government officer," the law firm was a "vendor," and the City Manager's son-in-law was a "family member." The opinion further advises that Chapter 176 of the Local Government Code requires a local government office to file a conflicts disclosure statement if (1) the local governmental entity has executed a contract with a vendor or considers such a contract, and (2) the vendor has an employment or other business relationship with a family member of the local government officer. The relationship must result in the family member receiving taxable income greater than $2,500.00 during the 12-month period preceding the date that the officer becomes aware of the local governmental entity's execution or consideration of a contract with the vendor. Therefore, based on the relationships of the parties involved, the City Manager had a duty to file a disclosure statement and the law firm had a duty to complete and file a conflict-of-interest questionnaire as required by Chapter 176 of the Local Government Code.

A special election is not invalid because a proposition's enabling date is omitted from the ballot proposition language. Tex. Att'y Gen. Op. No. KP-0433 (2023).

The City of Combes held a special election to elect three new city councilmembers and to extend the terms of councilmembers from two- to four-year terms. The Cameron County District Attorney requested a Texas Attorney General Opinion regarding (1) whether the new councilmembers should serve two- or four-year terms, and (2) whether the special election was valid given the ballot proposition did not specify the proposition's enabling date. The Attorney General determined that the councilmembers elected during the special election should serve two-year terms and that the special election was valid.

First, the opinion advises that the newly elected councilmembers should serve two-year terms. Article XI, Section 11 of the Texas Constitution requires a municipality to elect members of its governing body by majority vote when the terms of office are set at more than two but not more than four years. During the special election, the City of Combes did not have the necessary changes in place to implement a majority vote system. Because the City was unable to elect the councilmembers by majority vote, the councilmembers were not eligible to serve four-year terms.

Second, the opinion advises that the special election was not invalid simply because it did not include the date that the new terms would take effect. A ballot measure may be inadequate when it misleads the voters by omitting certain chief features that reflect its character and purpose. However, in the matter at hand, the chief feature of the ballot measure was the length of terms of office of the mayor and councilmembers, not the enabling act. Therefore, the special election was valid.

The common-law doctrine of incompatibility prohibits dual public service in cases of self-appointment, self-employment, and conflicting loyalties. Tex. Att'y Gen. Op. No. KP-0434 (2023).

The Hardin County Attorney requested a Texas Attorney General Opinion regarding whether a commissioner of an emergency services district ("ESD") may also serve as a voluntary fire fighter for the emergency services district. The Attorney General determined that a court would likely conclude that the common-law doctrine of incompatibility bars a person from simultaneously serving as a volunteer fire fighter for an ESD and a commissioner on the ESD's board of commissioners.

First, the opinion advises that the constitutional prohibition on dual officeholding did not apply to the matter at hand. Under Article VI, Subsection 40(a) of the Texas Constitution provides that "no person shall hold or exercise at the same time, more than one civil office of emolument." While the Attorney General office has determined that an ESD commissioner holds an office of emolument, the office has consistently determined that a volunteer fire fighter does not hold an office. Therefore, the prohibition on dual officeholding does not apply.

Second, the opinion advises that the common-law doctrine of incompatibility prohibits dual public services in cases of self-ap-

pointment, self-employment, and conflicting loyalties. Self-employment is not limited to employment but can also include a position performed in a voluntary capacity. The fundamental consideration under the self-employment aspect of the incompatibility doctrine is the supervision of the subordinate by the officer. Because an ESD is ultimately governed by its board of commissioners, a court would likely conclude that the common-law doctrine of incompatibility bars a person from simultaneously serving as a volunteer fire fighter for an ESD and a commissioner on the ESD's board of commissioners.

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ERCOT continued on page 1

is a private entity and indicated that the legislature's control over ERCOT may be a controlling factor. Justice Bland questioned whether, based on recent legislation regarding ERCOT and Winter Storm Uri-related securitization, "the legislature considers that it has control over the governance of ERCOT" similar to its control over state agencies. Justice Blacklock asked if PUC has authority "to control and dictate everything ERCOT does or does not do." Counsel responded that the Texas Supreme Court recently held that "essentially complete [governmental] oversite was not enough to confer immunity." And, the legislature's selection of the ERCOT Board is too attenuated to provide the political accountability that justifies "immunity's unfairness." Finally, ERCOT primarily performs operational functions that are not subject to PUC control. As such, in the absence of clear legislative intent, ERCOT is not entitled to sovereign immunity.

ERCOT counsel focused on the exclusive jurisdiction issue emphasizing that, based on the Public Utility Regulatory Act's ("PURA's") pervasive regulatory regime, CPS Energy's claims belong in front of PUC. If the court allows CPS Energy to pursue its claims "in its hometown district court," all other market participants will similarly abandon the regulatory process and "chaos will follow." As such, it is imperative that PUC have exclusive jurisdiction over CPS Energy's claims.

II. *Panda Power*

In *Panda Power*, Panda took issue with ERCOT's "CDR Reports" that, pursuant to PUC rules, ERCOT issues to predict future electricity demand and forecast market participants' ability to meet that demand. According to Panda, ERCOT fabricated its 2011 and 2012 CDR Reports and intentionally "broadcast[ed] false market information throughout Texas" to encourage market participants to build new power generation. Panda asserted that because the CDR Reports predicted a generation shortfall, it invested $2.2 billion to build three new power plants. After Panda initiated construction, ERCOT revised the CDR Reports and, in contrast to its initial forecast, predicted excess generation capacity. Accordingly, Panda sued ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty.

A. The Dallas Court of Appeals found that ERCOT is not a governmental unit and, therefore, not entitled to sovereign immunity.

In "*Panda I*," the Dallas Court of Appeals first found that ERCOT was a governmental entity entitled to sovereign immunity. But in response to three intervening Texas Supreme Court cases, and after Winter Storm Uri, the court revisited its holding sitting *en banc*. Specifically, it reviewed the Supreme Court's reasoning that the Court has "yet to extend sovereign immunity to a purely private entity—one neither created nor chartered by the government—even when that entity performs some governmental functions." And, because ERCOT is a "private, membership-based, nonprofit corporation that was neither created nor chartered by the government," the Dallas Court of Appeals reversed Panda I finding that ERCOT is not a governmental unit entitled to sovereign immunity.

B. The Texas Supreme Court focused on PUC's control over ERCOT.

At the Texas Supreme Court, ERCOT counsel focused on ERCOT's sovereign immunity and emphasized that, without sovereign immunity, lawsuits around the state would lead to conflicting results and, ultimately, "regulatory collapse." Counsel asserted that because ERCOT has "no autonomy from the state" and cannot spend or incur debt without the state's permission, it is a private organization "in name only." It is therefore entitled to sovereign immunity.

The Court first scrutinized ERCOT's conflicting lawsuit argument and questioned whether PUC's exclusive jurisdiction would remedy this issue. Counsel responded that there are claims outside PUC's exclusive jurisdiction, such as gross negligence, that would subject ERCOT to conflicting judgments. Justice Bland addressed ERCOT's decertification process and asked whether ERCOT's assets and liabilities would wind up similar to those of a private corporation. Counsel conceded that ERCOT's assets would transfer to a successor organization. But because the state generated ERCOT's assets through regulatory action, the state would maintain control over the assets in the event of a transfer. Thus, ERCOT's asset and liability transfer would not be a purely private transaction.

Panda's counsel also focused on the sovereign immunity issue and emphasized that ERCOT exercised independent discretion over the CDR Reports. And, because ERCOT did not engage in a governmental or regulatory function when it produced the CDR, sovereign immunity was not appropriate in this context. Counsel also addressed ERCOT's fiscal structure and opined that none of ERCOT's revenue is subject to the legislative appropriation process. As such, due to the lack of governmental control and "other typical markers for modern

justifications of immunity," ERCOT is not entitled to sovereign immunity.

The Court questioned whether ERCOT had complete discretion over the CDR. Specifically, Justice Blacklock asked if PUC has "the power" to dictate how ERCOT compiles its CDRs and, if it does, whether ERCOT is actually acting with independent authority. He indicated that PUC does have authority to influence ERCOT's CDRs but, in this instance, chose not to. As such, he seemingly rejected Panda's argument that ERCOT functions in a private capacity.

C. Conclusion

It appears that ERCOT's autonomy is the controlling factor for purposes of sovereign immunity. Although the Court questioned other factors, such as ERCOT's fiscal structure and whether ERCOT ultimately serves the general welfare or itself for a profit motive, the justices consistently returned to the legislature and PUC's control over ERCOT's operations. ERCOT's exclusive jurisdiction defense is a question of statutory interpretation and, specifically, whether PURA grants PUC exclusive jurisdiction over CPS Energy and Panda's claims. The Texas Supreme Court will now consider these factors to determine whether ERCOT is subject to Winter Storm Uri-related liability or, in the words of ERCOT counsel, whether "chaos" will ensue.

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TAKING ADVANTAGE OF THE FAIR MARKET VALUE METHODOLOGY FOR RATEMAKING PURPOSES IN WATER/SEWER SYSTEM ACQUISITIONS

by David Klein and Chloe Daniels

It is commonplace in Texas for retail water and sewer systems to be bought and sold, and when the parties to such a transaction involve a for-profit utility and/or non-profit water supply corporation, the parties must first secure the approval of the Public Utility Commission ("PUC") to close on that transaction. To obtain that approval, the parties must file a "Sale, Transfer, Merger" ("STM") application at PUC under Texas Water Code ("TWC") § 13.301. In its review of the application, PUC examines whether the purchaser has an adequate financial, managerial, and technical capability to provide the retail service(s). Additionally, PUC also considers whether the facilities conveyed were initially obtained by the seller as a contribution in aid of construction, because such contributed capital may not be included in invested capital or allowed depreciation expense by the buyer in rate-making proceedings. In other words, the buyer cannot recover a rate of return over such improvements. Now, however, PUC has afforded buyers and sellers with an alternate and potentially helpful methodology for valuing water and sewer systems that are the subject of an acquisition, based upon the "fair market value" of those assets.

The Fair Market Valuation ("FMV") process, established in TWC § 13.305, is not a substitute process for the STM application, but rather is a process that the buyer and seller can undertake before filing the STM application. In short, the use of the FMV process allows the buyer and seller to voluntarily agree to an independently determined transaction price for the selling utility or facilities to be sold, and this transaction price can then be used in the STM application. Within thirty days of initiating the FMV process, PUC will select three qualified utility valuation experts to prepare appraisals of the selling utility or facilities to be sold. The appointed experts then have 120 days to jointly retain an engineer to conduct an assessment of the tangible assets of the utility or facilities to be sold, conduct individual independent appraisals in compliance with TWC § 13.305(c), and provide the buyer and seller with their completed appraisals. The fair market value for the contemplated transaction is calculated by taking the average of the three experts' appraisals. The utilities then file their STM application that must include each of the three appraisals and the price agreed upon by the parties, among other transaction details. Actual use of the calculated FMV amount is not expressly required by TWC and associated regulations; therefore, the utilities can use a transaction price that differs from that calculated in the FMV process. From start to finish, the process can take approximately 150 days – 30 for staff to appoint experts and an additional 120 for the experts to complete and submit their appraisals. Then, PUC will review the transaction and closing costs, including fees paid to utility valuation experts, in the rate case in which the acquiring utility requests rate recovery of those costs.

The FMV process is not necessarily available to all for-profit utilities. Instead, at this time, the FMV process is only available to buyers that are Class A or B Utilities. But for those utilities that qualify, the FMV process can be a valuable tool for the buyer in establishing an updated rate base, especially considering that the participating utilities are not bound to the determined FMV amount. On the flip side, however, the FMV process can add additional delay and expense to the STM application process. Therefore, in the end, a buyer and seller should evaluate their goals and timing constraints to decide whether to take advantage of PUC's FMV process.

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THIRD COURT OF APPEALS DECIDES PUBLIC UTILITY COMMISSION EXCEEDED AUTHORITY DURING WINTER STORM URI

by Wyatt Conoly and Samantha Miller

Luminant Energy Company ("Appellants") filed a direct appeal in March 2021 to the Third Court of Appeals challenging the Public Utility Commission of Texas's ("PUC's") First and Second Orders (the "Orders") as competition rules under Section 39.001(e) of the Texas Utilities Code. On March 17, 2023, the Court filed its opinion reversing and remanding the case back to PUC. *Luminant Energy Co. LLC v. Pub. Util. Comm'n of Tex.*, No. 03-21-00098-CV (Tex. App.—Austin Mar. 17, 2023, pet.filed). In addition to issues related to the Court's subject matter jurisdiction, two main issues that were considered by the Court were whether the Orders were considered *de facto* competition rules under Chapter 39 of the Texas Utilities Code, and whether the Orders exceeded PUC's statutory authority. The Court held that the Orders were in fact *de facto* competition rules and exceeded PUC's statutory authority. The PUC has filed a petition for review to the Texas Supreme Court.

Scarcity Price Mechanism

In 2006, PUC created a rule that established a general outline of a scarcity pricing mechanism ("SPM") for use during high demand periods. The rule required ERCOT to establish rules that add specificity to SPM. ERCOT's rules include a complex mathematical formula and enumerate several variables to determine when and how scarcity pricing takes effect. The scarcity pricing is limited to a system-wide offer cap of $9,000/megawatt hour ("MWh"). The purpose of the windfall price is to incentivize generators, who are compensated only for energy sold, to come online when demand (also referred to as "load") exceeds supply. This helps ensure the equilibrium of flow of generation and consumption of energy system frequency of 60 Hertz is maintained in order to prevent the risk of grid collapse or damage to grid equipment.

Winter Storm Uri and PUC Orders

Winter Storm Uri ("Uri") hit Texas on February 12, 2021, causing significant blackouts until February 18, 2021. Uri took out almost 50 percent of the generation available and caused the system's frequency to drop below 59.4 Hertz for approximately four minutes and three seconds. During the Storm, SPM indicated the market clearing prices to be just over $1,200/MWh. During the 87th Legislative Session in 2021, then-Chair of PUC, DeAnn Walker, spoke at a Hearing before the Senate Committee on Business and Commerce about her conclusion that during Uri the market price of $1,200/MWh indicated that SPM malfunctioned by erroneously disregarding the lost load for purposes of computing price. SPM instead should have moved prices in an inverse correlation with reserve capacity, and that at load shed, maximum demand had been reached, such that maximum price cap should be in effect. This was an issue because the clearing prices signal to market participants that additional generation is needed to maintain the frequency of the grid. As a result of the malfunction, SPM was sending the market false signals indicating additional generation was not needed.

To address the false signals, PUC held Open Meetings on February 15 and 16 issuing separate orders during each meeting. The First Order stated, "if customer load is being shed, scarcity is at its maximum, and the market price for energy needed to service that load should also be at its highest." PUC issued the order because it determined the $1,200/MWh clearing price to be "inconsistent with the fundamental design of ERCOT," thus directing ERCOT to ensure that firm load that is being shed is accounted for in ERCOT's scarcity pricing signals. ERCOT adjusted its price algorithm accordingly to cause clearing prices to increase to the $9,000/MWh cap. The next day, PUC revisited the First Order and issued the Second Order which was nearly identical to the first but rescinded the language that allowed for retroactive repricing. As a result, ERCOT issued settlement statements to market participants that reflect the $9,000/MWh clearing price.

Subject Matter Jurisdiction

PUC challenged the Court's subject matter jurisdiction on five separate bases: (1) Appellants' claims are moot; (2) PUC's rules are valid until adjudicated void; (3) Appellants' alleged injury is non-redressable; (4) the Orders were not competition rules within the meaning of Section 39.001(e); and (5) the Appellants are not actually challenging the Orders' validity, they are challenging the application. The Court held that subject matter jurisdiction was proper, disagreeing with each of these arguments.

Mootness

The Third Court of Appeals held that the Appellants' Claims were not moot, because a live controversy existed as to whether Appellants were required to pay what PUC invalidly charged in excess of what should have been charged. PUC argued that, under Texas case law, issues relating to the validity of a PUC order are rendered moot upon the expiration of that order. In other words, if the order is expired, so too is any controversy surrounding that order. The Court disagreed. It held that PUC's temporary orders had caused financial damage to the Appellants. Those Orders had been timely challenged by Appellants and the amounts payable set pursuant to those Orders were either due and payable or paid under protest. Thus, the legality of the Orders is a live controversy. Whether the Orders had expired had no bearing on that controversy.

Valid until Void

The Court held that it had the authority to grant an aggrieved party relief with respect to the material PUC rules. PUC pointed out that under the Government Code, even if the Orders were not adopted under the Emergency Act, the rule was "voidable." Tex. Gov't Code § 2001.035.

PUC argued that, given this statute and Texas case law regarding voidable rules, the "voidable" status of the rule entails that any such rule is valid until adjudicated void. Retroactive relief for any action performed prior to a declaration that the rule is void is therefore not available. The Court disagreed. In reviewing the case law, the Court found the current case to be distinct from those cited by PUC, as none of the cases cited stated that courts lack jurisdiction to remedy action undertaken pursuant to a voidable order before it is adjudicated as void. The Court compared voidable private contracts with the current voidable PUC rule, noting that a voided private contract in fact entitles each party to retroactive relief: a recovery of the consideration already paid under the contract. Thus, by parity of reasoning, there is no bar to retroactive relief for voidable rules solely because they are voidable rules. The Court acknowledged the difficulties associated with remedying damages after the passage of some time; however, it pointed out that the Appellants here timely filed their direct appeal within 15 days after the First Order was issued. In sum, the Court found PUC's argument, under the specific circumstances of the case, unpersuasive.

Redressability

PUC also argued that the Utility Code and the Government Code only allowed for the Court to remand a rule held to be invalid back to PUC; therefore, the grievance complained of could not be redressed by the Court. Additionally, PUC argued that ERCOT was the proper defendant instead of PUC, and that PUC did not have the authority to order ERCOT to undertake such repricing. The Third Court of Appeals disagreed, holding that it had the authority either to remand the case for a ruling consistent with its holding, or to reverse the rule outright under Section 39.001(f) of the Texas Utilities Code. Additionally, the Court held that PUC had complete authority to order ERCOT to undertake such repricing under Section 39.151 of the Texas Utilities Code and Title 16, Texas Administrative Code Section 25.501(a), and thus PUC was the proper party in the case.

PUC additionally argued that it was too late under the Nodal Protocols for ERCOT to act, as the requisite notice had not been provided. The Court held that the time bar implemented by Nodal Protocols applied to actions taken on ERCOT's own initiative and had no effect on whether ERCOT could effect a price correction by order of the Court.

Order is a Rule

The Court held that the Orders were subject to the direct appeal process provided by the Texas Utilities Code, since the Orders were competition rules within the meaning of the Texas Utilities Code Section 39.001(e). When determining whether the Orders are a rule or not, PUC looked at the Administrative Procedure Act's ("APA") definition of "rule" which defines rule as a "state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency." Tex. Gov. Code § 2001.003(6). APA further indicates that a rule includes a repeal of or amendment to a previous rule but does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures. The Court found that, since the Orders and directions to ERCOT were intended to affect the rights of private parties, and did so, it was a rule. Additionally, the Court found that Section 25.505 of Title 16, Texas Administrative Code is a rule, and the Orders had the effect of amending such rule by creating an extratextual exception to a previous rule which constitutes an amendment.

Validity of the Rules

PUC finally argued that the Court lacked jurisdiction because Appellants actually were challenging the application, rather than the validity of the Orders. The Court disagreed, finding that the face of Appellants' pleading challenged the validity of the guidance order issued by PUC, which expressly required ERCOT to take steps necessary to ensure that energy prices would clear at $9,000/MWh during the duration of the Energy Emergency Alert Level 3 event.

Finding none of PUC's arguments persuasive, the Court thus held that it had jurisdiction to decide the case.

Court Finds PUC Exceeded its Authority

The Court found the substance of the Orders exceeded PUC's statutory authority because, as argued by Appellants, the subject of the Orders "contravene statutory authority and run counter to statutory objectives that electricity prices should be determined by the normal forces of competition." A state administrative agency obtains its power from the legislature who expressly confers power upon the agency, as well as those reasonably necessary to carry out their express functions or duties. If an agency goes beyond such power in implementing a rule, the rule is invalid. In determining PUC's authority, the Court considered the statutory language in Sections 39.001 and 39.151 of the Texas Utilities Code.

In doing so, the Court determined that Section 39.151's direction for PUC (or independent organization if PUC delegates this authority) to ensure system reliability was not an exception to Section 39.001's preference for reliance on competition rather than regulatory authority in setting prices. Section 39.001 usage of clear language showing a preference of competition to the "greatest extent feasible" for setting prices, and Section 39.151 being silent on the issue, indicated that actions of PUC pursuant to Section 39.151 must be subject to the preference provided in Section 39.001. Section 39.001 further limited PUC rules by requiring the rules to be "limited so as to impose the least impact on competition." In issuing the Orders to set the market clearing price at the market cap of $9,000/MWh and directing the market price for energy be at its highest while there was load shed, PUC eliminated competition and ordered the maximum impact on competition by setting a single price. By doing so, PUC exceeded its statutory authority granted by the Legislature. Consequently, the Court reversed the Orders and remanded back to PUC for further proceedings consistent with the ruling.

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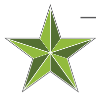

ASK SARAH

Dear Sarah,

We have an employee who recently requested intermittent FMLA leave. He is non exempt and works a non-typical schedule in that he is regularly scheduled for more than 40 hours per week, usually around 45 hours per week. I know that FMLA provides eligible employees up to 12 weeks of protected leave, but I often hear it alternatively described as three months, 90 days, or when dealing with intermittent leave—480 hours. How do we calculate how much FMLA leave our employee is entitled to when 12 weeks of their particular schedule does not equal 480 hours?

Sincerely,
Math is Not My Strong Suit

Dear *Math is Not My Strong Suit,*

There must be something in the water. My Family Medical Leave Act ("FMLA") treatise has been open on my desk for weeks, with odd questions and unusual issues popping up over and over again. This is one such question—probably not going to come up often, but a big deal for those it relates to.

To start with, I am assuming your organization is covered by FMLA, that the employee is eligible for FMLA leave, and that he has provided appropriate medical documentation supporting the need for intermittent leave. So, the only question is—how do you calculate how much intermittent FMLA leave this employee is entitled to?

FMLA and its Regulations provide that an employee is entitled to 12 workweeks of leave per year and that an employee does not accrue FMLA leave at any particular hourly rate. So, the primary focus in your calculations is the employee's workweek.

Practically speaking, if the employee is taking leave in increments of a full day, or longer, then there is no need to calculate the number of hours the employee has available because the simplest method is to calculate the time using fractions of the workweek. This method is recommended by the U.S. Department of Labor ("DOL") in a 2002 Opinion Letter. For example, if the employee is out for two days out of a week, that is 2/5 of a workweek. The employer can add the fractions up (or full weeks) until reaching 12 weeks.

If the employee is taking FMLA intermittent leave in hourly increments, it is more complicated. DOL addressed this issue in its 2002 Opinion Letter, and again very recently in a February 2023 Opinion Letter, reminding employers that the number of hours of FMLA an employee is entitled to is dependent on how many hours the employee works in a workweek.

DOL used the following example to illustrate the calculation: an employee who ordinarily works 50 hours per week would be entitled to 600 hours of FMLA leave in a 12-month period (50 hours * 12 workweeks = 600 hours). If the employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period should be used. This also means that if your employee works fewer than 40 hours per week, they are entitled to fewer than 480 hours of FMLA leave.

So, bottom line is that you should focus your calculations of FMLA leave use on the employee's workweek. And in the situation you asked about, if your employee will need intermittent leave on an hourly basis, he is entitled to 540 hours of FMLA leave in a 12 month period (45 hours * 12 workweeks = 540 hours).

"Ask Sarah" *is prepared by Sarah Glaser, 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 Sarah at 512.322.5881 or sglaser@lglawfirm.com.*

Water Cases

City of Ames v. City of Liberty, No. 09-22-00092-CV, 2023 WL 2180967 (Tex. App.—Beaumont Feb. 23, 2023, no pet. h.).

The City of Liberty (the "Plaintiff") owns and operates a wastewater collection system and treatment plant. The Plaintiff and the City of Ames (the "Defendant") have a wastewater disposal contract (the "Contract") in which the Plaintiff receives and treats wastewater from the Defendant. The Contract requires the Defendant to operate its wastewater collection systems in accordance with the Plaintiff's plumbing code and city ordinances, specifically requiring the Defendant prevent seepage and infiltration into the Plaintiff's collection systems. In the case of excess volumes of wastewater, the Defendant is required to pay service charges to the Plaintiff.

The Plaintiff initiated this suit after several exceedances of the allowed wastewater volumes and repeated failure to pay the required service charges. The Defendant filed a Plea to the Jurisdiction, claiming governmental immunity that had not been waived. The trial court denied the Defendant's Plea, and on appeal, Defendant argued that the trial court erred in denying the Plea to the Jurisdiction because the damages sought are an unenforceable penalty and the Contract is not subject to Chapter 271, Subchapter I of the Texas Local Government Code because it does not contain the essential terms of an agreement to which the Subchapter is applicable. This statute provides that immunity is only waived under the statute if the contract (1) is in writing, (2) states the essential terms of the agreement, (3) provides for goods or services (4) to the local governmental entity, and (5) is executed on behalf of the local governmental entity.

The Court held that the Contract contains the essential terms because it pertains to the flow of wastewater and sewage and is sufficiently definite to confirm both the Plaintiff and Defendant intended to be bound. The Court held that the Contract was for goods and services because the collection and treatment of wastewater is a service provided for the benefit of the Defendant, a local governmental entity. As the mayors of both cities signed the Contract, the Court held that the Contract was properly executed on behalf of the Defendant. Because the Contract met the requirements for a waiver of governmental immunity, the Court held that the Defendant's plea to the jurisdiction was properly denied.

GateHouse Water LLC v. Lost Pines Groundwater Conservation District, No. 1:22-CV-00132-LY, 2023 WL 1424000 (W.D. Tex. Jan. 31, 2023).

GateHouse Water LLC ("GateHouse") was developed with the plan to create a regional groundwater-based municipal water supply project. GateHouse has several operating and transport permits issued by the Lost Pines Groundwater Conservation District (the "District"). The operating permits include Special Condition 8, which requires the permittee to have a binding contract to "provide at least 12,000 acre-feet of water per year to one or more End Users." If this provision is not met, the permit authorizes the District to reduce the aggregated annual withdrawal amount of groundwater.

Shortly after renewing its operation permits, GateHouse submitted a contract between GateHouse and a water supply corporation (the "Contract") that detailed the sale of 12,000 acre-feet during 2021. The Board of Directors of the District (the "Board") evaluated the validity of the Contract and found that the Contract did not comply with Special Condition 8. The Board then reduced GateHouse's permitted groundwater production to zero acre-feet per year. GateHouse initiated this suit against the District and the individual board members for allegedly acting beyond their authority as the governing body of the District.

The Board found that the Contract did not meet Special Condition 8 because it contained no obligation to accept delivery of the contracted water and stated that the title to the groundwater remained with the District until delivery. The Contract required the water supply corporation to pay a fee for the option to acquire the water. The Board found that the Contract was a non-binding option contract and an "unenforceable agreement to agree." As such, the Board held that GateHouse failed to provide a binding contract that met Special Condition 8. Gatehouse subsequently appealed the Board's decision.

At issue in this case is whether the District and Board acted beyond their authority in adjudicating the validity of the Contract. This opinion found that the Texas Local Government Code grants districts a broad authority to "manage, conserve, and protect groundwater," including the issuance of permits and the making of determinations concerning such permits. GateHouse did not prove that Special

Condition 8 is not reasonably related to the conservation or preservation of groundwater, nor did it prove that it is not a condition or restriction on the rate and amount of withdrawal of groundwater, which the District is allowed to enforce as part of the permitting process. Consequently, the court held that GateHouse did not prove that the District acted beyond its authority in adjudicating the Contract.

Litigation Cases

Rattray v. City of Brownsville, No. 20-0975, 2023 WL 2438952 (Tex. Mar. 10, 2023).

In *Rattray, et al. v. City of Brownsville*, No. 20-0975 (Tex. March 10, 2023), the Texas Supreme Court decided that the Texas Tort Claims Act's ("TTCA's") waiver of immunity for motor-driven equipment applied to a City of Brownsville's (the "City's") closure of a stormwater gate during a rainstorm, but acknowledged that upon remand, lower courts would need to address the issue of whether any of the TTCA's exceptions to such waiver were applicable to the circumstances alleged. Thus, the question of whether the Courts had jurisdiction was left pending; however, the decision demonstrates that the decision to close or open a motorized stormwater gate can fall under the TTCA's motor-driven equipment waiver of immunity.

The plaintiffs were homeowners in a Brownsville subdivision, who alleged that the overflow of a former channel of the Rio Grande flooded their homes and caused extensive property damage. According to their petition, the overflow would not have occurred but for the City's decision to close a stormwater gate during a severe rainstorm. The City's decision to close the gate was made to trap abnormal waterflow in the channel and prevent flooding downstream; however, the trapped water overflowed behind the gate and allegedly damaged the plaintiffs' properties. The plaintiffs claimed that the City and its employees should have known that abnormal waterflow at the flood gate was only "temporary," that closing the gate would trap the water, and that its resulting accumulation would cause the channel to overflow and flood their neighborhood.

The plaintiffs brought tort claims against the City. The City responded with a plea to the jurisdiction on the grounds of governmental immunity. The plaintiffs argued the City's governmental immunity had been waived under TTCA's "use of motor-driven equipment" waiver. The trial court denied the City's plea. A divided Court of Appeals reversed. 647 S.W.3d 710 (Tex. App.—Corpus Christi—Edinburg 2020). The Supreme Court granted the plaintiffs' petition for review, and largely affirmed the trial court's decision.

Under Section 101.021(1)(A) of TTCA, a governmental unit waives immunity for property damage arising from the "operation or use" of "motor-driven equipment." The Court acknowledged that it was not sufficient to merely demonstrate that governmental action met the criteria of Section 101.021(1)(A); a plaintiff must also demonstrate that none of the many exceptions to 101.021(1)(A) are applicable. The Court made clear that the issue it was deciding was solely on the grounds considered by the Court of Appeals: the applicability of Section 101.021(1)(A) of TTCA. The Court remanded the case for the lower courts to determine whether any of the exceptions applied to the circumstances alleged. Therefore, the Court's decision did not hold that there is jurisdiction, but instead merely decided that the City's actions met the elements of Section 101.021(1)(A).

In briefing the issue of the applicability of the motor-driven equipment waiver, the parties did not dispute that the gate had a motor. Instead, the parties disagreed as to whether the statutory phrase "operation or use" encompassed the allegations, and if so, whether the plaintiffs' property damage "arose from" that operation.

Operation or Use. The plaintiffs alleged that the City operated or used the gate by closing it to block water. The City, on the other hand, argued that what the plaintiffs truly allege is *non*use: the City's *failure* to later *open* the floodgate and thus relieve the accumulated overflow. Under Texas law, the distinction between use and nonuse is critical to the determination of whether the waiver of governmental immunity applies—nonuse will not satisfy the "operation or use" element of Section 101.021(1)(A). The Court decided that the fact that City employees had closed the gate during the rainstorm and the flooding of the plaintiffs' properties happened soon after the closure supported the plaintiffs' characterization of the closing of the gate as the impetus of the subsequent flooding damage. Therefore, the Court held the "operation or use" element of Section 101.021(1)(A) was satisfied.

Arose From. The City argued that the causation requirement under Section 101.021(1)(A) had not been met, as the plaintiffs had not sufficiently tied the City's act of closing the flood gates to their property damage. The Court disagreed, holding that the temporal and geographic links were "both tight." Temporally, the flooding of the plaintiffs' properties came closely after the closing of the floodgates. Likewise, the City did not suggest that there was any significant geographical attenuation between the gate and the plaintiffs' properties. In fact, the gate was fairly close and "immediately downstream" of the subdivision. Thus, the Court found that the facts alleged were sufficient to create a connection between the closing of the gates and the property damage alleged.

The City asserted two further arguments to counter the plaintiffs' theories of causation: 1) it was the *rainstorm*, not the mere act of opening and closing the gate, that caused the damage; and 2) the flooding of the subdivision would have occurred regardless of whether the gate had been closed. As to the first issue, the Court stated that the TTCA allowed for claims that the act at issue was a *substantial factor* in causing damages to fall under the TTCA's waiver of immunity. That is, the plaintiffs could still establish causation if the rainstorm was necessary but not sufficient for the flooding of the subdivision. As to the second issue, the Court determined that the plaintiffs had sufficiently met their burden of putting forth sufficient evidence to show that the closure of the gate proximately caused

their property damages. The Court cited both testimony from the City's Public Works Director, Santana Torres, and plaintiffs' expert witness, Lawrence Dunbar, who each opined that closing the North Laredo Gate had the effect of trapping water, which is what allowed the water to accumulate and overflow into the plaintiffs' properties. The Court stated that, although far from dispositive, this evidence was enough for the plaintiffs to meet their burden of showing that the City's theory of causation (or lack thereof) cannot yet be deemed established as a matter of law.

Given its analysis outlined above, the Court determined that the plaintiffs' allegations concern the "operation or use" of the floodgate, and there was sufficient evidence for a factfinder to infer that the property damage "arose from" the gate's closure. The Court held that the action satisfied Section 101.021 of TTCA, remanding the case to lower Courts to determine whether any of the TTCA's exceptions applied to the plaintiffs' alleged claims.

Fraley v. Tex. A&M Univ. Sys., No. 21-0784, 2023 WL 2618532 (Tex. Mar. 24, 2024).

In *Fraley v. Tex. A&M Univ. Sys.*, No. 21-0784, (Tex. Mar. 24, 2024), the Texas Supreme Court decided that the Texas Tort Claims Act ("TTCA") does not waive a governmental unit's judicial immunity for its discretionary design decisions, including the decision not to install safety features, if the decision results in an ordinary premises defect.

While driving on Texas A&M University ("University") property, the plaintiff drove through a T-shaped intersection, leaving the roadway and crashing into a ditch on the opposite end of the intersection. The plaintiff claimed that governmental immunity was waived under the TTCA because the unlit, unbarricaded intersection constituted an unreasonably dangerous condition of real property which had caused the plaintiffs' injuries. *See* Tex. Civ. Prac. & Rem. Code § 101.021. The trial court denied the University's plea to the jurisdiction. The Court of Appeals reversed, holding that the complained-of condition was not a special defect and that the discretionary-function exception shielded the University from liability for its decision not to install safety features. The Supreme Court granted the plaintiff's petition for review.

As in any claim of a premises defect, the Court began by determining the nature of the duty owed by the University to the plaintiff. This duty depends on the legal determination of the alleged condition: for an ordinary premises liability claim, the governmental entity owes the duty of a private person to a licensee—the duty to warn of a known dangerous condition or to make the known condition reasonably safe; in contrast, when a plaintiff alleges a special defect, the governmental entity owes the duty of a private person to an invitee—the duty to warn of an unreasonable risk of harm that the premises condition creates when the government owner knows or reasonably should know of that condition.

The Court held that the complained-of condition was not a special defect. The TTCA describes special defects as being akin to obstructions or excavations on the road. The Court held that the ditch adjacent to the roadway was not a special defect because it posed no danger to an ordinary user, who is expected to remain on the paved surface of the road. Thus, the claim presented an ordinary premises liability claim, and the University owed the plaintiff only the duty a private person owes to a licensee.

The Court then held that the plaintiff's complaint about the intersection's lack of lights, barricades, and warning signs fell squarely within the discretionary-function exception for which the University retained immunity. As stated by the Court, the design of any public work, such as a roadway, is a discretionary function. "This retention of immunity for discretionary design decisions extends to decisions about the installation of safety features."

The Supreme Court therefore affirmed the decision of the Court of Appeals, holding that Texas A&M University was immune from suit and the Court thereby lacked jurisdiction to hear the claim.

Air and Waste Cases

El Paso v. Ramirez, 633 S.W.3d 246 (Ct. App. – El Paso, 2021, pet. denied).

The case of *El Paso v. Ramirez* involved an inverse condemnation action in which property owners downstream of the City of El Paso's Clint Landfill sued the City after a heavy rain event, alleging that the City committed a compensable taking. The property owners asserted that the City's continued operation and maintenance of the Clint Landfill caused flood damage to their properties. The trial court found that the City knew that specific property damage was substantially certain to result from its continued operation and maintenance of the Clint Landfill. The trial court also found that the property owners had shown that remedial measures taken by the City were inadequate. On appeal, the City asserted that the City could not have known its continued operation and maintenance of the Clint Landfill was substantially certain to flood the properties because an expert certified that the drainage structures met all TCEQ requirements. The Court of Appeals still considered the downstream flooding a taking. A petition for review was filed on November 30, 2021, and the Texas Supreme Court requested full merits briefing on June 3, 2022. On January 27, 2023, the Court denied review of the petition, allowing the decision of the trial court and Court of Appeals to stand.

"In the Courts" *is prepared by Lora Naismith in the Firm's Water Practice Group; Wyatt Conoly in the Firm's Litigation Practice Group; Mattie Isturiz in the Firm's Air and Waste Practice Group, and Samantha Miller 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 Mattie at 512.322.5804 or misturiz@lglawfirm.com, or Samantha at 512.322.5808 or smiller@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

Texas's Clean Water Act Permitting Under Investigation by the EPA. EPA is conducting an "informal investigation" of the state of Texas's National Pollutant Discharge Elimination System ("NPDES") permitting program. The investigation is in response to alleged violations of the Clean Water Act ("CWA") brought in a suit by environmentalists. In a letter from EPA Region 6 to the Texas Commission on Environmental Quality, the EPA states that the CWA's implementation rules permit the EPA to conduct an informal investigation of the alleged violations to determine if there is cause to withdraw approval of the state's NPDES program. The investigation has focused on allegations relating to the state's public participation process and further allegations of burden shifting in permit proceedings and roadblocks to the public's ability to obtain judicial review of issued permits. The Region 6 office will review the claims and supporting information to decide whether to take action, which could entail limiting or withdrawing the state's NPDES authority.

Updates Made to EPA Water Finance Guide. EPA has updated its guidance for the calculation of community ability to pay for CWA requirements and compliance with enforcement deadlines. The updated guidelines retain measures endorsed by environmentalists, including more accelerated compliance schedules. The updated Financial Capability Assessment ("FCA") guidance establishes a revised framework for calculating community financial capability during the negotiation of implementation schedules for CWA compliance. The updated FCA guidance includes revised recommended compliance schedule benchmarks for "high" and "medium" impact communities, the use of a lowest quintile poverty indicator as a new calculation metric, and other key measures. The new guidance also retains requirements under the CWA from the Combined Sewer Overflow Policy as part of FCA, including the consideration of median household income ("MHI") and other household costs as a percentage of MHI. These updates finalize agency efforts to respond to the fiscal year 2016 congressional mandate to update the 1997 affordability guidance, and the new FCA guidance will replace the 1997 guidance and supplement the public sector sections of the 1995 Water Quality Standards Guidance. Despite this effort, water utilities have stated that this could increase negative impacts on low-income households by making the process more onerous. The National Association of Clean Water Agencies, representing municipally-owned wastewater and stormwater utilities, contends that a household-level approach should be taken to avoid payment of disproportionately higher amounts of income on clean water bills by environmental justice communities. The guidance is available for download at: https://www.epa.gov/system/files/documents/2023-01/cwa-financial-capability-assessment-guidance.pdf.

EPA Adds Cybersecurity Requirements to Sanitary Surveys. Addressing cybersecurity vulnerabilities in the water sector is a top priority for the Biden Administration in the face of warnings of activity targeting the technology that supports the U.S. Water and Wastewater System. In response to a 2022 Congressional mandate to produce a water systems cybersecurity support plan, EPA plans to develop a checklist of best practices for utilities and to create technical support resources. EPA has also stated that it intends to add cybersecurity requirements to the triennial sanitary survey program, a move opposed by water sector groups that view sanitary surveys as the wrong tool for cybersecurity efforts and charge that the approach is legally flawed. The EPA's draft Memorandum to State Drinking Water Administrators on Public Water System Cybersecurity has not been released to the public but was reviewed and approved by the Office of Management and Budget on February 14, 2023. The final memorandum was issued to state drinking water administrators on March 3, 2023. An EPA fact sheet has been issued that outlines the requirements for water systems to take cybersecurity into account during sanitary surveys with a number of options for systems to choose from in order to comply. The memorandum, fact sheet, and guidance are available at: https://www.epa.gov/waterriskassessment/epa-cybersecurity-water-sector#rule.

EPA Proposed Clarification to MS4 Rule due to Census Bureau Definition Change. EPA has released a proposed new final rule aimed at clarifying decades-old requirements for small municipal separate storm sewer system ("MS4") discharges in urbanized areas. The original 1999 rulemaking contained a "once in, always in" provision in its preamble that is now being argued to exceed the agency's authority under CWA by a coalition of cities in Minnesota. The new rule, which retains the "once in, always in" policy, accounts for last year's move by the Census Bureau to remove the term "urbanized area" and replace it with a category

for "urban areas with a population of 50,000 or more people." Contrastingly, a group of state agencies, the Association of Clean Water Administrators, supports the new change for its allowance of the National Pollutant Discharge Elimination System permitting authorities to use 2020 and future Census data. The proposed rule clarification and guidance on the Census Bureau's change are available at: https://www.epa.gov/npdes/stormwater-discharges-municipal-sources.

Proposed Rule on PFAS Announced. The first-ever national drinking water standard for per- and poly-fluoroalkyl substances ("PFAS") was announced on March 14, 2023. The announcement comes after the completion by the Office of Budget and Management of their review of the proposed rule on March 3, 2023. This major step by EPA to protect public health from PFAS pollution builds on other key milestones of the Biden Administration to combat PFAS, including an EPA proposal to designate two PFAS substances as Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") substances. The proposed rule, once finalized, will regulate perfluorooctanoic acid ("PFOA") and perfluoro octane sulfonic acid ("PFOS") as individual contaminants and four other PFAS as a mixture. The proposed rule will also require public water systems to monitor these chemicals as well as notify the public and reduce PFAS contamination if levels exceed the proposed regulatory standards. The proposed rule is available for download at: https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking#addresses. EPA requests input on the proposed rule from stakeholders and the public. Comments may be submitted through the public docket, identified by Docket ID No. EPA-HQ-OW-2022-0114, at www.regulations.gov. Verbal comments can be made at the public hearing, to be held on May 4, 2023, for those registered by April 28, 2023. Registration is available at: https://www.eventbrite.com/e/proposed-pfas-npdwr-public-hearing-tickets-549335536377.

Push for PFAS CERCLA Liability Exemption. Water utility groups have begun to push Congress for a statutory exemption from CERCLA liability concerning PFAS traveling through their systems in light of EPA lack of authority to provide such protection. The Water Coalition Against PFAS has said that efforts to address PFAS must appropriately assign liability to those responsible for creating the contamination. CERCLA follows the "polluter pays" principle, which holds those responsible for releasing hazardous chemicals into the environment liable for clean-up costs. The Coalition contends that this principle will effectively result in "public pays" scenarios where, without a statutory exemption for drinking water and wastewater systems that merely passively receive PFAS, polluters can pass cleanup costs on to customers. Although EPA has pledged to use enforcement discretion when addressing liability concerns, water utilities maintain that such efforts will be insufficient to shield them from liability because of EPA's limited authority. Public listening sessions were held on March 14 and 23, 2023, to help draft a PFAS enforcement discretion policy.

EPA Issues New WOTUS Rule. The new Waters of the United States ("WOTUS") rule was published in the Federal Register on January 18, 2023, and went into effect on March 20, 2023 for all jurisdictions except Idaho and Texas. The new rule codifies proposed modifications to the ever-changing definition of WOTUS. Finalized back in December 2022, EPA and U.S. Army Corps of Engineers ("USACE") have attempted to create a durable policy that will return to pre-2015 standards while simultaneously introducing several new exclusions from federal jurisdiction, including six new waivers for agricultural land. The new rule broadens the Trump-era rule and attempts to bring additional clarification to wetland jurisdictional determinations. Most notably, the new rule endeavors to apply both competing tests set out in the *Rapanos v. United States* plurality decision that created the favored Justice Scalia's narrow test for jurisdiction based on a "continuous surface connection" between "relatively permanent waters" and the solo Justice Kennedy concurrence that provided a broader "significant nexus" standard. As previously stated, officials plan for this definition to merely be the first phase in a two-part repeal and replace effort, with a second, more durable, and long-term definition planned in the coming future. Further changes to the definition of WOTUS are expected by some in light of the ongoing Supreme Court *Sackett v. EPA* case that takes up the issue of wetland jurisdictional determination, the outcome of which is still pending post-October 3, 2022 oral arguments.

Updated EPA Effluent Guidelines. This past January 2023, EPA announced its plans to propose rules revising effluent limitation guidelines and pretreatment standards to address rapidly growing the Per-and Polyfluoroalkyl Substances ("PFAS") concerns. In collecting data for this plan, EPA analyzed various PFAS sources and determined that revisions to 40 Code of Federal Regulations Part 445, Landfills Point Source Category, are warranted to address PFAS in landfill leachate. EPA has held stakeholder meetings with various organizations in the industry such as the National Wildlife Rehabilitators Association, the Solid Waste Association of North America, and the Association of State and Territorial Solid Waste Management Officials and intends to initiate a publicly owned treatment works influent study, including for landfills. While commencement and pace of these activities depend on EPA's 2023 Fiscal Year appropriations and operating plan, a future rule would potentially impact landfill discharges to surface waters and sanitary sewers.

United States Department of Defense ("DOD")

DOD released specifications for PFAS-free replacement of Aqueous Film-Forming Foam ("AFFF"). In October 2022, DOD announced its plan to replace AFFF with a PFAS-free alternative at military bases. On January 6, 2023, DOD released its plan to transition to Fluorine-Free Foams ("F3") along with specifications for F3. While F3 may not currently be capable of meeting these specifications, [this plan is an important step in having all DOD foams bought after the October 2023 deadline to cease buying AFFF be met,] and DOD must cease using all PFAS-based foam by October 2024. Civilian use of the AFFF alternative remains discretionary.

Texas Commission on Environmental Quality ("TCEQ")

Draft Guidance for Post Closure Care ("PCC"). As the thirtieth anniversary of Subtitle D of the Resource Conservation and Recovery act approaches, municipal solid waste ("MSW") landfills that closed on or soon after October 9, 1993 will soon be seeking exit from PCC. In preparation for this, TCEQ published a draft guidance document to address how it handles landfills requesting to exit PCC in October 2022. The guidance would require that an engineer submit a certification that the facility is ready to exit PCC or notify and explain to TCEQ why it is not. The guidance also lays out what must be submitted to determine if landfill gas monitoring, groundwater monitoring, and leachate collection and removal may be discontinued, as well as whether the final cover and surface drainage control system are functioning properly. While the guidance provides various specific requirements and parameters, it leaves room for TCEQ discretion in several instances. TCEQ held several informal stakeholder meetings and accepted comments on the draft document. TCEQ is reviewing comments and there is no estimated timeframe for a final document or revised draft to be published.

Electric Reliability Council of Texas ("ERCOT")

ERCOT Technical Advisory Committee has Two New Officers. In late January, the Technical Advisory Committee ("TAC") held its first meeting of 2023 where officer elections were held. TAC makes recommendations to the ERCOT board regarding policies and procedures and is responsible for prioritizing projects. Clif Lange was elected unanimously for Chair, and Caitlin Smith was elected for Vice Chair. Clif Lange is the General Manager for the Generation and Transmission Cooperative at South Texas Electric Cooperative. Caitlin Smith works for Jupiter Power in their Trading, Analytics, and Market Operations team. The most recent TAC meeting was held on March 21, 2023.

Public Utility Commission of Texas ("PUC")

Electric Market Redesign Discussion Continues. The Senate Business and Commerce Committee held two hearings in February to continue their evaluation into the electric market redesign options. The first hearing focused on assessment of the Performance Credit Mechanism ("PCM") model, which PUC and many generators throughout the industry support. The second hearing focused on the other proposals.

At the first hearing on February 7, 2023, PUC Chairman Peter Lake, Zachary Ming, a Consultant with Energy + Environmental Economics ("E3"), and Carrie Bivens, ERCOT's Independent Market Monitor Director, testified. Chairman Lake, a major proponent of the PCM model, was adamant that if PCM is approved, it will result in construction of dispatchable power plants. Ms. Bivens emphasized that market incentives are currently in place to promote investment, but the legislature did not seem convinced by this approach. The biggest take away from the hearing was the legislature's desire to implement financing from the state to reduce the cost of capital for investment.

The hearing on February 16, 2023 had six witnesses present to speak, including former PUC Chair Becky Klein, who spoke about her perspective and experience from deregulation. The two main issues at the hearing were operational performance and long-term resource adequacy. At this hearing, PCM was met with greater skepticism from the legislature. However, PCM was supported by witness Michele Richmond with Texas Competitive Power Advocates. The other witnesses provided new proposals for dispatchable reliability ancillary service and a state funded emergency reserve program.

Additionally, two Senate Bills relating to the electric market reliability were filed on March 9, 2023, sponsored by Senator Schwertner and Senator King. Senate Bill 6 establishes the Texas Energy Insurance Program, which supports and maintains current dispatchable generation through a state-backed low-cost loan program. Senate Bill 7 allows power generators to bid a day ahead on dispatchable reliability reserve services to account for market uncertainty and allocates costs for providing ancillary and reliability services procured under this section among dispatchable and non-dispatchable generation facilities, and load serving entities.

Sunset Bill Affecting ERCOT and PUC- SB 1368/HB 1500. Senate Bill 1368 and its companion bill, House Bill 1500, are the Sunset Review Bills for PUC and Office of Public Utility Counsel. The bills' major amendments to the Public Utility Regulatory Act include the requirement of PUC to include public testimony on each non-contested case meeting item in the agenda for each regular PUC meeting; the requirement of PUC to prepare a biennial report that includes scope of competition in the electric and telecommunications market; and the requirement of PUC to develop a strategic communications plan.

The bills also made changes to the independent organization certified for the ERCOT power region. The changes include providing clarification of PUC's authority over the independent organization, establishing how PUC may make directives to the independent organization, and requiring two members of the independent organization to include the Commission Chairman and a Commissioner picked by the Chairman. Finally, the bills require PUC and independent organization submit an electric industry report to the legislature in January on every odd-numbered year.

PUC Rulemaking Update. PUC Staff's current rulemaking calendar for 2023 can be found under Docket No. 52935. As of February 7, 2023, the following projects are being prioritized:

- Project No. 54212 – Terms and Conditions of Access by a Competitive Retailer to the Delivery System of Certain MOUs and Electric Cooperatives
- Project No. 52796 – Review of Market Entrant Requirements
- Project No. 52059 – Review of Commission's Filing Requirements
- Project No. 54589 – Review of Chapter 26

Other rulemaking projects that are being prioritized but do not yet have a determined schedule include:

- Project No. 53924 – Water and Sewer Utility Rates After Purchase or Acquisition
- Project No. 53404 – Restoration of Electric Service After a Widespread Outage
- Project No. 54233 – Technical Requirements and Interconnection processes for Distributed Energy Resources ("DERs")
- Project No. 54224 – Cost Recovery for Service to DERs
- Project No. 54585 – Emergency Pricing Program
- Project No. 52301 – ERCOT Governance and Related Issues
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 53981 – Review of Wholesale Water and Sewer Rate Appeals.

Texas Railroad Commission ("RRC")

Investigation into ATMOS after Power Outage in December. RRC began examining Atmos Energy late last year after more than 2,300 customers lost service or had their service curtailed during a December 22-26, 2022 winter storm. Both Governor Greg Abbott and local city officials have complained about what they described as the company's lack of planning and have called for the inquiry.

On February 7, 2023, RRC's Oversight and Safety Division ("OSD") closed its investigation into Atmos Energy's service disruptions during the cold weather event that occurred in late December 2022. In its investigation, OSD found Atmos Energy's extensive, localized service interruptions experienced by Atmos customers due to low pressure on localized areas of the Mid-Tex distribution system on December 22 through December 26, 2022 were a violation of RRC's Rules on Quality of Service, which establishes minimum service standards like the continuity of service. The violation occurred due to the insufficiency of Atmos Energy's cold weather contingency plan in preventing serious interruptions in eight primary localized communities of its Mid-Tex distribution system.

As a result of the investigation, RRC staff will refer the violation of the Quality of Service to the RRC's Enforcement Section of its Office of General Counsel to enforce penalties on Atmos Energy.

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