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THE U.S. SUPREME COURT SPEAKS: BLOCKING USERS FROM COMMENTING ON PUBLIC OFFICIAL'S SOCIAL MEDIA ACCOUNT VIOLATES THE FIRST AMENDMENT... MAYBE

by José de la Fuente

Does a public official's act of blocking certain individuals/members of the public from commenting on an official's social media account violate the First Amendment rights of that member of the public? The United States Supreme Court recently answered that question in its March 15, 2024 opinion in *Lindke v. Freed*, 144 S. Ct. 756 (2024) with a standard that amounts to maybe yes, maybe no, it depends on the facts and circumstances. While that general answer may not seem helpful, the Court provided some helpful standards for public officials to consider in how they manage their social media accounts.

The short version of the standard is that a public official who prevents someone from commenting on their social media page engages in state action (that is, something that can give rise to liability for a civil rights violation pursuant to 42 U.S.C. § 1983) only if the official both 1) possessed the actual authority to speak on the government's behalf on a particular matter, and 2) purported to exercise that authority when speaking in the relevant social media posts. As many public officials have mixed-purpose public social media pages that they use for both clearly personal communications ("Here's my family's favorite 4th of July barbecue recipes!") and government communications ("Official advisory to all citizens: the City has closed Elm Street to all traffic until further notice due to a SWAT situation"), determining the nature of a page and/or communication can be a fact-intensive inquiry.

Lindke involved the case of the city manager of Port Huron, Michigan, James Freed. Mr. Freed had a "public" Facebook profile that he used to post information about both his personal life and information related to his job. A particular Facebook user, Mr. Lindke made multiple disparaging comments on Freed's page in response to posts about the COVID 19 pandemic, and Freed eventually blocked Lindke from posting comments on his page altogether. Lindke challenged the act of blocking him as a violation of his First Amendment rights by Freed, who Lindke contended was acting in his official capacity.

The Court observed the challenge this question poses with respect to local officials:

> The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights.

The pivot point of the Court's test is the following standard:

> Freed's conduct is not attributable to the State unless he was "possessed of

U.S. Supreme Court continued on page 4

IN THIS ISSUE

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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.

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

Jack M. Klug has joined the Firm's Energy and Utility Practice Group as an Associate. Jack's practice focuses on administrative law in the area of public utility regulation. He assists municipalities and utilities in matters before the Public Utility Commission of Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, and the State Office of Administrative Hearings. Prior to joining the Firm, Jack gained experience in mergers and acquisitions, corporate tax, partnership tax, affordable housing, and tax planning. Jack received his doctor of jurisprudence from Tulane University Law School, his LLM in taxation from New York University School of Law, and his bachelor's from the University of North Carolina at Chapel Hill.

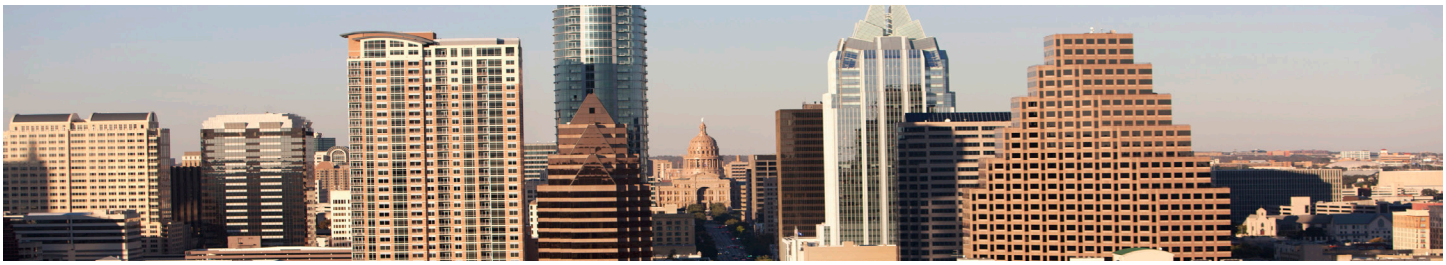
Sarah Glaser will hold an "Employment Law Roundtable" at the Hill Country Society of Human Resources on May 1 in New Braunfels.

Sarah Glaser will be presenting "Retaliation: Still the Most Attractive Claim for Plaintiffs and Most Complicated for Defendants" at the 31st Annual Labor Law and Employment Law Conference on May 30 in Austin.

Thomas Brocato will present "Stop the Rate Case! - Why in an Era of Streamlined Regulation Cities are Seeing More Utility Rate Cases than Ever" at the Texas City Attorneys Association Summer Conference on June 13 in South Padre Island, Texas.

Members of the Firm and their families participated in the annual Keep Austin Beautiful Day on April 20, 2024. Each April, Keep Austin Beautiful has hundreds of volunteers for a day of community service throughout Greater Austin to honor Earth Day. Again this year, people participated in cleanups by removing litter and restoring Austin's beloved green spaces and waterways.

MUNICIPAL CORNER



A Water Control and Improvement District may not use surplus "interest and sinking funds" to reduce the cost of future bonds. Tex. Att'y. Gen. Op. KP-0459 (2024).

The Victoria County District Attorney requested an opinion from the Texas Attorney General regarding whether a water control and improvement district may use surplus Interest and Sinking ("I&S") funds to reduce the cost of future bonds. After reviewing the Texas Water Code, the Attorney General determined that the District may not use its surplus I&S funds to reduce future bonds.

In 2020, the Victoria County Water Control and Improvement District (the "District") was left with surplus I&S funds after paying off all debt for which I&S *ad valorem* taxes were assessed during the 2019-20 fiscal year. Accordingly, the District sought clarification regarding other authorized uses of the surplus funds. In response, the Attorney General provided that, as a water control and improvement district created under the authority of Article XVI, Subsection 59(a) of the Texas Constitution, the District has only those powers expressly granted by statute or implied as an incident to its express powers. And irrespective of prior Attorney General opinions providing for how surplus I&S funds may be used, neither the Texas Constitution nor the Texas Water Code authorizes the District to expend surplus I&S fund moneys.

The Attorney General determined that Chapter 51 of the Texas Water Code, which governs water control and improvement districts, provides an exhaustive list of ways districts can expend I&S funds that does not authorize repurposing such funds. Additionally, Chapter 49, which applies to all water districts, fails to authorize such use of these funds. Because neither chapter expressly authorizes the use of I&S funds to reduce future bond amounts, the Attorney General concluded that the District cannot use the surplus I&S funds for the suggested purpose.

Emergency Service Districts originally formed as Rural Fire Prevention Districts have authority to provide county-wide services. Tex. Att'y. Gen. Op. No. KP-0457 (2024).

The Johnson County Attorney requested an opinion from the Texas Attorney General regarding whether Johnson County's Emergency Services District ("ESD"), originating as a Rural Fire Prevention District ("RFPD"), has the authority to operate a county-wide ambulance service. The Attorney General concluded that the converted ESD does have the authority to provide county-wide ambulance services under Texas Health and Safety Code § 775.

In 1956 Johnson County voters agreed to create an RFPD pursuant to Article III, Section 48-d of the Texas Constitution which, at the time, did not expressly authorize RFPDs to provide ambulance services. Upon the enactment of Texas Health and Safety Code § 775 in 2003, the RFPD converted to an ESD as required by new State law. Because the present-day ESD originated as an RFPD when ambulance services were not expressly authorized, the County Attorney questioned whether the ESD does in fact have authority to provide county-wide ambulance services.

In reviewing the statutory history, the Attorney General provided that once the new Texas Health and Safety Code § 775 was enacted, Article III, Section 48-d of the Texas Constitution was repealed, thereby removing the authority to create RFPDs and replacing it with the new authority for ESDs. The Attorney General interpreted Texas Health and Safety Code § 775, along with the remaining provisions of Article III, Section 48 of the Texas Constitution, to authorize ESDs to provide emergency ambulance services. Accordingly, the Attorney General concluded that a Court is likely to find a converted ESD has the same general authority to operate and provide ambulance services under Texas Health and Safety Code § 775 as if it were an entity originally created as an ESD.

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

U.S. Supreme Court continued from page 1

> state authority" to post city updates and register citizen concerns. . . . The alleged censorship must be connected to speech on a matter within Freed's bailiwick.

Applying this standard, the Court stated that:

> [A] city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled."

The Court did observe a pathway to eliminating any confusion with respect to the social media accounts of public officials, essentially suggesting a policy governmental entities might want to enact relating to the social media accounts of its officials (to the extent that any such official has a social media presence that is not the voice of the entity itself):

> Had Freed's account carried a label (e.g., "this is the personal page of James R. Freed") or a disclaimer (e.g., "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal . . . Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (e.g., a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (e.g., an "@PHuronCityMgr" Instagram account).

Thus, it may be a best practice – and it might even rise to the level of something that should be made official policy of a governmental entity – that officials attach such a disclaimer to any of their social media accounts that are not official accounts of the entity itself.

Finally, the Court offers a helpful example of how to compare an official post with one that is more personal in nature, even if the subject matter is identical:

> Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "relate[d] to his public employment" or "concern[ing] information learned during that employment."

There is also the matter of statements of members of a legislative body (e.g., city council members, board members, etc.), and how those might be affected. That scenario was not addressed by the Court because the official in that case was not a legislator, but the scenario should be considered for planning purposes. Generally, individual legislators are not legally empowered to speak on behalf of a governmental entity because the legislative body speaks only as a whole. Therefore, a legislator is much less likely to run afoul of this standard. However, if a legislator has some independent power, such as chairman of an official committee, it is possible that their statements about that committee could be deemed to be made in their official capacity; again, the potential for liability should be assessed based on the specific facts of each situation.

Ultimately, the court remanded the *Lindke* case for further factual inquiry, noting that the full "blocking" function of a particular poster/commenter from a social media page that might have mixed use (that is, some of its posts by the owner of the page might constitute state action) creates a risk of a First Amendment violation.

In light of the *Lindke* decision, public officials would be well-advised to keep their social media accounts separate the best they can (certain accounts being clearly labeled as personal accounts, and not used for any official government business, with any other "official" account(s) being for official purposes only).

That said, the standard pronounced by the Court understands that individuals, particularly the kind of individuals who choose to engage in public service and hold a public position, are likely to post on matters of public importance on their personal pages. So long as those statements are plainly statements of the individual, and/or are passing along already public information that is available elsewhere (e.g., a city manager re-posting an announcement of a road closure from a city's official social media page, or a river authority's general manager re-posting important river flow announcements from a river authority's official page), then public officials can likely avoid liability. Government entities may wish to enact a specific policy to this effect, and likewise may wish to brief their officials on the substance and impact of *Lindke* so as to protect and respect the interests of officials and the public alike.

Joe de la Fuente is the Chair of the Firm's Litigation, Appellate, and Business Services Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact Joe at 512.322.5849 or jdelafuente@lglawfirm.com.

TEXAS SUPREME COURT SET TO DETERMINE WHETHER PUBLIC UTILITY COMMISSION OF TEXAS WINTER STORM URI PROCEDURE VIOLATED TEXAS LAW

by Richard A. Arnett

On January 30, 2024, the Supreme Court of Texas ("SCOTX") heard oral argument from the Public Utility Commission of Texas (the "Commission"), Calpine Corp. ("Calpine"), and Luminant Energy Co. ("Luminant") in *Luminant Energy Co. LLC v. Pub. Util. Comm'n of Tex*, Cause No. 23-0231 (Tex. 2023)—a lawsuit challenging the Commission's authority to set real-time energy prices at $9,000 per megawatt hour ("MWh") during Winter Storm Uri.

The lawsuit's implications are immense. SCOTX must clarify what Commission action constitutes a rule and is therefore subject to rulemaking procedures. Additionally, the Court must determine what action "restricts" wholesale energy market competition and, as such, is invalid under the Public Utility Regulatory Act ("PURA"). Significantly, a ruling against the Commission would impose burdensome procedure on emergency protocols and require the Electric Reliability Council of Texas ("ERCOT") to unwind all market transactions that occurred when the Commission set prices at $9,000/MWh—a process that could result in consumer refunds. A summary of the lawsuit, oral arguments, and market implications is below.

I. BACKGROUND

Freezing temperatures during Winter Storm Uri resulted in generation outages, requiring ERCOT to order systemwide load shed to maintain system frequency. Despite insufficient generation supply, energy prices remained relatively modest. Specifically, market clearing prices were approximately $1,200/MWh, far lower than the $9,000/MWh systemwide offer cap. Then-Commission Chair Deann Walker concluded the Scarcity Pricing Mechanism ("SPM"), which should raise prices during times of low generation supply to incentivize additional generation, malfunctioned by erroneously disregarding load shed. Accordingly, the Commission issued an order directing ERCOT, when "customer load is being shed," to set market prices at the $9,000/MWh systemwide offer cap (the "Order").

Luminant subsequently incurred losses of almost $1 billion. Winter Storm Uri outages required Luminant to purchase energy to fulfill Luminant's market obligations, requiring the generator to purchase energy from the market at the $9,000/MWh cap. Accordingly, it sued the Commission alleging the Order was an invalid competition rule and exceeded the Commission's authority under PURA. Specifically, Luminant asserted that because the Commission manually adjusted the SPM to the systemwide offer cap, it frustrated free competition in the energy market in violation of PURA. The Third Court of Appeals agreed, finding the Order constituted a competition rule and exceeded the Commission's statutory authority. The Commission and its aligned Intervenors, including Calpine, appealed.

II. ORAL ARGUMENT

SCOTX focused on two issues: (A) whether the Order constitutes a "competition rule," and therefore grants the Court jurisdiction over the lawsuit; and (B) whether the Commission exceeded its statutory authority by limiting market competition. Whether the Commission's decision to manually adjust the SPM was the *correct* decision, for purposes of this lawsuit, is irrelevant. Arguments on each issue are addressed in turn below.

A. The Commission argued the Order did not constitute a competition rule because it did not relate to market abuse.

PURA § 39.001(e) grants the courts jurisdiction to review "competition rules" under the Administrative Procedure Act ("APA"). Whether the Order constituted a competition rule, therefore, determines whether SCOTX has jurisdiction over Luminant's lawsuit.

Commission counsel asserted the Order was not a competition rule and, therefore, the Court lacks jurisdiction. She argued the Order did not *amend* the SPM rule. Rather, during Winter Storm Uri the Commission recognized the SPM was malfunctioning and, accordingly, issued the Order directing ERCOT to comply with *existing* rule. Justice Bland appeared skeptical, questioning whether the Order's expressed consideration of "load shed"—which the previous SPM rule did not consider for pricing purposes—demonstrates the Order did amend the SPM rule. Commission counsel responded that other pricing mechanisms, such as the Operating Reserve Demand Curve (ORDC), already consider load shed, and therefore load shed considerations were already incorporated in the SPM. As such, the Order did not amend the SPM and constitute a rule.

B. SCOTX attempted to reconcile the Commission's duties to promote reliability and free market competition.

PURA § 39.001(d) instructs the Commission to "order competitive rather than regulatory methods to achieve the goals of [PURA] to the greatest extent feasible." The Commission must also "adopt and enforce rules relating to the reliability of the regional electric network." The legal question, therefore, is whether PURA § 39.151(d) qualifies, or is qualified by, PURA § 39.001(d). Put differently, SCOTX must determine whether the Commission's duty to ensure reliability trumps the Commission's duty to promote competition.

Calpine counsel argued that statutory mandates related to reliability are paramount and, therefore, the Order did not exceed the Commission's statutory authority. She questioned the Third Court of Appeals' reasoning, asserting the court highlighted one mandate, related to competitive pricing, over the Commission's most critical duty—grid reliability. According to Calpine counsel, competition cannot exist without a reliable

grid, and the Commission cannot risk grid collapse "in the name of unfettered competition."

Luminant counsel argued the Commission violated an expressed prohibition: the Commission cannot promulgate rules or issue orders regulating competition, except as authorized. According to Luminant counsel, the Commission cannot use vague statutory authority to "override" this express ban from the Legislature. Justice Busby questioned Luminant's argument, opining that PURA § 39.001(d) requires the Commission to order competitive methods only "to the greatest extent feasible." Justice Blacklock further questioned whether "it is really" Luminant's position that the Commission "is tied to competition in a way that prevents them from taking an action…to make sure that we are not in the stone ages." In response, Luminant counsel emphasized that the Legislature has expressly prohibited the Commission from setting wholesale market prices. Because the Commission manually adjusted the SPM and set wholesale prices, it violated PURA and exceeded its statutory authority.

III. MARKET IMPLICATIONS

SCOTX's decision will have both immediate and far-reaching consequences. First, if SCOTX does find the Order violated PURA, it would result in complex settlement proceedings to unwind all energy market transactions that occurred while the Order was in effect. It is unclear whether consumers would ultimately receive refunds from the settlements. It is almost certain, however, that the settlements would result in additional, expensive litigation.

A holding that the Order violated PURA would also establish an arguably damaging precedent. First, it would necessarily require a finding that the Order was a competition rule. Justice Blacklock addressed the significance of this finding, questioning "if [the Order] is a rule, what are the practical consequences for the Commission's ability to respond to an emergency?" Commission counsel responded that the consequences would be significant—almost all ERCOT emergency protocols, including load shed decisions, would be rules subject to emergency rulemaking requirements that include notice and public participation. In sum, if SCOTX does find the Order was a rule, it could greatly frustrate the Commission and ERCOT's ability to address future emergency conditions that require immediate attention. Second, a finding that the Order unlawfully limited competition could undermine other market mechanisms such as the ORDC, Reliability Unit Commitment, and Emergency Pricing Program. The market and consumers rely on these programs for reliability and reasonable prices during emergencies.

IV. CONCLUSION

SCOTX will now consider the Commission, Calpine, and Luminant's oral arguments before rendering its decision. The decision will be final—no other avenues for appeal are available. We will continue to monitor the litigation and report as it proceeds.

Rick Arnett is an Associate in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Rick at 512.322.5855 or rarnett@lglawfirm.com.

DOL ISSUES FINAL INDEPENDENT CONTRACTOR RULE

by Michelle D. White

With an effective date of March 11, 2024, the Department of Labor ("DOL") issued its long-awaited final rule addressing independent contractor classification under the Fair Labor Standards Act ("FLSA"). *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 *Fed. Reg.* 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795). The FLSA provides legal protections for employees, as opposed to independent contractors or volunteers; however, the FLSA does not provide a method to distinguish independent contractors from employees.

Historically, courts have used a multi-factor economic reality test to differentiate between independent contractors and employees, which the DOL supported in informal guidance. While courts varied in the number and weight of factors considered, most courts reviewed relationships on a case-by-case basis by considering:

1. Worker's opportunity for profit or loss;
2. Investments in equipment or materials by the worker and the employer;
3. Degree of permanence and duration of the work relationship;
4. Nature and degree of control over the manner in which work is performed;
5. Degree to which the work performed is integral to the employer's business; and
6. Whether the work requires special skills and initiative. *Id*. at 1641–44.

In 2021, the DOL published a final rule with a new five-factor test. *Id*. at 1644–45. This new business friendly test primarily considered two core factors—the worker's opportunity for profit or loss and the nature and degree of control exercised by the employer. When these factors produced an unclear result, the analysis moved to three guidepost factors—the relationship's length or permanence, the worker's special skills, and the work's integration into the principal's operations. With the concurrent change in administration, the DOL attempted to delay and withdraw the rule days after the final rule was published, but these actions were rejected as violations of the Administrative Procedure Act. *Id*. at 1645.

In October 2022, the DOL proposed a new rule to rescind the 2021 rule and replace it with a return to a "totality of the circumstances" test. *Id*. The proposed rule, which has almost uniformly been described as tending towards a determination that the worker is an

employee rather than an independent contractor, became effective on March 11, 2024. The "totality of the circumstances" test considers the six factors of the economic reality test (described above) while allowing other relevant factors to be considered. The new rule further clarified these factors and provided examples to illustrate their applicability.

Several challenges to the rule have been filed claiming the rule broadly classifies workers as employees, the rulemaking was outside the scope of DOL authority, and the rule is arbitrary and capricious in violation of the Administrative Procedures Act. *See* Complaint in *Frisard's Transp., LLC v. DOL,* 2:24-CV-347 (E.D. La., filed Feb. 8, 2024). Freelance workers have also challenged the rulemaking alleging similar violations while further seeking to "vindicate the right of individual entrepreneurs to remain independent in the face of a concerted effort to force them into employment relationships they neither want nor need." Complaint in *Warren, et al. v. Su*, 2:24-CV-0007 (N.D. Ga., filed Jan. 16, 2024); *see* also Complaint*, Littman and Chesak v. DOL*, 3:24-CV-194 (M.D. Tenn., filed Feb. 21, 2024).

Additionally, Congressional Review Act Resolutions have been introduced in both the Senate and the House of Representatives. H.R.J.Res. 116, 118th Cong. (Mar. 6, 2024); S.J.Res. 63, 118th Cong. (Mar. 6, 2024). This process would require both houses of Congress to approve a joint resolution of disapproval, and the President would be required to sign the joint resolution. If vetoed, Congress can vote to override the veto. If this lengthy process is successful, the rule would be unenforceable.

Despite the many legal challenges, the rule has not been enjoined or invalidated, and the new independent contractor rule became effective March 11, 2024. While these many legal challenges are pending, the rule remains in effect.

Employers with independent contractors should carefully review the circumstances of each independent contractor agreement to ensure appropriate classification under the final rule. Any agreements that do not meet the test under the final rule will need to be carefully evaluated to determine appropriate changes, including reclassification to employees, if necessary.

This article was prepared by Michelle White, an Associate in the Firm's Employment Law Practice Group, with the assistance of Apurva Gunturu, a Law Clerk with the Firm. If you have any questions related to this article or other employment law matters, please contact Michelle White at 512.322.5821 or mwhite@lglawfirm.com.

NEW COURTS COMING THIS FALL

by Gabrielle C. Smith

The 88th Legislative Session saw the creation of two new court systems in the state of Texas—business courts (*See* HB 19) and a Fifteenth Court of Appeals (*See* SB 1045). Both of these new courts are intended to address specific and complex legal matters, but their creation has raised some procedural questions for Texas lawyers and litigants alike.

Business Courts

While dedicated business courts are new to Texas, this is not a novel concept. The majority of states have some form of business court, and multiple states including Delaware, Georgia, North Carolina, and Wyoming have a state-wide business court system akin to what Texas is establishing. These courts will be located in divisions corresponding to the administrative districts in Texas, and judges will be appointed by the governor for two-year terms.

The enabling authority and governing statutory framework for the business courts in Texas are codified in chapter 25A of the Texas Government Code. The business courts will have concurrent jurisdiction with district courts for complex and high-stakes commercial disputes. Jurisdiction in the business courts is dependent upon the amount in controversy and the subject matter of the claims, and will specifically include cases where the amount in controversy exceeds $5 million and the action involves a derivative proceeding, the governance, governing documents, or internal affairs of an organization, allegations that an owner, controlling person, or managerial official breached a fiduciary duty, or claims arising out of the Business Organizations Code. The business courts also have jurisdiction over matters where the amount in controversy exceeds $10 million arising out of a qualified transaction, the parties to a contract by their contract agreed that the business court has jurisdiction (except actions arising out of an insurance contract), and an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization, or an officer or governing person acting on behalf of an organization, other than a bank, credit union, or savings and loan association. Tex. Gov't Code 25A.004(b)(d).

One of the exceptions to the jurisdiction of the business courts is suits brought by or against a governmental entity. Tex. Gov't Code § 25A.004(g)(1)(A). There is an exception to this exception, however, and if claims in suits involve the business court's supplemental jurisdiction, those claims can be adjudicated in the business court. Though the statute allows the court to exercise that supplemental jurisdiction where applicable, if the parties to the claim within the court's supplemental jurisdiction do not agree to proceeding within the business court, the matter proceeds in front of the court that has original concurrent jurisdiction. Tex. Gov't Code § 25A.004(f).

Cases out of these courts, which will be appealed to the new appellate court, are in want of guiding precedent that will take time to develop at the intermediary level. Departing from current Texas trial court practice, the new business courts will issue written opinions rather than orders that simply grant or deny the requested relief and render judgment. With this change, the business courts will be able to develop a body of case law to guide

the court in navigating interpretation of the law in these complex business disputes involving corporate governance and fiduciary duties, with a goal of creating consistency and predictability for the court and litigants alike.

Business courts will begin hearing cases on September 1, 2024.

Fifteenth Court of Appeals

New trial courts are not the only change our state will see come September 1, 2024. The new Fifteenth Court of Appeals will have exclusive intermediate jurisdiction over (1) appeals arising from the business courts, (2) appeals of cases brought by or against a state agency, board or commission, or an officer or employee of a state agency, board, or commission, and (3) appeals of cases in which a party has challenged the constitutionality or validity of a state statute or rule, and to which the attorney general is a party. Tex. Gov't Code §§ 22.220(d), 25A.007. There are exceptions, including eminent domain cases. Tex. Gov't Code § 22.220(d).

The Fifteenth Court of Appeals will sit in Austin, Texas, though it will decide matters across the state within its jurisdiction and may choose to hold oral argument in other counties. *See* Tex. Gov't Code § 22.2151. As with the business courts, justices for the new court of appeals will be appointed by the governor. However, after appointment of the initial bench, the Fifteenth Court of Appeals justices will be elected, though candidates for the office will appear on ballots statewide unlike the other 14 courts of appeal which serve specific counties.

Examples of what this change means include a different appellate path for judicial-review actions challenging an administrative order of a state agency (like the Public Utility Commission or the Texas Commission on Environmental Quality). Judicial-review actions under the Texas Administrative Procedure Act are filed in Travis County, Texas. Currently (and soon historically), if the trial-court decision is appealed, that appeal is filed with the Third Court of Appeals, though due to docket equalization, the Supreme Court of Texas can and regularly does transfer those cases to one of the other appellate courts in the state. Starting September 1, 2024, those appeals will go to the Fifteenth Court of Appeals, and they cannot be transferred to the other appellate courts for docket equalization.

Though the Fifteenth Court of Appeals will not open its doors before September 1, 2024, processes are currently in place to redirect cases to the court. The Office of Court Administration has issued an amended docketing statement that is already live for active appeals, and for any appeals noticed after September 1, 2023, parties are required to identify whether the appeal involves matters within the Fifteenth Court's jurisdiction. Though the other appellate courts will continue to move forward with existing cases through briefing, in an October 2, 2023 letter to the Supreme Court Advisory Committee, the Fifteenth Court of Appeals Subcommittee suggested that the other appellate courts "adopt a process for identifying and notifying parties that a particular case is designated for transfer to the Fifteenth Court of Appeals" and "should not invest significant time and other resources on the merits of these appeals unless they believe they can finally dispose of the appeal in its entirety before September 1, 2024." And come September 1, 2024, all cases pending in other appellate courts over which the Fifteenth Court has exclusive intermediate jurisdiction will be transferred.

What Next?

These courts are being established and with that comes questions about remote versus in-person proceedings and location of facilities, who will fill these judicial appointments (though the governor's office has already received applications), jury selection, and more.

The next few months will see some of the details of these new courts solidify as we near September 1, 2024. Stay tuned for further updates as these courts develop.

Gabrielle Smith is a Principal in the Firm's Litigation, Appellate, Business Services, and Employment Law Groups. If you would like additional information or have questions related to this article or other matters, please contact Gabrielle at 512.322.5820 or gsmith@lglawfirm.com.

TEXAS BROADBAND UPDATE: THE BROADBAND, EQUITY ACCESS, AND DEPLOYMENT PROGRAM

by Jack M. Klug

The Broadband, Equity Access, and Development ("BEAD") Program was created as part of the 2021 Infrastructure Investment and Jobs Act and is a $42.5 billion federal grant program which aims to expand high-speed Internet access through the development of broadband infrastructure, broadband action plans, and other programs to promote user adoption of new networks. Texas was the largest BEAD award recipient, as it will receive $3.31 billion under the program.

The Texas Broadband Development Office ("BDO") will oversee the allocation of this $3.31 billion and has created a competitive process (the "Challenge Process") for potential subgrantees to apply for funding. Eligible subgrantees include local governments, nonprofits, and Internet service providers ("ISPs"). BDO will prioritize unserved locations that have no Internet access or have access under 25/3 Mbps and underserved locations that only have access under 100/20 Mbps.

As part of the Challenge Process, BDO will release the Texas Broadband Development Map which will show broadband availability data within the state. This map

will largely be based off the FCC National Broadband Map and is meant to identify eligible areas for funding. The Challenge Process will begin once the National Telecommunications and Information Administration ("NTIA") approves Texas' Initial Proposal, which outlines the steps that BDO will take to pursue universal service. Through the Challenge Process, eligible subgrantees can challenge certain determinations made by BDO, including those relating to availability, speed, and technology. Eligible subgrantees will only have 14 days to submit their challenges once Challenge Process starts, and a Tier E license is necessary for any grantee to submit a challenge. BDO forecasts that the Challenge Process will start in April.

After the Challenge Process is completed, results will be submitted to NTIA. Thereafter, the subgrantee process will begin, wherein the eligible subgrantees will apply for BEAD awards. The Initial Proposal outlines both the Challenge Process and subgrantee process. To access a Tier E license, use the following link: NTIA Tier E License Request (costquest.com). It is encouraged that local governments apply for this license as soon as possible so that they are prepared and able to participate in the Challenge Process.

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ASK SARAH

Dear Sarah,

I'm a small business owner here in town. Don't you think it's a bit of a pain to track employees clocking in and clocking out every day? What if I just pay all my employees a salary, and they get the same amount of money each week regardless of how much they work? It's so much easier, and my employees would benefit too on the weeks they worked fewer hours than normal. Seems like a no brainer to me!

Small Business Owner

Dear Small Business Owner,

It would be so easy, wouldn't it! Unfortunately, paying an employee a salary does not eliminate the obligation to calculate and pay overtime if the employee is entitled to it. This is a frequently misunderstood aspect of compliance with the Fair Labor Standards Act, or the FLSA.

Central to this question is the distinction between exempt and non-exempt status under the FLSA. Employers often think that the primary characteristic for an exempt employee (one who is exempt from overtime requirements) is whether they are paid on a salary or hourly basis. In fact, a central tenet to classifying an employee as exempt is that they must have job duties that qualify them for the exemption.

If an employee's job duties do not qualify them for an exemption, then they cannot be classified as exempt, even if they are paid a salary, and as a result, they are entitled to overtime pay under the FLSA if they exceed the statutory 40-hour workweek threshold. In other words, the manner of compensation—be it salary or hourly—does not remove the entitlement to overtime pay for non-exempt employees.

In practical terms, this means that salaried employees who are non-exempt must still track their hours worked so that you can pay them overtime any time they work more than 40 hours in a workweek. Many employers find that the obligation to continue to track hours despite the salary is enough to move towards just paying the employee an hourly rate.

In summary, each employee in your organization should be classified as either exempt or non-exempt, and the classification should be documented, preferably in their offer letter and in their job description. Those who are exempt must be paid on a salary basis, and they must have job duties that qualify them for an exemption. Those who are non-exempt may be paid a salary or on an hourly basis, and their hours must be tracked so you can pay overtime on any hours worked over 40 in a single workweek.

Finally, remember that wage and hour compliance is an employer obligation. If your employees are not keeping accurate time records, you should require them to do so, including through corrective discipline if they continue to have problems. Strictly following these requirements protects you (the employer) from claims and protects employees from mistakes or improper payments. The Department of Labor Wage and Hour Division has helpful resources on employee classification and other aspects of compliance. Our employment law practice group can help too, and we take pride in explaining these complicated compliance issues in a straightforward manner.

"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 League City v. Galveston Cnty. Mun. Util. Dist. No. 6, No. 01-23-00007-CV, 2023 WL 8814635 (Tex. App.—Houston [1st Dist.] Dec. 21, 2023, no pet. h.).

The central issue in this case is whether a governmental entity can be sued for breach of a utility agreement and subsequent settlement agreement. League City (the "City") and the Galveston County Municipal Utilities District (the "District") entered a forty-year utility agreement enabling the District to construct water distribution, sanitary sewage collection, and drainage systems to provide water services to a portion of the City lying within the District's boundaries. Following a lawsuit regarding the funding of this project, the parties agreed to a settlement agreement obligating the City to continue forty percent tax payments to the District through 2024, which had been agreed upon in the utility agreement. In exchange, the District agreed to release any claims the District asserted or could have asserted against the City as of the settlement agreement date.

In January 2022, the District filed another lawsuit asserting the City breached both the utility and settlement agreements by delaying and underpaying the required tax payments. The District sought declaratory relief, asking the Court to establish that the contract did not alter the City's obligation to pay the District in full, and the settlement agreement did not release the City of claims unknown to the District at the time the settlement agreement was executed. The District also sought monetary damages for the City's failure to pay the District in full. The City filed a plea to the jurisdiction, claiming that neither the utility agreement nor settlement agreement provided goods and services as required to waive governmental immunity under the Texas Local Government Code § 271. The trial court denied the City's plea and the City appealed to the Houston Court of Appeals.

The Court of Appeals first considered whether the utility agreement provided goods and services by reviewing the text of the utility agreement and the benefits it conferred upon the City. The Court recognized that the City received a direct benefit from the utility agreement in its eventual ownership of the water system, which would become part of the City's infrastructure. The Court distinguished the utility agreement from others in previous cases, recognizing that: the purpose of the utility agreement was to construct the water system, rather than solely to provide water service upon the system's completion; the City provided consideration for the District's construction of the water system in the form of tax payments; and the agreement provided a wholly conveyed water system for the City's future use and operation. Based on these circumstances, the Court upheld the trial court's ruling that the City's immunity was waived for claims related to the utility agreement.

The Court then rejected the City's argument that it is immune from suit for claims related to the settlement agreement because the settlement agreement was not a contract for goods and services. The Court concluded that since the settlement agreement resolved a dispute related to the utility agreement and the City's immunity was not waived for those claims, the City's immunity could not be waived for actions related to the settlement agreement itself. The rationale for this conclusion is that the City could not dispose of its immunity waiver for the utility agreement by entering a settlement agreement for which immunity is not waived under Texas Local Government § 271. Thus, the Court upheld the trial court's ruling that the City's immunity was waived for claims related to the settlement agreement.

Finally, the Court considered whether the City's immunity was waived for the District's declaratory judgment claims. The Court recognized that the Texas Civil Practices and Remedies Code § 37.004 allows for a narrow waiver of immunity, allowing a party to seek declarations related to the adjudication of breach of contract claims under Texas Local Government Code § 271.152. The Court concluded that the District failed to meet its burden of proof that its declaratory relief claims were brought for the purpose of adjudicating its breach of contract claims. Therefore, the Court reversed the trial court's ruling, finding the City immune from litigation related to the District's declaratory relief claims, and dismissing those claims for lack of jurisdiction.

Selinger v. City of McKinney, No. 05-23-00180-CV, 2024 WL 260500 (Tex. App.—Dallas Jan. 24, 2024, no pet.).

In 2018, Selinger submitted a plat application to the City of McKinney (the "City"), indicating that the Cambridge Meadows development would include sewer infrastructure construction as well as a wastewater treatment plant. Water was to be provided through the North Collin Special Utility District. The City rejected Selinger's plat application, indicating that it did not provide for the connection of the development to City water and sewer systems, and it did not

include any mention of the City's water and sewer impact fees. The City offered Selinger a Facilities Agreement, which would allow the development but would require the payment of water and sewer impact fees, "if, and only if, the City ever extended its water and sewer transmission lines to the Property." Selinger refused to agree to the impact fee, and the City denied his application. Selinger brought suit against the City, alleging that the zoning restrictions imposed on his property amounted to an infringement of his property rights and constituted an unconstitutional taking without just compensation.

Selinger contended that the zoning regulations imposed by the City substantially restricted the potential use and development of his property, diminishing its value and impairing his ability to derive economic benefit from it. He argued that these restrictions were not in line with the principles of eminent domain and zoning laws, as they deprived him of the beneficial use of his property without providing fair compensation. The trial court found there was insufficient evidence to establish that the City's ordinance establishing impact fee requirements was unconstitutional, that Selinger's right to due process was violated by the City, or that the City's denial of Selinger's application constituted a taking. Selinger appealed.

The City's impact fee requirement is considered an exaction, as it is a governmental entity requiring an "action by a landowner as a condition to obtaining government approval of a requested land development." To be considered a taking, an exaction must show some relation to the advancement of a governmental interest and it must be "roughly proportional" to the impact of the proposed development. Applying this standard, the Court of Appeals held that the City's capital improvement plan, prepared in accordance with Texas Local Government Code Chapter 395, mathematically demonstrated that the impact fees were proportional to the size of the proposed development, and such fees were to be spent only on water and sewer services. As such, the City's impact fee requirement was not a taking under the rough proportionality standard, and Selinger presented no evidence to the contrary.

Regarding Selinger's argument that the ordinance was unconstitutional, a home-rule city, such as the City in this case, has broad discretionary powers to enact ordinances, so long as such ordinance does not contain any provision inconsistent with the state constitution or state laws. The City presented evidence to the trial court that the impact fees were not in conflict with the constitution or any state laws. Absent Selinger's presentation of contrary evidence, the Court of Appeals held that there was no conflict and the ordinance was not unconstitutional. The Court of Appeals affirmed the trial court's final judgment in favor of the City on all issues.

Litigation Cases

Univ. of Tex. Sw. Med. Ctr. v. Matias, No. 03-21-00575-CV, 2023 WL 8285105, at *4 (Tex. App.—Austin Nov. 30, 2023, no pet. h.).

The Texas Tort Claims Act (the "TTCA") creates a limited waiver of governmental immunity for claims of personal injury or death but requires prompt notice of the claim within six months of the incident. If a plaintiff does not give notice within the six-month window, the claim is generally barred by governmental immunity. Section 101.101(c) of the Texas Civil Practice and Remedies Code provides three exceptions where formal notice is not required when the governmental entity has actual notice that: (1) a death has occurred, (2) the plaintiff received some injury, or (3) the plaintiff's property has been damaged.

In this case, the plaintiff's daughter, Sindy, was born prematurely with a congenital heart disease that made her unable to properly circulate oxygenated blood. Sindy had to undergo surgeries and was transferred to Dell Children's Pediatric Intensive Care Unit. At Dell Children's, a doctor employed by the University of Texas Southwestern Medical Center ("UT Southwestern") performed surgery on Sindy, which resulted in Sindy being put on life support until she later died.

More than a year later, the plaintiff sent a notice of claim letter to the doctor and sued UT Southwestern for medical negligence. UT Southwestern, a governmental entity, moved to dismiss the lawsuit on grounds that the plaintiff did not timely provide notice under the TTCA. The plaintiff responded that UT Southwestern had actual knowledge of Sindy's death. The trial court denied UT Southwestern's motion to dismiss.

On appeal, the Austin Court of Appeals stated that the "actual-notice standard requires evidence that the governmental unit was 'subjectively aware that its alleged acts or omissions contributed or produced injuries in the way the claimant alleged.'" The Court reviewed the evidence, which included a discharge summary and autopsy report that the doctor had reviewed with Sindy's family and found that this evidence created an issue of fact for the jury concerning whether UT Southwestern was subjectively aware that its alleged acts produced or contributed to Sindy's death. Ultimately, the Court affirmed the trial court's order denying UT Southwestern's motion to dismiss.

The lesson for governmental entities is that plaintiffs need not always give formal notice. Sometimes, the facts will show that the governmental entity had actual notice sufficient to meet the requirements of the TTCA's waiver of governmental immunity.

Legacy Hutto, LLC v. City of Hutto, No. 22-0973, 2024 WL 1122521, at *1 (Tex. Mar. 15, 2024).

When governmental entities enter into contracts with business entities, the business entity typically must submit a "Disclosure of Interested Parties" form, commonly called a Form 1295. When the Texas Legislature enacted this requirement in 2015, the sole purpose was to provide the public with transparency into government contracts. Because the statute in Texas Government Code § 2252.908(d) stated that a "governmental entity or state agency may not enter into a contract . . . unless the business entity submits a disclosure of interested parties," the City of Hutto (the "City") was able to use this statute to temporarily void a contract.

In 2019, the City entered into a Master Development Agreement (the "MDA") with Legacy Hutto, LLC for the creation of a mixed-use real estate development. This development included commercial, residential, recreational, and other spaces, and had an estimated value in the hundreds of millions of dollars. Along the way, Legacy Hutto incurred about $3 million under the contract.

When progress on the project deteriorated, Legacy Hutto sued the City, and the City filed a motion to dismiss and a plea to the jurisdiction, arguing that it was immune from suit. Specifically, the City contended that the MDA was not properly executed sufficient to waive governmental immunity because Legacy Hutto never submitted the Form 1295 as required by Texas Government Code § 2252.908(d).

The district court granted the City's plea to the jurisdiction and its motion to dismiss. The Amarillo Court of Appeals affirmed, holding that the plain language of the statute was clear: a governmental entity may not enter into a contract unless the business entity submits the Form 1295. Because no evidence showed that Legacy Hutto had submitted the Form 1295, the contract was not properly executed sufficient to waive the City's governmental immunity.

After the Court of Appeals affirmed, Legacy Hutto appealed to the Texas Supreme Court. While on appeal, the Texas Legislature passed H.B. 1817 adding Section 2252.908(f-1). This section now expressly makes contracts voidable for failure to provide the Form 1295 if: (1) the governmental entity submits to the business entity written notice of the business entity's failure to provide the Form 1295; and (2) the business entity fails to submit to the governmental entity the Form 1295 within 10 days.

On March 15, 2024, the Texas Supreme Court remanded the case to district court, holding that the amended law applies retroactively to Legacy Hutto's lawsuit against the City. Consequently, Legacy Hutto will have another shot in district court against the City on its breach of contract claim.

This case highlights that a contract with a business entity may now be voidable by the governmental entity in the rare instance that the governmental entity gives the business entity notice that the Form 1295 is missing, and the business entity fails to submit the Form 1295 within 10 days of the notice. Ultimately, though, this case serves as a reminder that governmental contractors should verify procedures are in place to ensure the Form 1295 is submitted, as the public has an interest in transparency in governmental contracts.

Tex. State Univ. v. Guillen, No. 03-23-00333-CV, 2024 WL 39819, at *1 (Tex. App.—Austin Jan. 4, 2024, pet. filed).

The Texas Tort Claims Act (the "TTCA") creates a limited waiver of immunity for personal injury or death caused by premise defects. But even when a premise defect exists, governmental entities can retain immunity in a couple of instances. One instance is when the premise defect was "based on an act or omission occurring before January 1, 1970"—i.e., a governmental entity would be immune for a defect existing on a structure built in 1960. Another instance is when the decision to act or not act is a "discretionary decision."

Texas State University v. Guillen provides an example of both exceptions, and the difficulty governmental entities may have in utilizing them. In this case, the plaintiff, Sylvia Guillen, visited Texas State University ("Texas State") to help her granddaughter move out of her dorm. Unknown to Guillen, the ground below the bottom step of a fourteen-step exterior staircase had naturally lowered, causing the bottom step to have a difference in height almost twice that of the other steps. When Guillen stepped off the fourteenth step, she lost her balance and fractured her ankle. As a result, she needed emergency surgery, and was left with permanent implants and hardware in her body.

Guillen sued Texas State for her injuries, alleging that the staircase was a dangerous condition. She also alleged it violated the International Building Code because the Code requires stairs to have uniform size and shape and provides that the difference between the largest and smallest step height cannot exceed 3/8th inch.

Texas State filed a plea to the jurisdiction, asserting that it had governmental immunity on two grounds. First, the staircase was constructed in 1961 and there was no record of modification prior to Guillen's injury. The Court of Appeals explained that a governmental entity is entitled to immunity if it can prove (1) the structure was completed before January 1, 1970, and (2) the structure has remained in the same condition since that time. The Court of Appeals ultimately held that Texas State was not immune because it had not established that the staircase had remained in the same condition between its construction and Guillen's injury.

Texas State also argued that the decision not to modify the staircase was a discretionary decision for which the TTCA expressly preserves immunity. Under the "discretionary-function exception," a governmental entity retains immunity for policy decisions made when the law does not require a particular action. The Court of Appeals provided an example involving water districts: the decision to release water from a spillway constitutes policy formulation for which the district is immune, but its subordinate decision of determining the volume of the outflow from the spillway is an implementation or operational decision for which the district is not immune. Applying this exception to this case, the Court of Appeals held that the decision not to repair or modify the staircase was an operational or maintenance decision, not a policy decision. Consequently, Texas State could not claim immunity under the discretionary function exception.

This case serves as a reminder that a governmental entity's immunity may be waived when injuries occur on its premises. It also illustrates that repairing dangerous conditions (e.g., a dangerous step on a staircase) is not only safer for its citizens, but also a cheaper alternative than litigation. Nevertheless, this case illustrates that the TTCA contains several intricate exceptions, including for defects existing before 1970 and discretionary decisions, and governmental entities

should work with attorneys well-versed in these nuances.

Garland Indep. Sch. Dist. v. Reeder Gen. Contractors, Inc., No. 05-22-00855-CV, 2024 WL 301917, at *1 (Tex. App.—Dallas Jan. 26, 2024, no pet. h.).

Governmental entities are not liable for as many types of money damages as non-governmental entities. The total amount of money awarded against a local governmental entity for a breach of contract is limited to the balance due and owed under the contract, the amount owed for change orders or additional work, reasonable attorney's fees, and interest. In other words, damages awarded against a local governmental entity cannot include consequential damages or exemplary or punitive damages. Common examples of consequential damages are lost profits and delay damages. Thus, while non-governmental entities may be liable for consequential damages, governmental entities are not.

In this case, the Court of Appeals addressed whether a governmental entity's plea to the jurisdiction can be granted when the plaintiff seeks liquidated damages and delay damages alongside other types of damages. The plaintiff, Reeder, contracted with Garland ISD to perform construction work. When Reeder discovered an undisclosed electrical feeder line that made it impossible to finish the project as called for in the plans, Reeder incurred significant additional costs resulting from the six-month delay. Reeder submitted various proposed change orders for delay damages, including a change order seeking $154,504. Ultimately, Reeder sued Garland ISD for breach of contract seeking various damages, including actual damages, liquidated damages, change order damages, and damages for retainage balance still owed.

In response, Garland ISD filed a plea to the jurisdiction, arguing that it was immune and that the damages sought were outside the scope of the waiver of immunity provided in the Local Government Contract Claims Act. Specifically, Garland ISD alleged that immunity was not waived for Reeder's claim for liquidated damages nor Reeder's claim for delay damages of $154,504 because it was not an amount due and owed under the contract.

The Court of Appeals stated that the Local Government Contract Claims Act does not waive immunity from suit when the claim for damages are not recoverable. In other words, Garland ISD would be immune from suit unless Reeder sought damages that were recoverable. The Court of Appeals explained that Reeder did request recoverable damages because the amounts resulting from increased costs from Garland ISD-caused delays, amounts owed for changed orders, attorney's fees, and interest are recoverable damages. Because the Court of Appeals concluded that Reeder did plead recoverable damages, Garland ISD did not have immunity from suit.

Instead, the Court of Appeals held that Garland ISD's arguments did not address its immunity, but rather addressed its liability and whether Reeder would ultimately recover those other types of damages. The Court concluded that it did not have to address whether Reeder will ultimately be able to recover those damages because at least some of the damages were recoverable.

Though governmental entities are statutorily not liable for "consequential damages," governmental entities must exercise care when contracting because certain categories of damages such as delay-damages may be recoverable in some instances.

Air and Waste Cases

Texas Supreme Court Rules that a "Skeleton Day" is a Business Day When Replying to Public Information Act Requests.

After a Public Information Act ("PIA") Request served by the Sierra Club on the Texas Commission on Environmental Quality ("TCEQ") created a dispute about the definition of "business days" in 2023, the Sierra Club requested an official opinion from the Texas Attorney General ("AG"). The AG responded by issuing an opinion that stated a "skeleton crew day," a day when TCEQ operates with a smaller staff than usual in lieu of an official Agency holiday, is considered a business day when calculating response times under the PIA. Having always operated under the alternative, TCEQ appealed the AG's opinion; both the District Court and Third Court of Appeals upheld the AG's opinion. In May 2023, TCEQ filed a petition for review, and the Texas Supreme Court denied the petition on December 15, 2023, leaving the AG opinion to stand that a skeleton crew day is a business day under the PIA. A motion for rehearing has been pending since January 16, 2024. While the opinion relates directly to PIA responses, it may have broader implications for other state statutes or policies that have deadlines. *Texas Comm'n on Envtl Quality v. Sierra Club*, No. 03-21-00256-CV, 2022 WL 17096693 (Tex. App. 2022. pet. denied).

Florida Court Deems a Class of Residents Has Standing Against a Resource Recovery Facility.

On March 3, 2023, property owners and citizens living near a Miami Waste Management Facility sued the facility owner for damages caused by a fire at the facility. The complaint alleges the fire was caused by the facility's negligence and caused hazardous and toxic fumes to enter the air and onto the plaintiffs' properties, contaminating soil and water. The complaint further alleges that migration of toxic fumes from the waste-to-energy plant at the facility and adjacent landfills caused a trespass to land, a continuous nuisance, and the need for medical monitoring of potential ongoing health issues. The facility's operator requested that the Court dismiss the case, claiming the plaintiffs are unable to demonstrate a viable claim for trespass and nuisance and exposure to toxic fumes and the need for specific medical monitoring. On January 2, 2024, the federal judge denied the facility's request, allowing the case to move forward and the citizens to continue investigating the extent of damages and the number of citizens to include within its class. This leaves open the possibility for the facility to be held liable for the trespass to property by migration of the fire's toxic fumes and for the continued

medical monitoring of citizens who may later develop health issues as a result. A jury trial is currently set for November 4, 2024. *Brashevitzky v. Covanta Dade Renewable Energy, LLC*, No. 23-20861-CIV-ALTONAGA/Damian (S.D. Fla. Jan. 02, 2024).

Utility Cases

Travis County District Court Rules Against ERCOT Stakeholders, Upholds ERCOT Bylaws Amendments.

On March 4, 2024, the Honorable Judge Maya Guerra Gamble of the 455th District Court of Travis County issued a final order in Cause No. D-1-GN-23-001430 denying the Public Utility Commission of Texas' ("Commission") Plea to the Jurisdiction but affirming the challenged Commission order. As previously reported, Texas Industrial Energy Consumers ("TIEC") sued the Commission seeking judicial review of the Commission's December 20, 2022 order approving amendments to ERCOT's bylaws (the "Order"). The Texas Coalition for Affordable Power ("TCAP") and Steering Committee of Cities Served by Oncor ("OCSC") (collectively, "Cities") jointly intervened seeking to invalidate the Order. The parties convened for a final hearing on December 19, 2023, and Judge Gamble ultimately issued the final order approving the Order.

The Electric Reliability Council of Texas ("ERCOT") operates as a non-profit corporation under the Texas Business Organizations Code ("TBOC") and is therefore bound by its corporate bylaws. Prior to the Order, ERCOT's bylaws required a majority vote by Corporate Members—including city members—to approve proposed ERCOT bylaws amendments. Nevertheless, ERCOT unilaterally approved bylaws amendments removing the provision that required Corporate Member approval. Under the proposed amendments, only the ERCOT board has a say over ERCOT bylaws, albeit with oversight from the Commission. The bylaws change was uniformly opposed by stakeholder groups.

The Commission subsequently issued the Order adopting the bylaws amendment outside a Commission contested case. TIEC, TCAP, and OCSC sued, asserting the Commission violated the substantial evidence rule because, among other things, it failed to provide notice of ERCOT's petition to amend the bylaws and ratified amendments that violated the TBOC. As such, the plaintiffs argued the Order was arbitrary and capricious and should be reversed. In response, the Commission filed a Plea to the Jurisdiction claiming the Order was not issued in a "proceeding" and, therefore, the Public Utility Regulatory Act ("PURA") did not entitle the plaintiffs to judicial review of the Order.

Judge Gamble first addressed the Commission's Plea to the Jurisdiction. In a few sentences, she dismissed the Plea, holding the Commission "held a proceeding…as that term is defined in [PURA] and the Commission's rules." The 455th District Court, therefore, had jurisdiction to review the Order under PURA § 15.001. Despite this finding, however, Judge Gamble affirmed the Order necessarily finding the Commission "proceeding" conformed with Commission rules and the Administrative Procedure Act. Judge Gamble therefore rejected TIEC, TCAP, and OCSC's claims that ERCOT bypassed the Corporate Member vote required under the TBOC. Further, she dismissed claims that the Commission violated Corporate Members' due process rights by approving the amendments without notice or a hearing. Judge Gamble did not provide any reasoning or analysis behind her decision. Judge Gamble's order will likely be appealed to the Austin Third Court of Appeals.

"In the Courts" *is prepared by Lora Naismith in the Firm's Water Practice Group; Riley Zoch in the Firm's Litigation Practice Group; Mattie Neira in the Firm's Air and Waste Practice Group; and Rick Arnett in the Firm's Energy and Utility Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Lora at 512.322.5850 or lnaismith@lglawfirm.com, or Riley at 512.322.5863 or rzoch@lglawfirm.com, or Mattie at 512.322.5804 or mneira@lglawfirm.com, or Rick at 512.322.5855 or rarnett@lglawfirm.com.*

AGENCY HIGHLIGHTS

U.S. Environmental Protection Agency ("EPA")

EPA Announces Final Rule Designating Two PFAS as Hazardous Substances Under CERCLA and Issues Enforcement Discretion Policy. On April 17, 2024, EPA posted a "pre-publication" copy of a final rule designating perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), including their salts and structural isomers, as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). PFOA and PFOS are categories of per- and polyfluoroalkyl substances ("PFAS") which are widely used, long-lasting chemicals which break down very slowly over time. This action is based on EPA's finding that PFOA and PFOS "may present a substantial danger to the public health

or welfare or the environment when released" and serves to further EPA's environmental goals of remediating contaminated properties in a timely manner and holding the polluters accountable for the contamination. The rule is set to be effective 60 days after it is published in the *Federal Register.*

The proposed rule was published on September 6, 2022, and received approximately 64,000 comments, including significant interest by solid waste and wastewater industry leaders who sought an exemption for passive receivers such as landfills and wastewater treatment plants. Rather than address the request for a passive receiver exemption, EPA instead supplemented the proposed final rule with an enforcement discretion policy published in a guidance document on April 19, 2024, just two days after posting the pre-publication version of the final rule. In this policy, EPA asserts that the focus of the final rule is to hold responsible the parties who "significantly contributed to the release of PFAS into the environment, including parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." EPA further asserts that it will consider equitable factors when seeking response actions or costs under CERCLA and that it does not intend to pursue facilities such as "community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land." Although the policy may give some comfort to passive receivers of PFAS, such receivers should keep in mind that the policy does not shield them from third party claims brought under CERCLA, and that EPA is not generally bound by such policies.

It should also be noted that the rule does not classify PFOA or PFOS as hazardous wastes. EPA cites to interim guidance published by EPA on April 8, 2024 regarding destruction and disposal of PFAS which acknowledges that PFAS contaminated wastes could be sent to either hazardous waste or municipal landfills, and EPA specifically states that "waste containing PFOA and PFOS is not necessarily hazardous waste (unless the particular wastes are hazardous for some other reason)." EPA further states that "for CERCLA cleanups, only hazardous wastes listed or identified under [the Resource Conservation and Recovery Act] ("RCRA") Section 3001 (or any authorized State program) are required to be managed at RCRA subtitle C facilities" and that no PFAS are currently listed or being proposed to be listed as RCRA hazardous wastes.

PFAS regulation is continually evolving, and Lloyd Gosselink continues to follow changes as they occur.

EPA Proposes Revisions to Performance Standards for New Stations Sources and Emission Guidelines. Under Clean Air Act ("CAA"), EPA is required to review emission standards for municipal waste combustors every five years. The initial standards were originally set in 1995, and despite the CAA mandate, they have not been updated since 2006, in part due to significant lobbying from differing interests and ever-changing administrations. However, in June 2023, EPA entered a consent decree that required the agency to publish a proposed rule by December 31, 2023, and finalize it by November 20, 2024. EPA published its proposed rule shortly after the deadline, on January 23, 2024. The proposed rule would strengthen emission standards for existing large municipal waste combustors and new source performance standards for new combustors. EPA also proposes to remove exemptions for pollution during startups, shutdowns, and malfunctions ("SSM" exemptions) although the D.C. Circuit Court recently ruled that EPA cannot require states to revise air pollution plans solely to remove such exemptions. The proposed rule is published in 89 Federal Register 4243, and EPA is reviewing comments.

EPA Proposes Listing Nine PFAS as Hazardous Constituents Under RCRA and Amending the Definition of Hazardous Waste to Expand Corrective Actions. EPA published two rules that go hand in hand in allowing the agency to address historical per- and polyfluorinated substances ("PFAS") contamination on February 8, 2024. EPA first proposes listing nine specific PFAS as "hazardous constituents" in 40 CFR Part 261, Appendix VIII. Second, EPA proposes amending the definition of Hazardous Waste as it applies to the Corrective Action Program to clarify EPA's authority to address releases of emerging contaminants, which includes, but is not limited to, PFAS. Specifically, the proposed rule would expressly apply the Resource, Conservation, and Recovery Act ("RCRA") section 1004(5) statutory definition of hazardous waste to corrective actions and other necessary locations such as in the hazardous waste facility permitting regulations. The scope of both rules is intended to be very narrowly tailored to the RCRA Corrective Action Program, and EPA explicitly states that making certain PFAS hazardous constituents does not make them, or wastes containing them, RCRA hazardous wastes. EPA's intent is to allow for PFAS to be considered in the RCRA Corrective Action Program, which requires facilities that treat, store, or dispose of hazardous waste to investigate and clean up contaminated soil, groundwater, and surface water. Comments are no longer being accepted on the second rule, but will be accepted until April 9, 2024, on the first.

Final PFAS Drinking Water Rule Announced. On April 10, 2024, EPA announced the final version of its first ever rule on enforceable Safe Drinking Water Act ("SDWA") limits for per- and polyfluoroalkyl substances ("PFAS"). This announcement comes well ahead of EPA's September 2024 statutory deadline to finalize the rule. The National Primary Drinking Water Regulation ("NPDWR") is the first federally enforceable drinking water regulation to address any PFAS substances. During its formulation, EPA evaluated 120,000 public comments and considered input received from consultants and stakeholders. EPA anticipates the rule will prevent PFAS exposure in drinking water for approximately 100 million people, prevent deaths and reduce serious PFAS-attributable illnesses. NPDWR establishes legally enforceable maximum contaminant levels ("MCLs") for six PFAS: perfluorooctanoic acid ("PFOA"), perfluorooctane sulfonic acid ("PFOS"), hexafluoropropylene oxide ("HFPO") dimer acid, perfluorononanoate ("PFNA"), perfluorohexanesulfonic acid ("PFHxS"), and perfluorobutane sulfonic acid ("PFBS"). The final MCLs set for PFOA and PFOS are 4.0 parts per trillion ("ppt"). The MCLs for PFHxS, PFNA, and HFPO-DA are 10 ppt. EPA also

finalized a hazard index for mixtures containing two or more PFHxS, PFNA, HFPO-DA, and PFBS that has a MCL of a unitless 1. The final rule requires public water systems ("PWS") to conduct PFAS monitoring, with an initial monitoring deadline of 2027. And by 2029, PWS must also implement PFAS reduction solutions if their monitoring shows drinking water levels exceed the MCLs. In conjunction with the new rule, $1 billion in funding has been made available through the Bipartisan Infrastructure Law to assist states and territories with PFAS testing and treatment. Despite this funding, states have raised concerns over the financial impact of the new rule, flagging that the funding and resources needed for PFAS implementation will be in competition with other drinking water mandates such as cybersecurity, infrastructure updates, and the updated lead and copper rule.

EPA Proposes Clean Water Maui Guidance. In November 2023, EPA released a draft guidance titled Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* decision in the CWA Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater ("Maui Guidance"). The draft Maui Guidance outlined the factors to be considered when evaluating whether discharges through groundwater are subject to the CWA. The Maui Guidance is available online at: https://www.epa.gov/system/files/documents/2023-11/maui-draft-guidance.pdf. States and industry groups have expressed concerns over the Maui Guidance, particularly over EPA's proposal to use pollutant constituents as indicators for prohibited pollutants due to the possibility of misleading results. The Maui Guidance pertains to the application of the Supreme Court's "functional equivalence" to direct discharges that necessitate a National Pollutant Discharge Elimination System ("NPDES") permit. The draft includes the ability of regulators to evaluate constituents of identified pollutants to support the finding of a functional equivalent to a direct discharge. Critics of the guidance have called into question the use of constituents as indicators due to a lack of factual information regarding the factors for determining a functional equivalent laid out in *Maui*. These factors are: transit time, distance traveled, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution at that point has maintained its specific identity. While industry groups dubbed the draft as overbroad and unclear, environmentalists have urged EPA to expand the guidance to include additional pathways for systems and facilities to meet the functional equivalent standard. This includes the use of a rebuttable presumption that permeable impoundments of wastewater treatment systems of a certain size that are designed to leak and are within a certain distance from protected surface waters meet the functional equivalence standard.

Joint Agency Guidance on Water Cybersecurity. EPA, the Federal Bureau of Investigation ("FBI"), the Office of the Director of National Intelligence and the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA") issued a joint guidance to water and wastewater utilities in the wake of a cyber attack on a Pennsylvania utility, and EPA's withdrawal of its policy proposal to mandate certain cyber requirements. The Cybersecurity Advisory encourages water and wastewater facilities to bolster cybersecurity defenses with planning tools and security elements focused on preparedness, response, and mitigation. The Cybersecurity Advisory is available online at: https://www.cisa.gov/sites/default/files/2024-01/WWS-Sector_Incident-Response-Guide.pdf. The guidance highlights security tools and services offered by CISA, and the first responders and rapid response teams of the FBI. It also encourages multi-level reporting, as well as tailored containment, eradication, and recovery responses. Post-incident retention of data and evidence is emphasized for prevention of future incidents with the use of a lessons-learned approach. Also following the attack on the Pennsylvania utility, the House Energy and Commerce Committee planned a January hearing on cybersecurity safeguards for drinking water systems. The hearing presented an opportunity for lawmakers to discuss safeguarding water infrastructure from attacks. These events came just months after the EPA withdrew its controversial policy that attempted to mandate state review of water system cybersecurity measures under the SDWA. Discussion at a February Homeland Security CISA hearing on cybersecurity focused on administrative agency collaboration rather than the possibility of new legislation.

Combined Sewer CWA Proposed Guidance. On February 20, 2024, EPA released a proposed draft guidance meant to clarify and inform future CWA permitting for combined wastewater and storm sewer systems. As proposed, the guidance clarifies permit terms for combined sewer overflow ("CSO") communities nearing completion of CWA long-term control plans ("LTCP"). The guidance recommends these communities allow adequate time for monitoring, assessing, and planning by beginning the process laid out in the guidance several years in advance. The guide is also meant to incorporate new policy decisions and environmental considerations since EPA's last CSO policy for combined sewer which was released in 1994. The guidance adds that permitting authorities and permittees should take climate change impacts into consideration. It also recommends the prioritization of projects that will improve water quality in underserved or overburdened communities.

EPA Urged to Assist Small Systems with Water Funding. EPA financial advisors have been urged to conduct research projects aimed at helping smaller drinking water systems better use federal funding dollars due to a lack of capacity of small communities to take advantage of increased infrastructure aid, such as that from the Bipartisan Infrastructure Law. During a February session, EPA's Environmental Financial Advisory Board ("EFAB") was asked to address smaller systems' struggles to utilize federal funding initiatives, such as state revolving funds. The main subjects presented for EFAB's focus were innovation, multi-benefit analysis, consolidation and regionalization of smaller systems, potential gains from water quality trading, and other market-based approaches; as well as financial incentives for systems. Some of the recommended study topics included expanding technology assistance, including for water recycling and reuse.

EFAB was also urged to conduct more research on innovative infrastructure improvements with cooperation between federal, state, and local authorities. EFAB was also urged to address the multi-benefit analysis of conservation and efficiency to meet water challenges and how a long-term approach could help with lead service line replacements and other mandates under EPA's Lead and Copper Rule Improvements.

Texas Commission on Environmental Quality ("TCEQ")

New Commissioner Appointed to TCEQ. On February 8, 2024, Governor Greg Abbott announced the appointment of Catarina Gonzales as next Commissioner of the TCEQ. Commissioner Gonzales joins TCEQ from the Office of the Governor, where she served as a budget and policy advisor. She assumes the position previously held by Commissioner Emily Lindley. Commissioner Gonzales' term is set to expire August 31, 2029.

Public Utility Commission of Texas ("PUC")

PUC Opens Rulemaking to Address Market Abuse. PUC, in Project No. 55948, opened a rulemaking to implement recent legislation passed by the 88th Legislature related to generator Voluntary Mitigation Plans ("VMPs")—plans voluntarily submitted by generators regarding market abuse regulation compliance. The rule, as contemplated, removes the VMP compliance absolute defense provision, which absolved a generator of all market abuse liability if the generator complied with its VMP. The rulemaking appropriately removes the absolute defense provision and directs PUC to consider VMP compliance, together with other factors, to determine administrative penalties. The rulemaking, however, maintains the "small fish" exemption, which automatically excludes generators that control less than 5% of installed ERCOT generation capacity from market abuse regulation.

Stakeholders, including city representatives, filed comments expressing support for the VMP absolute defense amendment. Because the ERCOT market is increasingly complex and constantly evolving, a VMP cannot realistically capture all market abuse mechanisms. As such, VMP compliance is more appropriately a factor—together with factors including the gravity of the violation, previous violations, and efforts to correct the violation—PUC should consider for administrative penalties. Cities, however, urged PUC to remove the "small fish" exemption. As reported by the ERCOT Independent Market Monitor, generators exempt under the small fish exemption may possess sufficient market power to engage in abusive behavior. PUC, therefore, should not shield these generators from administrative penalties. PUC Staff will now consider stakeholders' comments before issuing its Proposal for Adoption later this spring.

Oncor Electric Delivery Company, LLC Files its Third Distribution Cost Recovery Factor Application in Nine Months. Oncor filed an application to increase its DCRF by approximately $81,323,915. Transmission and Distribution Utilities ("TDUs") file DCRF applications to recover investment related to distribution poles, wires, and other equipment items that serve end-use customers. PURA, however, authorizes a TDU to adjust its DCRF "not more than twice per year." Although Oncor's DCRF application is the Company's first DCRF in the calendar year 2024, it is the Company's third DCRF in less than nine months. Collectively, the Company has sought an additional $290,369,280 of distribution revenue in less than one year.

Intervening parties filed a motion to dismiss Oncor's DCRF, asserting PURA only authorizes two DCRFs in a twelve-month period. Principles of statutory interpretation and other PURA provisions support this interpretation. Oncor responded that a "year" refers to a "calendar year." PURA, therefore, authorizes this DCRF—the Company's first DCRF filing in calendar year 2024. PUC Administrative Law Judge has not issued an order addressing the motion to dismiss.

AEP Texas Inc. Files Rate Case at the PUC. On February 29, 2024, AEP Texas Inc. ("AEP Texas"), a transmission and distribution investor-owned utility, filed an application at the PUC to change its rates. In its filing, AEP Texas seeks to increase system-wide distribution rates by $100.4 million per year (an increase of 13.1%) and increase system-wide transmission rates by $63.1 million (an increase of 9.29%). The impact of an approval of this proposed increase on an average residential customer would be an increase of about $4.59 per month. As filed, the rates would go into effect on April 4, 2024. On March 1, 2024, the Cities Served by AEP Texas filed a Motion to Intervene in this proceeding and has begun reviewing the application. More information can be found on PUC's website under Docket No. 56165.

CenterPoint Houston Electric LLC ("CenterPoint") Files Rate Case Seeking $60 Million Rate Increase. On March 6, 2024, CenterPoint filed with PUC and with cities retaining original jurisdiction an application to change rates. CenterPoint's last electric rate case concluded in March 2020. CenterPoint seeks an overall increase to its base rates equating to $60 million per year, or $17 million for retail customers and $43 million for wholesale transmission service. If approved, this would be an approximate 1% increase in wires charges to distribution customers and an approximate 6.6% increase for transmission service customers. The Company estimates that the monthly increase for an average residential customer would be $1.25 if the application is approved in its entirety. More information is available on PUC's Interchange under Docket No. 56211.

PUC Rulemaking Update. PUC Staff's current rulemaking calendar for 2024 can be found under Docket No. 56060.

As of February 15, 2024, the following projects are being prioritized:

- Project No. 55566 – Generation Interconnection Allowance
- Project No. 55826 – Texas Energy Fund In-ERCOT Generation Loan Program
- Project No. 55812 – Texas Energy Fund Completion Bonus Grant Program
- Project No. 55948 – Review of Voluntary Mitigation Plans
- Project No. 55955 – Review of Administrative Penalty

Authority Related to VMPs
- Project No. 53924 – Water and Sewer Utility Rates after Acquisition
- Project No. 53404 – Power Restoration Facilities and Energy Storage Resources for Reliability

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

- Project No. 52059 – Review of PUC's Filing Requirements
- Project No. 56199 – Review of Distribution Cost Recovery Factor
- Docket TBD - Water Financial Assurance
- Project No. 54233 - Technical Requirements and Interconnection Processes for Distributed Energy Resources ("DERs")
- Project No. 54224 – Cost Recovery for Service to DERs
- Project No. 52301 – ERCOT Governance and Related Issues
- Project No. 55249 – Regional Transmission Reliability Plans
- Project No. 54584 – Reliability Standard for the ERCOT Market
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 53981 – Review of Wholesale Water and Sewer Rate Appeal

Texas Railroad Commission ("RRC")

Texas Railroad Commission Primary Election Results. The Texas 2024 primary election occurred on March 5. Texas voters chose party nominees for statewide seats, and those nominees will face off in the general election on November 5.

Three elected commissioners oversee RRC, and one of their seats is up for election every two years. This year, Commissioner Chair Cristi Craddick, who has served on the RRC since 2012, faces re-election. She won the Republican primary, receiving just more than 50 percent of the vote against challengers Christie Clark, Corey Howell, James Matlock, and Petra Reyes. In the Democratic primary, process safety engineer Katherine Culbert won with 67.7 percent of the vote, beating drilling engineer Bill Burch, who received 32 percent. Culbert has worked in the oil and gas industry for more than two decades.

Atmos Energy's ("Atmos") Gas Reliability Infrastructure Program Filings. What is a Gas Reliability Infrastructure Program ("GRIP") filing? GRIP filings allow gas utilities to recover costs related to additional invested capital without filing a comprehensive rate case. These interim rate adjustment filings can be made by natural gas utilities with newly invested capital not already included in that utility's exiting rate base. However, the gas utility must have filed a full rate case within the previous two years. Below are two recent GRIP filings by Atmos' two utility divisions – Atmos Mid-Tex and Atmos West Texas.

Mid-Tex

Atmos Mid Tex has requested a $173.6 million increase under the GRIP statute for the environs in the Mid-Tex region and in the regions covered by the Atmos Texas Municipalities Coalition Cities ("ATM Cities"). The residential charge set in the last environs base rate case was $17.00, while the one set in the last base rate case for ATM Cities was $18.85. Since then, GRIP has added $29.06 to the customer charge (including $6.73 in the current filing). Ultimately, if this GRIP filing is approved, the residential customer charge in the environs will be $46.11, and the residential customer charge in the ATM Cities will be $47.96.

Atmos West Texas

Atmos West Texas has requested a $15.7 million increase under the GRIP statute for its environs in that region and for the Amarillo, Lubbock, Dalhart, and Channing Cities ("ALDC"). The residential charge set in the last environs base rate case was $16.10, while the residential charge in the last rate case for ALDC cities was $15.00. Since then, GRIP has added $19.06 to the environs customer charge (including $3.67 in the current filing) and added $9.36 to the ALDC cities customer charge (including $3.34 in the current filing). Ultimately, if this GRIP filing is approved, the residential customer charge in the environs will be $35.16, and the residential customer charge in the ALDC will be $24.36.

Atmos Request for Dallas Would Increase Rates Nearly 30 Percent. On January 12, 2024, Atmos submitted its 2024 Dallas Annual Rate Review Mechanism filing, where the gas utility proposed an annual review increase of $43.1 million for Dallas. Moreover, Atmos proposed recovering securitization regulatory expenses of $4.8 million for Dallas. These combined requests represent an increase in annual revenues of $47.9 million. If the filing is approved without changes, the average residential customer would see a monthly rate increase of $13.72 with gas costs included, which represents a 29.98 percent increase excluding gas costs. The statutory deadline to take action on this matter is May 26, 2024.

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