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ATTORNEYS AT LAW

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THE LONE STAR CURRENT

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LEGISLATURE ESTABLISHES NEW REPORTING REQUIREMENT FOR PUBLIC WATER SYSTEMS

by Nathan E. Vassar and Ashley N. Rich

Public Water Systems ("PWS") in Texas now have a new reporting obligation during times of certain outages of water service. Added during the regular 88th Legislative Session by House Bill 3810 (became effective September 1, 2023), Texas Health and Safety Code Subsection 341.033(i)(6) requires non-industrial PWSs to give immediate notice to the Texas Commission on Environmental Quality (the "TCEQ") in the event of unplanned conditions that have caused a public water supply outage or the issuing of an advisory or notice. This subsection applies to all PWSs that supply water for retail customers. Based upon legislative history, the intention of the bill is to ensure that if scenarios such as winter storms, hurricanes, or other natural disasters impact the availability of drinking water supplies, TCEQ and the Texas Division of Emergency Management are able to position themselves to handle an emergency response.

Under this new requirement, PWSs must submit a report to TCEQ if there are unplanned conditions that: (1) cause a public water supply outage and/or (2) result in the PWS issuing a do-not-use advisory, do-not-consume advisory, or a boil water notice. This new requirement does not negate any previous requirements and in addition to this new TCEQ notification, PWSs are still required to (1) issue a do-not-use advisory, do-not-consume advisory, or boil water notice to the public as soon as possible, but no later than 24 hours after notice requirements, (2) submit a copy of that notice to the TCEQ within 24 hours of delivery to the public, (3) submit a certificate of delivery to the TCEQ within 10 days, and (4) submit a copy of the rescind notice, a rescind certificate of delivery, and a copy of the microbiological samples to the TCEQ within ten days of rescinding the notice.

If a PWS encounters unplanned conditions that cause a water supply outage or necessitate the issuing of an advisory or notice, it can satisfy these new requirements by reporting online using the new "Immediate Notification Form" which can be found here: https://www.tceq.texas.gov/drinkingwater/boilwater.html. In order to complete the form, a PWS will need to be able to identify the issue its system is facing, the number of connections affected, the date of the incident, the name and ID number for the PWS, and the primary county affected, and provide contact information.

While this statute became effective September 1, 2023, questions remain surrounding what types of issues constitute "unplanned conditions." There is no immediate guidance on what will qualify as an outage or if there is a threshold number of customers affected; however, different scenarios may drive different decisions on whether the new notice is merited. A rulemaking will commence either in late 2023 or early 2024 and Lloyd Gosselink will be actively involved in the TCEQ work groups addressing these questions and will participate in such rulemaking process. Until those rules are developed and defined, it is important to reassess internal reporting processes to make sure that the HB 3810 notice is followed and implemented during emergency outage events.

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IN THIS ISSUE

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

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

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

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

FIRM NEWS

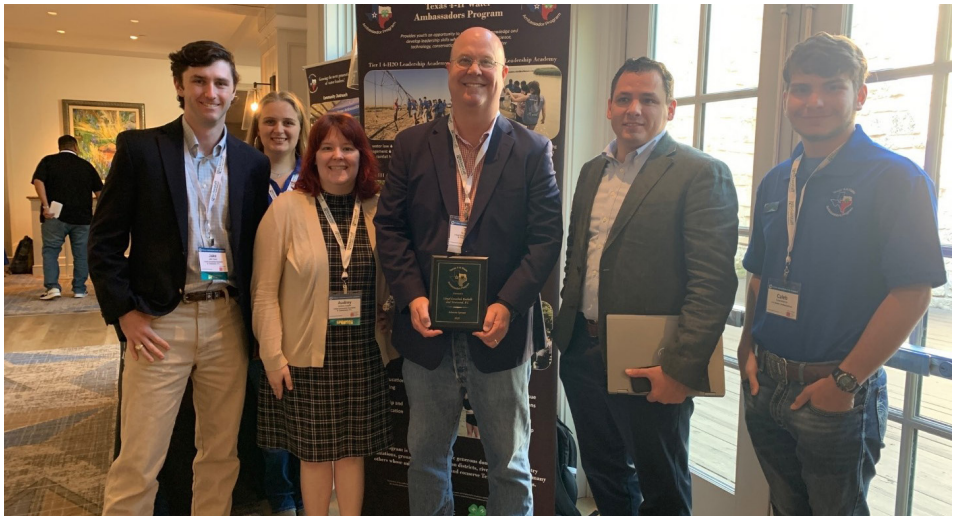
Jessie Powell will be giving a "Regulatory Update" at the 22nd Annual Robert F. Pence Drinking Water Seminar, North Central Texas Chapter of AWWA on October 27 in Fort Worth.

Thomas Brocato will be presenting "A Quick History of Electric Utility Deregulation in Texas" and "Gas and Electric Update" (Regulatory and State Case Law) at the Texas Coalition of Cities for Utility Issues "TCCFUI" Fall Seminar on October 27 in Houston.

Jamie Mauldin will be giving a "Telecom and Cable Update" at the Texas Coalition of Cities for Utility Issues "TCCFUI" Fall Seminar on October 27 in Houston.

Nathan Vassar will be a panelist discussing "Top Clean Water Legal Developments of the Year" at the National Clean Water Law & Enforcement Seminar on November 9 in Asheville, North Carolina.

Ty Embrey and Madison Huerta will be presenting "The 88th Texas Water Session" at the 22nd Annual Bell County Water Symposium on November 14 in Belton.



Lloyd Gosselink received recognition for our sponsorship of the 4-H Water Ambassadors Program.

Members of the Firm volunteered at the Central Texas Food Bank and helped make a positive impact on the local community.

Texas Water Code Subsection 12.013(a) gives the Public Utility Commission broad, general authority to fix water rates for any purpose provided by Water Code Chapters 11 and 12. Tex. Att'y Gen. Op. No. JS-0004 (2023).

The Executive Director of the Public Utility Commission ("PUC") requested an opinion from the Texas Attorney General regarding whether PUC has authority under Water Code Section 12.013 to hear an appeal by a municipal utility of rates set by a water control and improvement district, or whether the Texas Commission on Environmental Quality ("TCEQ") has exclusive authority over such an appeal under Water Code Subsection 51.305(d). The Attorney General determined that to the extent the PUC's authority to fix water rates under Water Code Section 12.013 encompasses authority to hear a matter concerning an amount allocated under Water Code Section 51.305, its authority overlaps with that of the TCEQ.

In October 2021, the City of McAllen (the "City") filed a petition with PUC pursuant to Water Code Section 12.013 to appeal water delivery rates set for its utility by the Hidalgo County Water Improvement District No. 3 (the "District"). In filing its petition with PUC, the City argued that PUC has assumed authority over rate appeals challenging the rates set by a water control and improvement district. Because there were still factual questions to be resolved, the Attorney General determined that he could not provide an answer to the ultimate question. However, the Attorney General provided insight as to how each statute may be interpreted.

The Attorney General interpreted Water Code Subsection 12.013(a) as authorizing PUC to fix reasonable rates for the furnishing of raw or treated water for any purpose under Water Code Chapters 11 or 12, and interpreted Water Code Section 51.305 as pertaining to specific expenses a water control and improvement district may allocate to certain users, concluding that the two provisions do not conflict. Under the plain terms of Subsection 51.305(d), when an authorized party disputes a water control and improvement district's allocation assessments and other payments necessary to cover the maintenance and operating expenses of its water delivery system, a petition filed with the TCEQ is the sole remedy. Otherwise, the matter is before PUC.

A person may not simultaneously serve as a board member of two taxing entities that serve geographically overlapping territory. Tex. Att'y Gen. Op. No. JS-0006 (2023).

State Representative Terry Canales requested an Attorney General Opinion regarding whether a member of the Board of Trustees of the La Joya Independent School District (the "School District") may simultaneously serve as a member of the Board of Directors of the Hidalgo County Irrigation District No. 6 (the "Irrigation District"). The Attorney General determined that an individual may not simultaneously serve as a school board trustee and irrigation district board member.

The common-law doctrine of conflicting-loyalties incompatibility prohibits one person from simultaneously holding two offices that would prevent the person from exercising independent and disinterested judgment. Because the School District and the Irrigation District have taxation authority in overlapping territory, one individual may not simultaneously serve as a school board trustee and irrigation district board member. Therefore, the Attorney General determined that a court would likely conclude that a person may not simultaneously serve as a board member of the School District and as a board member of the Irrigation District. Additionally, if an officeholder accepts and qualifies for a second incompatible office, that individual automatically resigns from the first as a matter of law.

A county commissioner's court lacks authority to impose a moratorium on commercial solar projects. Tex. Att'y Gen. Op. No. AC-0003 (2023).

The Franklin County Attorney requested an Attorney General Opinion regarding the authority of a county commissioners court to adopt and enforce a moratorium regarding commercial solar projects. The Attorney General ultimately determined that the commissioners court does not have such authority.

Franklin County proposed a moratorium on the sitting, construction, installation, operation, permitting, and licensing of any Commercial, Utility Scale Solar Energy Facility within the County. The Attorney General concluded that a court would likely find a moratorium invalid and unenforceable, citing several statutes. First, the Attorney General determined that the commissioners court has no specific authority to impose a "moratorium" on a solar facility. Second, although a commissioners court has authority over certain aspects of county roads under Transportation Code Chapter 251, the moratorium reaches activity other than that related to county roads. Therefore, Chapter 251 does not authorize the commissioners court to impose a moratorium. Third, although a commissioners court can enforce laws reasonably necessary to protect public health under Health and Safety Code Section 121.003, such an action must seek to enforce a specific, preexist-

ing public health law. Because the moratorium would not enforce a specific public health law, it would likely be invalid.

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DISABILITY, PREGNANCY, AND RELIGION: HOW TO BE ACCOMMODATING

by Sarah T. Glaser and Michelle D. White

State and federal law prohibits employers from discriminating against employees based on protected classifications. Certain protected classifications require employers to engage in the interactive process with covered employees to find reasonable accommodations. Three key areas of covered employees include disability, pregnancy, and religious accommodations. The interactive processes for these categories have similarities, but they also have important distinctions, which have been clarified and expanded in recent legal developments.

Disability Accommodations

Recently, the Texas Supreme Court clarified when obesity can be considered a disability under *Texas law. Tex. Tech Univ. Health Scis. Ctr.* – El Paso v. Niehay, 671 S.W.3d 929 (Tex. 2023). In this case, the employee alleged that she was terminated because the employer "regarded her as" having a disability, which she identified as morbid obesity. The employer filed a joint motion for summary judgment and plea to the jurisdiction, arguing morbid obesity is not considered a physiological impairment under the Texas Labor Code unless it is caused by an underlying medical condition. The trial court denied the employer's motion, holding that morbid obesity can be considered a disability under the Texas Labor Code in a "regarded as" claim. The court of appeals affirmed. However, the Texas Supreme Court reversed and dismissed. Acknowledging that one of the express purposes of the Texas Labor Code is to execute the policies of the Americans with Disabilities Act ("ADA"), the Court relied on comparisons to ADA regulations and guidance to establish that weight is an impairment only if it falls outside the normal range **and** it occurs because of an underlying physiological disorder. The Court rejected the employee's arguments that (1) the medical community considers obesity to be a medical disorder, and (2) obesity is a physiological disorder because it is a function of physiology. Since the employee presented no evidence of an underlying condition or disorder, the Court held that she could not be "regarded as" having a disability.

The Texas Supreme Court may soon further clarify what it means to be "regarded as" having a disability. *Dallas Cnty. Hosp. Dist. v. Kowalski*, No. 05-21-00379-CV, 2023 WL 2782312 (Tex. App.—Dallas Apr. 5, 2023, pet. filed). In *Kowalski*, an employee requested a keyboard tray, a mouse tray, and lower computer monitors to help alleviate back pain. Her supervisor approved the request, but then forwarded the information to human resources, where the request was categorized as a "reasonable accommodation complaint." The employee insisted the request was not based on a disability, but she was required to go through the ADA accommodation process. A few minutes after a mandatory "ergonomic appointment and evaluation," the employer eliminated her position. The employee sued for disability discrimination and retaliation. The trial court denied the employer's motions for summary judgment and plea to the jurisdiction because there was sufficient evidence to raise a question about whether the employer "regarded her as" an individual with a disability when it required her to follow the ADA procedures. A petition for review was filed with the Texas Supreme Court on July 21, 2023.

Disability: Transfer to a Vacant Position and the Interactive Process, Generally

When an employee requests an accommodation, both the employee and the employer must engage in the interactive process to find a reasonable accommodation. *Equal Employment Opportunity Comm'n v. Methodist Hosps. of Dallas*, 62 F.4th 938 (5th Cir. 2023). In this Fifth Circuit case, an employee was unable to perform essential functions of her position and requested a transfer to a new position as a reasonable accommodation, which was ultimately filled by a more qualified candidate in accordance with the employer's policy to hire the most qualified candidate. After the employer's repeated unsuccessful attempts to communicate with the employee about accommodations, the employer terminated the employee. The U.S. Equal Employment Opportunity Commission ("EEOC") claimed that an employer's "most qualified candidate" policy violates the ADA when the policy prevents a qualified, disabled employee from filling a vacant role as a requested accommodation. The Fifth Circuit held that the employer's policy was not unreasonable on its face, as the EEOC's proposed standard would "compromise the hospital's interest in providing excellent and affordable care . . . and would be unfair to . . . other employees." The court further held that the employee was responsible for the breakdown in the interactive process, finding that the employee repeatedly failed to respond to the employer's letters.

Pregnancy Accommodations

The Pregnant Workers Fairness Act ("PWFA") is a Federal law which requires employers with 15 or more employees to provide reasonable accommodations for known physical and mental limitations related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate an undue hardship. Recently, the EEOC proposed regulations to clarify the applicability and enforcement of the PWFA. While these regulations are not finalized and may be revised before they are issued, they provide important insight into how the EEOC will interpret and enforce the PWFA.

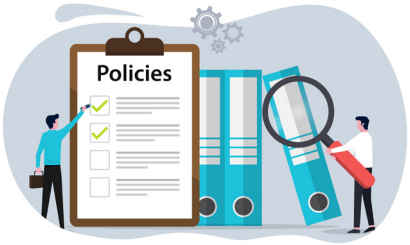
In these regulations, the EEOC used a broad definition of "reasonable accommodation." Notably, the EEOC provided a specific list of reasonable accommodations that do not impose an undue hardship, including extra bathroom breaks/time, food and drink breaks, drinking water on the job, and sitting/standing as necessary. These four accommodations will be considered reasonable in virtually all circumstances and presumptively will not impose an undue hardship. Additionally, the regulations provide a non-exhaustive list of potential accommodations such as job restructuring, part-time work, uniform modifications, temporary leave, light duty, and, most notably, the temporary removal of an essential function.

Under the ADA, employees must be able to perform the essential functions of their position, with or without reasonable accommodation. However, under the PWFA, workers can forgo essential functions so long as they can resume them in the near future and the employer can reasonably accommodate their inability to perform the essential function. "Near future" is defined as within 40 weeks of the requested accommodation. Time after childbirth for recovery does not factor into this timeline. Additionally, if there is a separate accommodation related to a different pregnancy-related medical condition, there is a separate 40-week timeline for that accommodation.

Pregnancy and "Related Medical Conditions"

The statutory language of the PWFA covers pregnancy, including uncomplicated pregnancies, existing conditions exacerbated by pregnancy or childbirth, employees only needing a temporary change, and "related medical conditions." These proposed regulations provide a broad, non-exhaustive list of "related medical conditions" such as past and potential pregnancy, lactation, use of birth control, menstruation, fertility treatments, endometriosis, postpartum anxiety and depression, symptoms associated with related medical conditions, and many others.

The PWFA also expands the requirements of the PUMP Act, which requires employers to provide reasonable time and a comfortable, private space to allow all nursing employees, non-exempt and exempt, to express milk. Under the PUMP Act, private employers with fewer than 50 employees may be able to establish an undue hardship exemption, but the proposed PWFA regulations restrict that exemption to employers with fewer than 15 employees. Under these regulations, the space provided for employees to express milk must also (1) be in reasonable proximity to the employee's usual work area, (2) be regularly cleaned, (3) have electricity and appropriate seating, (4) have a surface sufficient to place a breast pump, and (5) be in reasonable proximity to a sink, running water, and a refrigerator



for storing milk

Religious Accommodations

Employers also must engage in the interactive process for religious accommodation requests. Until recently, a requested religious accommodation that created a *de minimis* cost to the employer met the standard for an undue burden on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In a recent Supreme Court decision, the Court clarified the standard that an employer must meet to demonstrate an undue hardship as it relates to religious accommodations. *Groff v. DeJoy*, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023).

In this case, a U.S. Postal Service ("USPS") employee requested an accommodation because his religious beliefs dictated that he could not work on Sundays. On days when a coworker was unable to swap, he did not report to work and faced progressive discipline that led to termination. The employee sued for failure to provide religious accommodations. USPS argued that requiring the only other employee at that location to work every Sunday without a break created an undue hardship. The district court granted summary judgment for USPS, and the Third Circuit affirmed, finding that the requested accommodation met the *de minimis* standard for religious accommodations. A unanimous Supreme Court vacated and remanded the case and clarified the rule under Title VII. The Court emphasized that the standard for religious accommodation is not a *de minimis* test, but a "substantial cost" test.

The Court held that "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." The Court further clarified that "undue hardship" on coworkers is relevant but not sufficient to establish undue hardship on the employer unless this undue hardship affects the conduct of the business. Lastly, the Court indicated an employer is required to reasonably accommodate religion, not merely assess the reasonableness of a specific accommodation request without further consideration of other available options. This means that employers must engage in the interactive process with employees in connection with religious accommodation.

While adopting some features of disability accommodations, such as requiring employers to engage in an interactive process, the new standard for religious accommodation falls short of ADA accommodation requirements. This new standard will be highly fact specific and balance the religious beliefs of the employee against the costs related to the conduct of the employer's business. It remains to be seen how the new standard under *Groff* will affect religious accommodation claims, and how the courts will interpret this new standard.

This article was prepared by Lloyd Gosselink's Employment Law Practice Group: Sarah Glaser is the Chair of the Firm's Employment Law Practice Group and Michelle White is an Associate in the Firm's Employment Law Practice Group. If you have any questions related to this article or other employment law matters, please contact Sarah at 512.322.5881 or sglaser@lglawfirm.com, or Michelle at 512.322.5821 or mwhite@lglawfirm.com.

UPDATING THE LOCAL GOVERNMENT ADMINISTRATIVE CHECKLIST

by Kathryn B. Thiel and Lauren J. Kalisek

The 88th Legislative Session saw a number of changes to laws governing recurring administrative tasks of local governments, including water control & improvement districts, municipal utility districts, other special districts and public entities. This fall is a good time to confirm internal processes and policies are up-to-date and fully compliant with these new requirements. Examples of such changes with references to bills passed in the 88th Regular Session include:

- Local governments must report cyber-security breaches to the Texas Department of Information Resources (SB 271)
- All Article XVI, Section 59 districts must post meeting notices on their websites (HB 3440)
- Board member *per diems* for certain water districts governed by Chapter 49 of the Texas Water Code (Chapter 49) are now tied to the legislative *per diem* (SB 2815)
- Nonindustrial public water supply systems must report an "unplanned condition" that causes a system outage or triggers a boil water notice to the Texas Commission on Environmental Quality (HB 3810)
- Certain social media apps, including Tik Tok, are banned from devices owned or leased by governmental entities (SB 1893)
- A governmental entity may require Public Information Act ("PIA") requestors to provide identification to confirm that the requestor has not exceeded a limit or concealed their identity (HB 3033)
- A governmental entity must submit requests for PIA Attorney General ("AG") decisions through the AG e-filing system (with certain exceptions) (HB 3033)
- Chapter 49 water districts must use an updated form Notice to Purchaser (filed with the county) when updating information on their tax rates and bonds (SB 2815)
- Thresholds for board and staff approval of change orders and competitive bidding requirements have been increased for Chapter 49 water districts (HB 3437) (HB 3507)
- Annual review and updates to local government investment policies should consider new clarifications in the Public Funds Investment Act regarding the use of joint accounts for repurchase agreements (SB 1246)

As with any legislative session, this one resulted in a number of new or changed reporting requirements as noted above, but also included helpful increases in *per diems* and competitive bidding thresholds. We hope this list provides a convenient cross-check for local government entities confirming implementation of changes resulting from the 88th Regular Session on these administrative items.

Kathryn Thiel is an Associate in the Firm's Districts Practice Group and Lauren Kalisek is the Chair of the Firm's Districts Practice Group. If you have any questions or would like additional information related to this article or other matters, please contact Kathryn at 512.322.5839 or kthiel@lglawfirm.com.

ASK SARAH

Dear Sarah,

I am an HR manager, and I'm looking at a stack of projects that I am trying to prioritize. Our job descriptions haven't been updated in years, but our policy manual was updated about two years ago. How important are updated job descriptions and policy manuals? Any advice on whether to do this sooner or later and tips on making the process easier?

This Wasn't In My Job Description

Dear Job Description,

Updated job descriptions and policy manuals are crucial, not only in providing employees with accurate guidance on job expectations, but also to defend claims of discrimination and failure to accommodate.

In a recent case, a federal appeals court found that information in the job description and policy manual was key evidence in determining an employer's liability. In that case, the plaintiff requested an accommodation to be able to restrict the length of his required shift to 12 hours due to a disability, sleep apnea. The employer denied the accommodation and ultimately terminated the employee because he could not perform an essential function of his job. The employee sued for failure to accommodate his disability, but the court determined that the employer was not liable. Since both the job description and the policy manual specifically required this position to be available to work a 16-hour shift, in the form of two back-to-back 8-hour shifts, this requirement was an essential job duty. The plaintiff's inability to perform this essential function, with or without reasonable accommodation, made him unqualified for the job. *Cuellar v. GEO Group, Inc.*, No. 22-50135, 2023 WL 4535079, *3 (5th Cir. July 13, 2023).

Referring to job descriptions and policy manuals as evidence of an essential function is much more convincing when these documents already exist. Accurate job descriptions are also critical roadmaps to use when posting a job opening, hiring, and evaluating performance.

Additionally, now is a great time to review and update job descriptions! The Department of Labor recently released a

proposed update to the salary threshold of the Fair Labor Standards Act overtime exemptions. The proposed changes would raise the salary threshold from $684 to $1,059 per week, with automatic increases to the threshold every three years. These proposed changes are not final and are not yet effective, but employers should start reviewing their exempt positions for any position that would no longer meet the salary threshold.

One tip for updating job descriptions is to get the employees in each position to suggest edits to their own job descriptions. Create a questionnaire for employees to assess whether the current job description accurately reflects what they do every day, what they need to know how to do, and what skills and background it takes to do the job right. Many employees take this responsibility seriously because they want the document to fully reflect their full duties. You can then compare the results with others in the same job, ask supervisors for their input and suggestions, and then edit to get a more up-to-date job description.

Keeping your policy manual updated is also very important. Generally, policy manuals should be reviewed and updated at least every two years to capture changes in law. Some examples include changes to disability, pregnancy, and religious accommodations, which are covered in more detail in our article this quarter discussing accommodations. Additionally, in 2023, the Texas Legislature passed the Crown Act, which expands race discrimination to cover protective hairstyles. For private employers, the National Labor Relations Board recently updated the standard for policies that may have a chilling effect on protected activity. These are just a few examples of recent legal changes that could impact your policies. If it has been more than a year or two since your last policy update, you should prioritize reviewing and updating your policies.

Give us a call if you want help in reviewing your job descriptions or policy manual to ensure that they are up-to-date and are most beneficial to your employees and to the organization.

*"*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.*

IN THE COURTS

Water Cases

Cactus Water Servs., LLC v. COG Operating, LLC, No. 08-22-00037-CV, 2023 WL 4846861 (Tex. App.—El Paso July 28, 2023, no pet. h.).

COG Operating, LLC ("COG"), a mineral lessee, has the exclusive right to explore for and produce oil and gas on approximately 37,000 acres of land in Reeves County, Texas. COG routinely disposes of its oil and gas waste, including produced water. Cactus Water Services, LLC ("Cactus") was transferred the right to sell all water "produced from oil and gas wells and formations on or under the [covered properties]." After Cactus notified COG of its rights to the produced water, COG initiated this suit, claiming it had sole right to the produced water under the mineral leases. Cactus counterclaimed, stating it had the sole right to the produced water. Cactus argued that COG's mineral leases give rights to "oil, gas, and other hydrocarbons" or just "oil and gas," and as water is not a hydrocarbon, rights to the produced water are not included in the mineral leases. Cactus also claims that because COG's mineral leases expressly limit its use of surface water, COG cannot sell produced water to third parties. COG argued that produced water is part of the "single, combined product stream that arises from its wells," and it owns the produced water as a waste byproduct.

To determine who had rights to the produced water, the Court analyzed whether produced water is water or waste. As none of the leases defined water or produced water, the Court looked to Texas statutes and regulations. The Court determined that the relevant definitions of "oil and gas waste" in the Texas Water Code, the Texas Natural Resources Code, and the Railroad Commission rules include produced water. Further, produced water is defined as a type of oil and gas waste, and characterizing produced water as oil and gas waste conforms with industry practice. The Court held that a mineral lease granting the rights to "oil, gas, and other hydrocarbons" or "oil and gas" includes the rights and duties associated with disposing of its waste, which includes produced water. As such, the leases that conveyed produced water rights to Cactus were ineffective, and COG, the mineral lessee, had rights to the produced water.

City of Lake Jackson v. Adaway, No. 01-22-00033-CV, 2023 WL 3588383 (Tex. App.—Houston [1st Dist.] May 23, 2023, no pet.).

In this case, several landowners sued the City of Lake Jackson (the "City") and the Velasco Drainage District (the "Drainage District"), alleging that the governmental

entities took flood mitigation actions during Hurricane Harvey that resulted in flooding to the landowners' property. The City and Drainage District both submitted pleas to the jurisdiction, claiming they were immune from suit under governmental immunity. The trial court denied both the City and the Drainage District's pleas to the jurisdiction, and on appeal, the governmental entities argued that their governmental immunity was not waived, the landowners did not show causation, and several exceptions to waivers of immunity apply.

The landowners alleged constitutional taking claims as well as intentional nuisance and trespass. In addition to the constitutional claims, the landowners also alleged negligence, negligent trespass, and negligent nuisance. The Court analyzed each of these claims for a waiver of governmental immunity.

Under the Court's analysis, to waive governmental immunity for the constitutional takings claim, the landowners would have had to show that (1) the governmental entities took the flood mitigation actions with a substantial knowledge or certainty that such actions would cause flooding to the landowners' properties; (2) the governmental entities' actions were the proximate cause of the damage to the landowners' properties; and (3) the public-necessity doctrine (a doctrine allowing property to be taken or damaged "in the furtherance of the public interest") does not apply. The Court held that the landowners had sufficiently pled a constitutional takings claim because fact issues existed as to the governmental entities' knowledge of the effects of the flooding and whether their actions were the proximate cause of the flooding to the landowners' properties. The Court also held that the public-necessity doctrine is an affirmative defense that should be proven on the merits. The Court affirmed the trial court's denial of the City and Drainage District's pleas to the jurisdiction with regard to the constitutional takings claim.

For the negligence claims, the Court found that the actions the City and Drainage District took, closing a metal flap gate, pumping water into a canal, and building a sandbag dam, fall within a municipality's enumerated governmental functions of maintaining sanitary and storm sewers, waterworks, and dams and reservoirs. Because governmental entities are immune from liability for governmental functions under governmental immunity, the Court reversed the trial court's denial of the City and Drainage District's pleas to the jurisdiction for these claims.

Litigation Cases

It's Back-to-School time, which for us at *In the Courts* means it's also Back-to-Courts time! Because much like schoolchildren, judges also enjoy a nice summer vacation.

We don't have much in the way of decisions to talk about, because rather than writing opinions over the summer, our appellate-court judges were enjoying the beach. So instead of looking back, let's take a few minutes to look forward and discuss the decisions we can expect from the Texas Supreme Court over the next few months:

City of San Antonio v. Campbellton Road, Ltd., 647 S.W.3d 751 (Tex. App.—San Antonio 2022).

Earlier this month, the Texas Supreme Court granted developer Campbellton Road's petition for review of the San Antonio Court of Appeals' decision in this case involving the City's agreement with Campbellton to provide sewer service to its proposed new subdivision in southeast San Antonio.

Campbellton sought to develop 585 acres into two residential subdivisions, and entered into a contract with San Antonio Water System ("SAWS"), the water and wastewater utility for the City of San Antonio, to provide water and sewer connections. In exchange for SAWS' promise to reserve capacity to provide sewer connections to the subdivision, Campbellton promised to build and convey oversized wastewater facilities to SAWS. But when Campbellton asked to connect the new subdivision to the sewer system, SAWS answered that it had already allocated capacity to other customers, asserting that the contract had expired years earlier.

Campbellton sued the City for breach of contract, relying on the Texas Local Government Contract Claims Act, Tex. Loc. Gov't Code §§ 271.151–.159, for a waiver of the City's governmental immunity.

The Court of Appeals rejected Campbellton's argument that the Contract Claims Act applied, concluding that the City received no goods or services from the contract. Rather, the improvements to the lift stations that the contract required Campbellton to construct were in furtherance of Campbellton's desire to develop its property and obtain sewer service from SAWS. Any benefit the City received was merely indirect and not part of the essential terms of the agreement.

The Supreme Court has scheduled oral argument for November 20.

San Jacinto River Auth. v. City of Conroe, No. 09-20-00180-CV, 2022 WL 1177645 (Tex. App.—Beaumont 2022).

The same day that it granted the petition for review in *Campbellton Road*, the Supreme Court also granted the petition in another case involving the Contract Claims Act: *SJRA v. City of Conroe*.

This case is the latest chapter in the long-running litigation between SJRA and the Cities of Conroe, Magnolia, and Splendora arising from SJRA's Groundwater Reduction Plan and contracts between the Cities and SJRA. Claiming that the GRP breached their contracts with them, the Cities refused to pay increased groundwater rates charged by SJRA. SJRA responded by filing suit for breach of contract.

The Cities sought dismissal based on governmental immunity, claiming that the Contract Claims Act did not apply because SJRA did not engage in mandatory mediation required by the contracts. In addition, the Cities argued that the Contract Claims Act did not apply because the contract, which sets rates based on a formula that includes a number of variables, does not state an essential term of the contract, *i.e.*, the price.
The Court of Appeals did not reach the Cities' second argument, instead concluding only that SJRA's failure to mediate prior to suit as required by the

contract prevented it from invoking the Contract Claims Act's waiver of the Cities' immunity. Accordingly, the Court of Appeals affirmed the trial court's dismissal of SJRA's breach-of-contract claims against the Cities.

But both issues are presented for review to the Supreme Court. Accordingly, the Court may address whether a water supply contract that sets the rate based on a formula, rather than a stated price, states the essential terms of the contract so as to bring the contract within the scope of the Contract Claims Act. The Court's answer to that question, if one is given, may be of interest to other entities with similar contract language that sets rates based on a formula.

The Supreme Court has set oral argument for January 9.

City of Denton v. Grim, No. 05-20-00945-CV, 2022 WL 3714517 (Tex. App.—Dallas 2022).

The Supreme Court also granted the petition filed by the City of Denton in a case brought by two former employees of its electric utility under the Whistleblower Act. According to the employees, they were fired for accusing a member of the city council of leaking documents to the *Denton Record-Chronicle*.

The City argued that the Whistleblower Act does not apply to the employees' claim because the alleged violation of law they reported was committed by a city councilmember who was acting for her own personal purposes, and not as someone employed by the City.

The Court of Appeals rejected this argument, concluding that leaking confidential documents to a newspaper could fall within the councilmember's official duties insofar as it relates to her votes. Accordingly, the court held that even when a councilmember acts *ultra vires*, her acts are still the actions of the City for purposes of the Whistleblower Act.

Oral argument is set for January 10.

Air and Waste Case

Montana's Oil and Gas Policies to Change due to State Constitutional Right to a Safe Environment; Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

In March 2020, a group of Montana youths filed a complaint for declaratory and injunctive relief against the State of Montana, Governor of Montana, and several State agencies. Because Montana's state constitution explicitly includes a right to a safe environment, the petitioners challenged the constitutionality of the Montana Energy Policy Act ("MEPA"), which forbids the State and its agents from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews. The group was found to have standing to sue as Montana is one of three states that have a constitutional right to a safe environment; eight other states are currently considering a similar addition to their state constitution. After over two years of back-and-forth filings, the complaint headed to trial on June 12, 2023 and ended on June 20, 2023. The Judge's 103-page order was released on August 14, 2023, finding in favor of the plaintiffs, and ruling that MEPA infringes on Montana's young people's constitutional right to a safe environment. This ruling will ultimately invalidate statutes prohibiting analysis and remedies based on greenhouse gas emission and climate change impacts. As this is a narrow finding which has been rejected in similar cases where there was no explicit right to a safe environment, it sets a new precedent to consider climate change in more instances, though the Montana Attorney General has indicated the State's intent to appeal.

Utility Case

ERCOT Shareholders Challenge Commission Order in District Court.

On March 15, 2023, Texas Industrial Energy Consumers ("TIEC")—an industrial energy consumer coalition that participates in the Electric Reliability Council of Texas ("ERCOT") stakeholder process—filed an administrative appeal in the 455th District Court of Travis County, Texas of a Public Utility Commission of Texas ("PUC") Order approving amendments to ERCOT's corporate bylaws ("Bylaws amendments"). Significantly, the Bylaws amendments eliminated ERCOT Corporate Members' right to approve future amendments to the Bylaws. TIEC and municipal intervenors asserted the Order violated the substantial evidence rule and should be reversed accordingly.

ERCOT is a "membership-based" nonprofit corporation subject to Chapter 22 of the Texas Business Organizations Code ("TBOC"). As such, it has corporate bylaws that dictate internal ERCOT procedures. Among other functions, the bylaws establish the Technical Advisory Committee ("TAC")—composed of ERCOT Corporate Members including TIEC and city coalitions—to form subcommittees, collaborate, and ultimately provide the ERCOT Board policy direction. Prior to the Bylaws amendments, all ERCOT bylaw amendments required Corporate Member approval.

The ERCOT Board initially introduced the Bylaws amendments at the direction of former Commission Chairman Peter Lake, who insisted the legislature intended to remove Corporate Member control over ERCOT corporate governance. In filed comments, Corporate Members emphatically rejected the amendments, emphasizing the proposals violate Texas law and have a detrimental impact on the electric grid. Nevertheless, although no Corporate Member vote ever took place, ERCOT unilaterally filed with the Commission a petition to approve the Bylaws amendments. One day later, the Commission issued the Order approving ERCOT's petition.

TIEC and municipal intervenors asserted that the Commission violated the substantial evidence rule because, among other things, it compelled ERCOT to adopt Bylaws amendments in violation of Texas law. Specifically, the TBOC requires that a nonprofit corporation board amend bylaws in accordance with the corporation's bylaws. Therefore, because ERCOT failed to obtain Corporate Member approval of the Bylaws amendments, it

violated the TBOC. Additionally, when the Commission issued the Order approving the Bylaws amendments, it failed to follow Commission procedure. Indeed, it convened no hearing, established no evidentiary record, and afforded parties no opportunity to present evidence. TIEC and municipal intervenors asserted the Order must therefore be reversed.

Due to significant policy implications, ERCOT market participants are following the litigation closely. Municipal intervenors asserted the Order marginalizes stakeholders essential to a reliable electric grid, reduces confidence in the electric power market, and facilitates the elimination of the stakeholder process. As such, it chills stakeholder collaboration and policy guidance at a time of transformational market redesign. According to the Corporate Members, the Commission jeopardized the Texas electric grid accordingly. The parties are currently briefing the issues and the court will hold a hearing in December.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA's Revised WOTUS Rule. EPA faced a range of options after the Supreme Court's ruling in *Sackett v. EPA* narrowed the definition of the "waters of the United States" ("WOTUS"). EPA's initial approach was to keep the agency's options open in the wake of the May 25, 2023 decision, which narrowly defined wetlands subject to regulation as those indistinguishable from adjacent jurisdictional waterbodies based on a relatively permanent surface water connection. The ruling overturned decades of high court precedent and the broad provisions of the Biden Administration's 2023 WOTUS rule. EPA has since decided to make amendments to the 2023 WOTUS rule that would bring the rule in line with the Supreme Court's decision in *Sackett*. The new final definition of WOTUS was sent to the White House Office of Management and Budget ("OMB") in July. It will skip the notice-and-comment step of the rulemaking process for "good cause," as the Administrative Procedure Act allows in instances where it would be impracticable, unnecessary, or contrary to the public interest. EPA Water Chief, Radhika Fox, has stated that the new final definition will remove the now overturned significant nexus test and address the narrower adjacency definition provided by *Sackett*. Such final rule has been published in the *Federal Register* with an effective date of September 8, 2023 and is available at: https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming.

EPA Proceeds with CWA Section 404 Authority Assumption by States. Despite ongoing uncertainty surrounding the definition of WOTUS in the wake of the Supreme Court's ruling in *Sackett*, EPA has moved forward with issuing a new proposal regarding state assumption of Clean Water Act ("CWA") Section 404 dredge-and-fill permitting authority. The proposed CWA Section 404 assumption proposal would facilitate states' assumption of the permitting program by making procedures and requirements more transparent and also allowing flexibility in how requirements are met in an effort to address perceived barriers to assumption presented by current policies. Presently, EPA and the Army Corps of Engineers (the "Corps") implement CWA Section 404 permitting across a majority of the country. Only three states have authorized Section 404 permitting programs—Florida, Michigan, and New Jersey—and Florida's permitting authority is currently the subject of ongoing litigation. In light of such litigation, the proposed rule has raised concerns about how EPA will go about approving state permitting programs. The proposed rule would also require states assuming permitting authority to adhere to the federal definition of WOTUS, which had been undefined, pending revision to the 2023 WOTUS rule to account for the *Sackett* ruling. Without final WOTUS guidance, there was much uncertainty for states, as well as the Corps, which has paused approving jurisdictional determinations for new dredge-and-fill permits pending such guidance from EPA.

EPA Revised CWA Section 401 Certification Rule. OMB has received the final revised CWA Section 401 certification rule for review, which is expected to roll back previous reforms that narrowed states' ability to block or change projects through the certification process. CWA Section 401 allows states to review federally permitted or licensed projects to certify that they will

not impede state-level water standards. The proposed final rule would allow states to object to any activity related to a project seen as impacting water quality rather than only direct pollution discharges. It would also broaden cases where conditions can be imposed on a pending project with limited EPA oversight. The new rule's measures would also likely be applied retroactively to certification requests submitted before the rule goes into effect.

David Uhlmann Confirmed as EPA Enforcement Chief. The Senate confirmed David Uhlmann to serve as EPA's Enforcement chief on July 20, 2023. He will formally serve as Assistant Administrator for the Office of Enforcement & Compliance Assurance ("OECA"). Ulmann's confirmation comes more than two years after President Biden first nominated him for the position. Since being nominated, Uhlmann has served as Principal Deputy Administrator of OECA, and during such time, he sought common ground with conservatives and emphasized the need for nonpartisan enforcement that would be consistent across administrations. Uhlmann has committed to return EPA's enforcement numbers to 2019 levels.

EPA to Address Lead in Drinking Water. EPA has been called on by the Office of the Inspector General ("OIG") to immediately notify communities when it detects lead levels above its regulatory action levels in drinking water, as its failure to do so could create a significant public health risk. The requirement to notify the public of lead exceedances stems from the 2021 Lead and Copper Rule Revision ("LCRR"), which has a compliance date of October 26, 2024. Therefore, immediate notification is not currently required. However, 2016 amendments to the Safe Drinking Water Act ("SDWA") require EPA to provide notice of an exceedance as soon as practicable with a maximum delay of 24 hours. Additional notification requirements are expected to come with the upcoming Lead and Copper Rule Improvements ("LCRI"). EPA submission of the proposed LCRI to OMB has been delayed, but the final rule is still expected by its original target date of October 16, 2024.

EPA's Cyber Security Mandate Under Review. The Government Accountability Office ("GAO") has begun an examination of a recent EPA policy that requires states to consider public water systems' ("PWSs") cybersecurity in their SDWA reviews, principally that sanitary surveys include reviews of cyber preparedness. The new SDWA policy was launched in a March memorandum, and GAO has expressed interest in talking with PWSs who have since completed their sanitary surveys. Several groups representing PWSs have opposed the policy, challenging sanitary surveys as the appropriate mechanism to ensure the water sector has adequate cyber protections in place. These groups responded to the memorandum, urging EPA to clarify its requirements and scope. Concerns have also been raised that EPA must ensure states protect any potentially sensitive cybersecurity data utilities provide for the sanitary surveys. Following GAO's examination, proceedings in *State of Missouri, et al. v. EPA* have frozen further implementation of the policy pending a final ruling on its legality, with the possibility for EPA to make changes to the policy to address the claims brought against it.

EPA Proposes Changes to Greenhouse Gas Reporting. On July 6, 2023, EPA issued proposed amendments to the reporting requirements under subpart W of the Greenhouse Gas Reporting Program to improve the accuracy of reported greenhouse gas ("GHG") emissions. The rule would include updated calculation methodologies and reporting requirements and would add new emissions sources, referred to as "other large release events" to capture abnormal emission events that are not accurately accounted for under the existing methods, as well as clarify the existing rule requirements to improve understanding. These amendments are intended to address gaps in the total methane emissions reported by facilities and are expected to reduce methane from covered sources by 87 percent below 2005 levels. The revisions are proposed to be effective January 1, 2025. Comments will be accepted for 60 days after publication in the *Federal Register* and a separate proposed rule relating to implementation of the waste emissions charge is expected in the fall of 2023.

EPA Aims PFAS Regulations at Air Emissions Reporting. On July 25, 2023, EPA announced proposed revisions to the federal air emissions reporting requirements to require facilities to report PFAS as part of its PFAS Strategic Roadmap. Hurdles to the rulemaking include that PFAS are not yet designated as "hazardous air pollutants" ("HAPs") and there are no health benchmarks for the inhalation toxicity of PFAS compounds. However, EPA intends to move forward with the rulemaking, having determined that point source emissions into air can affect drinking water quality. The proposed revisions would not require facilities to measure PFAS emissions if measurements were not already available, but would require facilities to use PFAS source measurements for annual emissions reporting when available. The reporting threshold would be set at 0.05 tons per year. Comments will be accepted for 70 days after publication in the *Federal Register*.

Affirmative Defense Emission Waivers banned for Emergency Scenarios for Title V Air Permits. Historically, facilities operating under a Title V permit were shielded from civil liability during a malfunction or other emergency resulting in excess releases of air pollution under an "emergency defense waiver," if the permittee provided evidence that the event was unavoidable with reasonable maintenance. However, earlier this year EPA determined that this waiver was inconsistent with the enforcement structure of the Clean Air Act ("CAA") and began a highly controversial rulemaking process to ban this waiver. After significant discussion with industry leaders, the final rule was published on July 21, 2023 and is expected to face significant challenges from those operating under a Title V permit as many assert that EPA lacked statutory authority to enact this rule.

Public Utility Commission of Texas ("PUC")

PUC Finalizes Cut in Oncor Electric Delivery Company LLC ("Oncor") Rate Request. On August 24, 2023, the PUC cut Oncor's annual revenues by $13 million – or roughly 0.2 percent. In a rate case filed in May 2022, Oncor initially sought a $251 million revenue increase, or 4.5 percent over its 2021 test year revenues

of $5,560,081,218. The PUC Administrative Law Judge ("ALJ") hearing the case rejected that proposal with an initial Proposal for Decision ("PFD") adopted on April 6, 2023, and then the PUC reversed several findings in its Order on Rehearing adopted on June 30, 2023. During a vote on August 24, 2023, the PUC declined to extend the timeline for further consideration of the case.

As a result of the PUC's decision, Oncor has had its initial rate request slashed by more than a quarter-billion dollars. In addition, despite the utility's revenues remaining nearly unchanged under the order, residential customers nonetheless will see a bill increase because of the approved class cost-allocation methodology. More specifically, an average residential customer would have experienced a $7.22 monthly increase under the company's filed rate case, and Oncor would have benefited from an 11.2 percent increase in residential class revenues. Under the adopted Order on Rehearing, an average residential customer will experience a $3.10 increase in monthly bills, and the company will benefit from a 6.1 percent increase in residential class revenues.

CenterPoint Energy Houston Electric ("CenterPoint") Temporary Emergency Electric Energy Facilities ("TEEEF") Rider. CenterPoint filed an application to amend its TEEEF Rider requesting a revenue requirement of $187,875,401. This is a $148.9 million increase to the TEEEF Rider CenterPoint sought in its last Distribution Cost Recovery Factor and would result in a cost of $3.24 per month for the average residential customer.

CenterPoint requested interim rates related to its requested TEEEF Rider effective September 1, 2023. Although all intervening parties opposed the request, the ALJ granted CenterPoint's request after the issue went to hearing. Discovery related to the TEEEF request is ongoing. We will report more as the docket proceeds. More information concerning CenterPoint's TEEEF request can be found on the PUC Interchange under Docket No. 54830.

CenterPoint Distribution Cost Recovery Factor ("DCRF"). In its April 5, 2023 DCRF Application, CenterPoint sought an $84.6 million increase to its DCRF. The parties subsequently agreed to a black box reduction of $15 million. The Stipulation and Settlement Agreement and Proposed Order, filed on July 14 and August 28, respectively, reflect this reduction. On September 14, 2023, PUC consented to and adopted this Order. More information can be found on the PUC Interchange under Docket No. 54825.

Oncor Electric Delivery Company LLC ("Oncor") DCRF. Oncor filed an application to amend its DCRF seeking to increase its distribution revenues by $152.78 million. Intervening parties disputed several investment recovery requests and recommended offsets totaling approximately $34 million. Nevertheless, Oncor declined to settle, and the parties have since conducted a "paper hearing" on the application. Briefing concluded on September 5, 2023 and the PUC ALJ will likely issue a proposed order prior to the September 28 PUC Open Meeting. More information can be found on the PUC Interchange under Docket No. 55190.

PUC Rulemaking Update. PUC Staff's current rulemaking calendar for 2023 can be found under Docket No. 54455. As of August 3, 2023, the following projects are being prioritized:

- Project No. 55250 – Transmission and Distribution System Resiliency Plans
- Project No. 55153 – Review of §22.52
- Project No. 54589 – Rule Review of Chapter 26
- Project No. 54932 – Review of §24.101, Water Rate Appeals
- Project No. 53924 – Water and Sewer Utility Rates after Acquisition
- Project No. 53404 – Power Restoration Facilities and Energy Storage Resources for Reliability
- Project No. 52059 – Review of PUC's Filing Requirements
- Project No. 55182 – Circuit Segmentation Study
- Project No. 54585 – Emergency Pricing Program
- TBD – Renewal Energy Credit Program

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

- Project No. 54233 – Technical Requirements and Interconnection Processes for Distributed Energy Resources ("DERs")
- Project No. 55249 – Regional Transmission Reliability Plans
- Project No. 54999 – Texas Energy Fund
- Project No. 54584 – Reliability Standard for the ERCOT Market
- 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
- Project No. 54224 – Cost Recovery for Service to DERs

Texas Railroad Commission ("RRC")

Gas Securitization Update. Texas gas utility customers will pay at least $4 more each month because of high gas prices resulting from Winter Storm Uri in 2021. This increase of $4 will continue through 2036. In total, $3.5 billion in natural gas costs will be financed under the securitization arrangement. Gas utilities will receive bond proceeds up front while their customers will retire the bonds – plus interest – over the 16-year recovery period.

According to utilities' executives, securitization will spread the pain from what otherwise would have been massive billing spikes after Winter Storm Uri. Under the bond financing arrangement, Atmos Energy has securitized approximately $2 billion in fuel costs, CenterPoint approximately $1.1 billion and Texas Gas Service about $197.3 million. Other utilities to receive recovery through securitized debt include Bluebonnet, Corix, EPCOR, SiEnergy, UniGas, TGS West Texas Service Area and CoServ.

Atmos Pipeline Rate Case. On May 19, 2023, Atmos Pipeline filed a rate case at the RRC seeking to increase rates annually by $119.4 million on a systemwide basis. The Atmos Cities Steering Committee and other city groups intervened in the regulatory

proceeding, and evaluation of Atmos Pipeline's request is ongoing. Numerous discovery requests and responses have been exchanged, and settlement discussion commenced in mid-August. The hearing is set for October 10-12, 2023. More information can be found on the RRC website in Case No. 00013758.

CoServ Gas, Ltd. ("CoServ") Rate Case. On July 28, 2023, CoServ filed a rate case at the RRC seeking to increase annual revenues by $10.3 million in incorporated areas. The proposed rates and tariffs would increase CoServ's annual revenues by approximately $12,118,404 or 7.7 percent including gas costs, or 27.5% excluding gas costs. More information can be found on the RRC website in Case No. 00014771.

Texas Gas Service Company ("TGS") Rate Case. On June 30, 2023, TGS filed a rate case at the RRC seeking to increase annual revenues within the unincorporated areas of the Rio Grande Valley Service Area by $9.81 million, which is an increase of 16.10% including gas costs, or 25.94% excluding gas costs. On July 17, 2023, the Cities served by TGS filed its Motion to Intervene in this proceeding. This motion was granted on July 20, 2023. More information can be found on the RRC website in Case No. 00014399.

SiEnergy, LP ("SiEnergy") Rate Case. On May 5, 2023, SiEnergy filed a rate case at the RRC seeking to increase rates in the environs of North, Central, and South Texas. Parties reached a Unanimous Settlement Agreement, which resulted in an annual revenue increase for SiEnergy totaling $5,500,000 – a reduction from the $9,694,308 initially requested by SiEnergy. The deadline for RRC action is November 6, 2023.

On June 20, 2023, SiEnergy filed its Petition for Review of the rate action taken by the City of Princeton ("City"). SiEnergy stated that the City denied SiEnergy's requested rate change. This proceeding was docketed under OS-23-00014351.

On August 7, 2023, SiEnergy, the Staff of the RRC, the Cities Served by SiEnergy, and the City of Princeton filed a joint motion to consolidate the previously severed rate case expenses with the latter rate case. The parties contended that consolidation would support the preservation of the parties' resources and is an efficient resolution of all issues related to SiEnergy's rate request. This joint motion was granted on August 11, 2023, and OS-23-00014351 was consolidated with OS-23-00013504. More information can be found on the RRC website in Case No. 00013504.

RRC Budget Update. The RRC will receive approximately $481 million over the next two years under the state budget bill signed by Governor Greg Abbott on June 18, 2023. As part of the new budget, the RRC will hire up to 50 new pipeline safety professionals to conduct pipeline inspections on additional gathering lines. Moreover, funding will be provided for new staff in the Oil and Gas Environmental Permits and Support Unit and for additional cameras to increase inspection capabilities.

Electric Reliability Council of Texas ("ERCOT")

ERCOT Reveals its "Suite of Market Design Initiatives." In its August 21, 2023 memorandum, ERCOT released its "suite of market design initiatives." Recent legislation and PUC initiatives related to grid reliability and power generation retention have directed ERCOT to develop several market redesign mechanisms. As such, ERCOT's memorandum detailed the history, scope, and implementation timeline of the market enhancements. According to ERCOT CEO Pablo Vegas, the initiatives operate in parallel, support reliability, and implement market changes necessary for operational flexibility and long-term resource adequacy. Each initiative is detailed below.

A. Operating Reserve Demand Curve ("ORDC") Enhancement

The ORDC is a market mechanism that rewards an extra price adder to generators that participate in the real-time ERCOT market when total reserve capacity is below a certain threshold. Put differently, to incentivize generation during times of resource scarcity, the ORDC rewards generators that offer power at certain levels of grid constraint: (1) real time energy prices and (2) extra revenue through the ORDC price adder.

Recently, PUC determined that a "bridge program" to more comprehensive market redesign initiatives, such as the Performance Credit Mechanism ("PCM") (see below), is necessary to support resource retention in the interim. It directed ERCOT to establish such a program, and ERCOT ultimately proceeded with the enhanced ORDC. The enhanced ORDC implements a "multi-step floor" of $20 at 6,500 MW of reserve capacity and $10 at 7,000 MW of reserve capacity. PUC approved the ORDC enhancement in August 2023, and ERCOT anticipates the program to go live in November 2023.

B. The Dispatchable Reliability Reserve Service ("DRRS")

The 88th Legislature passed legislation requiring ERCOT to develop and implement an additional ancillary service by December 1, 2024. Currently, ERCOT utilizes five ancillary services: the Regulation Service-Up, Regulation Service-Down, Responsive Reserve Service, Non-Spinning Reserve Service, and the newly launched Contingency Reserve Service. ERCOT acquires these services in the day-ahead market to support the following day's operating reserves. More specifically, ERCOT "holds out" ancillary service capacity from the market to ensure system stability in the event a grid scarcity event during the preceeding day requires the extra capacity reserves. Pursuant to House Bill ("HB") 1500, ERCOT must now develop the DRRS.

After stakeholder workshops, ERCOT intends to establish the DRRS as a "sub-type" of the existing Non-Spin ancillary service. However, it narrowed DRRS eligibility to resources that: (1) run for at least four hours at their high sustained limit; (2) are online and dispatchable not more than two hours after ERCOT calls for deployment; and (3) have the operational flexibility to address inter-hour operational challenges. It still must develop an Impact

Analysis to identify cost, resource, and system impacts, but anticipates the DRRS to go live before the statutory deadline.

C. The PCM

Despite opposition at the legislature, ERCOT intends to proceed with the PCM subject to legislative constraints provided under HB 1500. Under the PCM, ERCOT rewards performance credits ("PCs") to generators that are "available" during hours of highest reliability risk. Load serving entities ("LSEs") must purchase from the generators PCs in amounts that reflect the LSE's energy consumption during the hours of highest reliability risk. Theoretically, this incentivizes and funds thermal generation, although several stakeholders assert that it burdens consumers with increased cost and falls short of legislative initiatives.

Nevertheless, ERCOT is now developing a "framing document," based on HB 1500 directives, that will provide a "level-set" on the PCM. It will subsequently file a strawman addressing PCM design parameters in October 2023. Finally, pending PUC approval, it anticipates the PCM to go live in 2025.

D. Real-Time Co-optimization + Batteries ("RTC+B")

The RTC is a transformative market redesign initiative that would merge the otherwise separate Real-Time and Ancillary Services markets. According to the ERCOT Independent Market Monitor ("IMM"), the RTC is "the most important improvement to the ERCOT market over the long term." It would grant ERCOT, for purposes of the real time market, access to ancillary service capacity and therefore improve pricing during scarcity events.

ERCOT initiated the RTC implementation process in 2017. Due to recent market and technological changes, however, it has reengaged stakeholders to reconsider RTC parameters. Specifically, it established the RTC+B task force to incorporate the proliferation of batteries—which are expected to contribute 14 GW to the ERCOT grid by 2025—into the RTC framework. ERCOT anticipates the RTC to go live in 2026.

Additional information regarding ERCOT's market redesign initiatives can be found in PUC Project No. 53298.

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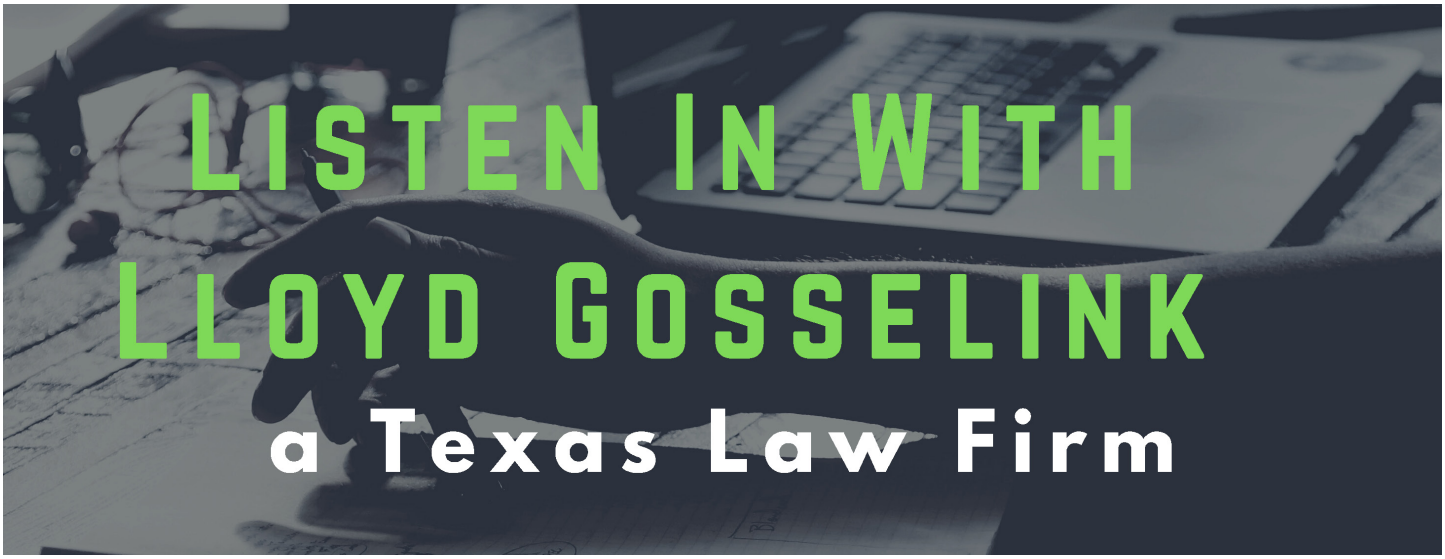

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