Lloyd Gosselink
ATTORNEYS AT LAW

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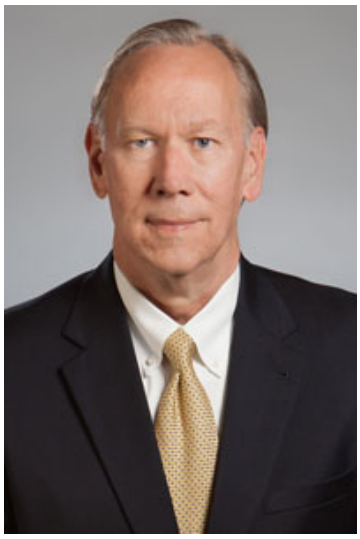
THE LONE STAR CURRENT

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

PHASES AND STAGES: MARTIN ROCHELLE



This edition of our Newsletter comes with the bittersweet announcement of the retirement of Martin Rochelle, the Chair of the Firm's Water Practice Group, effective October 1, 2017. Martin has been with Lloyd Gosselink since 1984, joining the Firm just months after it was founded. In the years that have followed, Martin has been providing unparalleled service to the Firm's clients, as well as helping develop and grow our Firm from a group of five attorneys into its current state.

Over the past 33 years, Martin has been a leader in the state on water law and policy, and he has assisted our clients at the Legislature, before state and federal agencies, and individually with all aspects of their water-related issues. No doubt Texans all across our state have benefited, and will continue to benefit, from Martin's perspective and counsel on water-related issues.

In addition to his accomplishments for his clients, Martin has also led the Firm's Water Practice Group since its inception. In this role, Martin has been "leaning forward," accomplishing his goal of creating a group of water lawyers in the state that are experts in every aspect of water law. This success is in large part the result of his efforts to initiate and continuously champion the Firm's efforts on attorney mentoring and career growth.

Martin has contributed nearly all of his professional career to this Firm, and his achievements will not be forgotten.

As he begins the next phase of his career, Martin plans to do some traveling with Marianne, volunteer with a couple of charitable endeavors that are close to his heart, and enjoy some of his favorite hobbies, such as playing golf at Roy Kizer or Barton Creek and mentoring young lawyers. Our guess is that he will also continue to pursue his true passion, sound water policy for our state, at the Capitol and through his continued participation with the Texas Water Conservation Association.

Please join us in wishing him well in the next steps of his journey. Martin, we thank you.

IN THIS ISSUE

Lloyd Gosselink
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THE LONE STAR CURRENT

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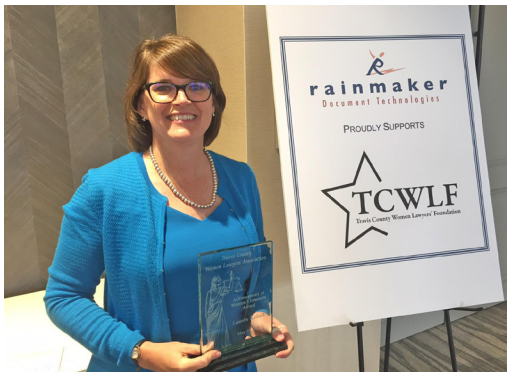
Lloyd Gosselink Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

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

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

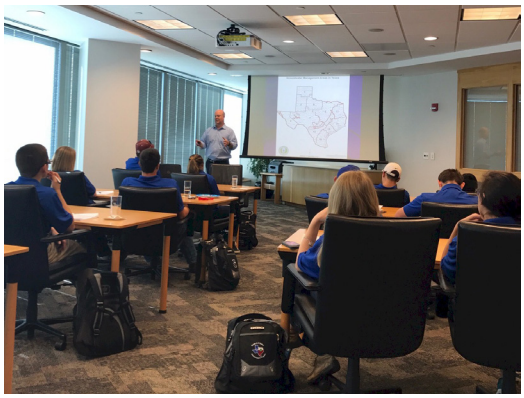
To receive an electronic version of The Lone Star Current *via e-mail, please contact Jeanne Rials at 512.322.5833 or jrials@lglawfirm.com. You can also access* The Lone Star Current *on the Firm's website at www.lglawfirm.com.*

FIRM NEWS



Lauren Kalisek received the Advancement of Women's Interest Award from the Travis County Women Lawyers' Association and the Travis County Women Lawyers' Foundation. Lauren received this award at the Annual Grants and Awards Luncheon on May 12th in recognition of her efforts in updating and expanding the Firm's women and family-friendly workplace policies, including the Firm's reduced hours schedule for associates and new parent leave policies. We are thankful for Lauren's leadership and dedication in continuing our Firm's culture of being a great place to work.

Ty Embrey, Ashleigh Acevedo, Michael Gershon, and Lauren Kalisek had the privilege of sharing their knowledge about water law with the Youth Water Leadership Academy, a Texas 4-Water Ambassadors program, this past month. This program gives students an opportunity to learn about applied research and technology, water law, policy, planning, and management strategies to help conserve our valued resources. Our Firm is a proud sponsor of this inspiring program that prepares and builds the future leaders of the Texas Water World.



Claire Labit has joined the Firm's Energy and Utility Practice Group as a paralegal. Claire earned her paralegal certificate and Master of Arts in Legal Studies from Texas State University and her Bachelor of Science in biology from Louisiana State University - Shreveport.

Sheila Gladstone will be giving an "Employment Law Update" at the Texas State Bar Advanced Government Law Seminar on July 28 in Austin.

Sara Thornton will be presenting "'Dammed' If You Do and Damned If You Don't: Complying with Section 404 of the Clean Water Act in the Development of Critical Water Supplies" at the 29th Annual Texas Environmental Superconference on August 3 in Austin.

Ty Embrey will be providing a "Legislative Debrief" at the Texas Alliance of Groundwater Districts Groundwater Summit on August 30 in San Marcos.

Troupe Brewer will be presenting a "Case Law Update" at the Texas Alliance of Groundwater Districts Groundwater Summit on August 31 in San Marcos.

Troupe Brewer will be giving a "Legislative Update" at the American Water Works Association North Texas Chapter Drinking Water Seminar on October 20 in Fort Worth.

A Texas court would likely conclude that a county's longevity pay policy for county officials may include the prior service of the individual as a county employee, so long as the longevity payments are provided prospectively from the date the policy is adopted. Tex. Att'y Gen. Op. KP-0135 (2017).

The Houston County Attorney asked the Texas Attorney General ("AG") whether a county may provide longevity pay to an elected county official for time worked as an employee for the county. In 2008, the Houston County Commissioners Court amended its employee handbook to adopt a longevity policy that applies to "employees, those appointed by Commissioners Court, and elected officials." In 2016, the handbook was amended again for the purpose of "codify the ongoing practice of paying longevity pay to elected officials." However, the County was uncertain if the policy was valid after the issuance of AG Opinion KP-0060. Article III, Section 53 of the Texas Constitution forbids paying "any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part," and the AG has consistently recognized that Art. III, Sec. 53 prohibits the retroactive awarding of compensation. See Tex. Att'y Gen. Op. Nos. KP-0060 (2016) and JC-0376 (2001).

The Court was specifically concerned with whether or not longevity pay for elected officials who were formerly county employees constituted unconstitutional "retroactive pay." The AG discusses the opinion issued in KP-0060, stating that while the opinion recognized that the Texas constitution's prohibition against extra compensation would prohibit a new county officer from receiving longevity pay under a policy that did not specifically authorize it, the opinion acknowledged a county commissioners court could adopt a new longevity pay policy that did include county officers on a prospective basis.

The AG explains that a policy operates prospectively (and constitutionally) when a benefit becomes a term of employment, and employees receive that benefit only for work performed after the benefit is established as a term of employment. Noting that Chapter 152 of the Texas Local Government Code authorizes longevity pay as a form of compensation, the AG states that a constitutional longevity policy does not authorize payment for an employee's past service, but rather authorizes longevity payment for current services provided while recognizing a person's enhanced value to his or her employer because of the person's many years of experience and knowledge. See *United States v. Alger*, 151 U.S. 362, 363 (1894).

The AG concludes that Art. III, Sec. 53 does not preclude a longevity pay formula from including service rendered prior to the adoption of the longevity pay policy itself. Therefore, the AG states that a court would likely conclude that a county's longevity pay policy for county officials may include an individual's prior service as a county employee, provided the longevity pay is earned after the adoption of the longevity policy.

A Texas Court would likely conclude that Texas Government Code § 552.1175 does not require the Texas Ethics Commission to redact or otherwise withhold information when a statute outside of the Public Information Act expressly makes that same information public. Tex. Att'y Gen. Op. KP-0151 (2017).

The AG was asked whether Section 552.1175 of the Public Information Act applies to except personal information contained in certain reports filed with the Texas Ethics Commission ("TEC") from disclosure to the public, or whether those documents must be made available to the public through other statutes, i.e., § 254.0401. TEC administers and enforces laws requiring certain persons to file campaign finance reports, lobby reports, and financial statements. Those reports contain certain personal information, and the Chairman of the TEC asks to what extent § 552.1175 is in conflict with the TEC's statutory requirements to make information in reports filed with the TEC available to the public, including on the Internet.

The AG notes that § 552.1175 specifically exempts from public disclosure certain information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom the section applies, or that reveals whether the individual has family members. However, the Chairman of the TEC notes that this information is required to be made public through numerous other statutes that require publication of campaign finance reports, lobby reports, and financial statements which include such information.

The AG begins his analysis noting that Texas courts will attempt to construe apparently inconsistent statutes in a manner that gives full effect to both. Tex. Gov't Code § 311.026(a). When statutes at

issue "irreconcilably conflict" (as do Section 552.1175 and others cited in the request) if one of the conflicting statutes is general and the other specific, the specific provision usually prevails as an exception to the general statute. The specific provision does not negate the general one entirely, but will prevail "in its application to the situation that the specific provision covers." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 185 (2012).

While § 552.1175 applies to any state or local governmental body in Texas, § 254.0401 of the Election Code and similar statutes pertain only to the duties of the TEC to make specified reports and statements filed with the Commission available to the public. Therefore, the AG states, a Texas court would likely conclude that § 552.1175 of the Government Code is a general statute while § 254.0401 and the other statutes referenced are the more specific statutes. Lastly, the AG notes previous decisions that concluded that "exceptions to required public disclosure provided in the [Public Information Act] are inapplicable to information that statutes other than the [Public Information Act] expressly make public." Thus, § 552.1175 does not require the TEC to redact or otherwise withhold covered information when a statute outside of the Public Information Act expressly makes that information public.

Municipal Corner *is prepared by Troupe Brewer. Troupe is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you would like additional information or have any questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.*

RECAP OF REGULAR SESSION OF 85TH TEXAS LEGISLATURE

by Ty Embrey and Troupe Brewer

The Texas Legislature wrapped up its Regular Session when it adjourned *sine die* on May 29th after many long days of legislative debate and action. For many observers of the Texas Legislature, the 2017 Regular Session will be remembered as one of the most contentious and acrimonious sessions in many years. The difficult nature of the Regular Session was reflected in the bill passage rate, which was one of the lowest percentages in some time. While 6,631 bills were filed during the Regular Session and only 1,211 bills ultimately passed. Then Governor Abbott ended up vetoing 50 of the 1,211 bills that were passed by the Texas Legislature.

The Texas Legislature did pass some major legislation during the Regular Session, including legislation to address immigration enforcement (sanctuary cities), windstorm insurance, foster care system reform, and statewide ban on texting while driving. The Legislature also approved the one bill the Legislature is required by the Texas Constitution to approve, when the Legislature approved a $217 billion budget to address the expenses of the State of Texas for the next two years.

Several bills that were important to Governor Abbott, Lieutenant Governor Patrick, and Speaker Straus did not pass during the Regular Session. As a result, Governor Abbott announced that he would call a Special Session to start on July 18th for the Legislature to work on 20 issues that Governor Abbott believes need to be addressed. Under the Texas Constitution, the Special Session could extend up to 30 days but the Legislature could adjourn before the end of the 30-day time period.

This article summarizes the significant legislation that impacted groundwater, surface water, water utility, and environmental issues.

I. Groundwater

The Texas Water Conservation Association ("TWCA") reassembled its Groundwater Stakeholder Committee this interim, and that group developed and supported eleven bills related to groundwater regulation and development in Texas. Ultimately, five of those bills were passed by the Legislature and one bill was vetoed by Governor Abbott. Those bills and a few other bills related to groundwater are discussed below.

Legislation successfully passed by the Legislature and signed into law by Gov. Abbott:

- **House Bill ("HB") 2215 (Price)** – "DFC Adoption" – This is a TWCA consensus bill. HB 2215 amends the Texas Water Code ("TWC") as it pertains to the process and the timeline for adopting desired future conditions ("DFC") by groundwater conservation districts ("GCDs") within groundwater management areas ("GMAs"). Specifically, HB 2215 makes amendments to TWC Chapters 16 and 36, primarily to amend the deadline for the upcoming round of DFC adoption. The bill removes the previous DFC adoption deadline of September 1, 2010, and inserts a new deadline of January 5, 2022 for the next round of DFC planning. The bill also includes language requiring that GMAs propose and adopt subsequent DFCs "before the end of each successive five-year period after that date." Effective Date – Immediately.

- **Senate Bill ("SB") 864 (Perry)** – "Notice to GCD of Alternative Supply" – This was a TWCA consensus bill. This bill requires the notice of a water rights application under TWC § 11.132 to identify any proposed alternative source of water, other than state water, that the applicant has identified in the application. SB 864 adds notice requirements if the applicant proposes to use groundwater from a well within a GCD as an alternative source of water. In such an application, notice must be provided to each GCD with jurisdiction over the proposed groundwater production not less than 30 days before the date the Texas Commission on Environmental Quality ("TCEQ") takes action on the application. This bill also

amends TWC § 11.135(b) to require a water right permit to include information about any alternative source of water that is not state water. If a public hearing is held on the application and the notice identifies groundwater from a well located in a GCD as a proposed alternative source, that notice must also be sent to the GCD in which the well is located and published at least 20 days before the hearing date stated in the notice in a newspaper of general circulation in each county in which the GCD is located. Effective Date – 9/1/2017.

- **SB 865 (Perry)** – "Authorization for Electronic Banking" – This is a TWCA consensus bill. SB 865 amends TWC § 36.151 to allow payroll disbursements to be made by electronic deposit, to except such electronic deposits from the requirement that disbursements of district funds be signed by two directors, and to allow a district, by resolution, to transfer funds by federal reserve wire or electronic means to any account. Effective Date – Immediately.

- **SB 1009 (Perry)** – "Administratively Complete Permit Applications" – This is a TWCA consensus bill. SB 1009 inserts the word "only" into TWC § 36.113(c) to make the list of information that may be required for an administratively complete application an exhaustive list. SB 1009 also adds a provision to that list to allow a GCD to require in a permit application any other information "required by district rule," as long as that rule was in place at the time the application was submitted, and as long as that rule is "reasonably related" to an issue that a district is authorized to consider under TWC Chapter 36. Lastly, SB 1009 amends TWC § 36.114 to state that an application is administratively complete if it contains all the information set forth in §§ 36.113 and 36.1131, and that a district shall not require that additional information be included in an application for a determination of administrative completeness. Effective Date – 9/1/2017.

Legislation finally passed but vetoed by Governor Abbott:

- **HB 2377 (Larson)** – "Brackish Groundwater Permitting" – As a follow-up to Chairman Larson's HB 30 from last session that required TWDB to study and report on "brackish groundwater production zones," HB 2377 sought to guide GCDs in the permitting requirements for production permits from those zones designated by TWDB. However, HB 2377 was vetoed by Governor Abbott, who stated that "[w]hile the development of brackish water resources as a potential means of meeting our state's future water needs is important, House Bill 2377 went about it the wrong way."

- **HB 2378 (Larson)** – "Export Permits" - This was a TWCA consensus bill. HB 2378 provided that a term for a groundwater transport permit issued by a GCD shall be automatically extended on or before its expiration to a term not shorter than the term of the associated operating permit for the production of groundwater that was in effect at the time of the extension. The transport permit term also would have been extended for each additional term for which the associated operating permit was renewed. However, HB 2378 was vetoed by Governor Abbott, who stated that the bill would effectively exclude "the public, potentially in perpetuity, from the decisions of a groundwater conservation district" and would "reduce transparency and inhibit the district's ability to respond to changed circumstances over time."

- **HB 3025 (King)** – "Plugging or Repairing of Abandoned and Deteriorated Wells" – HB 3025 amended Chapter 36 of the Water Code to provide that GCDs may require landowners to plug abandoned wells, and shall require landowners to plug or repair deteriorated wells in a manner sufficient to prevent groundwater contamination. The bill also provided a specific timeline for such action, and allowed GCD personnel to enter onto property to plug or repair wells if the landowner failed to act. However, Governor Abbott vetoed HB 3025, stating that the bill gave GCDs "greater discretion to infringe on private property rights and impose costs on landowners" and that the "legitimate need to repair deteriorated wells should be addressed in a way that provides more protections for landowners."

Legislation that failed to pass the Legislature:

- HB 31 (Larson) – Omnibus groundwater bill
- HB 180 (Lucio III) – Remove state auditor review of GCD Management Plans
- HB 3028 (Burns) – Groundwater ownership/rights
- HB 3043 (Workman)/SB 1528 (Creighton) – DFC joint planning process and advisory committees
- HB 3166 (Lucio III) – Creates definition for "modeled sustainable groundwater pumping"
- HB 3417 (King, T.) – Consideration of registered wells in permitting new production
- HB 4050 (Larson) – Export permit overhaul
- HB 4122 (Kacal) – Transfer of property into single GCD
- SB 862 (Perry) – "Loser pays"
- SB 1053 (Perry) – Appeal of DFCs
- SB 1392 (Perry) – Omnibus Chapter 36 bill

II. Surface Water/Water Utility

In the context of surface water and water utility legislation, those bills were more successful than legislation pertaining to groundwater. TWCA formed a Surface Water Legislative Committee, and that group developed two pieces of consensus legislation that successfully passed. Those bills and others pertaining to water and water utilities are discussed in more detail below.

Legislation successfully passed:

- **HB 544 (Anderson)** – "Use of Rural Water Assistance Fund for Planning" – HB 544 amends TWC Chapter 15 to authorize Texas Water Development Board ("TWDB") to use the Rural Water Assistance Fund for planning (in addition to existing uses of outreach, financial, and technical assistance) to assist rural entities to obtain and use financing. The bill also expands language to authorize financing from any source for a purpose described by Chapter 15. Effective Date – Immediately.

- **HB 965 (Springer)** – "Water Utility Restrictions on Correctional Facilities" – HB 965 amends TWC Chapter 13 to allow retail public utilities to require correctional facilities to comply with water conservation measures. These changes apply only to a correctional facility operated by the Texas Department of Criminal Justice ("TDCJ") or operated under contract with the TDCJ. The provisions of HB 965 apply to such facilities unless TDCJ submits a statement that conservation would unreasonably increase costs or endanger health and safety. Effective Date – Immediately.

- **HB 1573 (Price)** – "Water Loss Audits & TWDB Training" – HB 1573 amends TWC Chapter 16 to require persons performing annual water loss audits for retail public utilities providing potable water to receive specialized training on performing such audits. The bill requires TWDB to make training available for free on its website, and TWDB may provide training in person or by video or a "functionally similar and widely available medium." Training provided under this bill must include comprehensive knowledge of water utility systems and terminology and any tools available for analyzing audit results. Effective Date – 9/1/2017.

- **HB 1648 (Price)** – "Water Conservation Coordinator" – HB 1648 amends TWC Chapter 13, requiring retail public utilities providing potable water to more than 3,300 connections to designate a "water conservation coordinator" to assist in developing and implementing the utility's water conservation plan. Such utilities must inform TWDB in writing as to who is their designated water conservation coordinator. Effective Date – 9/1/2017.

- **HB 3177 (Lucio III)** – "Uncontested Matters and ED Appeals" – HB 3177 is a TWCA consensus bill that amends TWC Chapter 5 to provide that a surface water permit application or request may be delegated to the TCEQ Executive Director ("ED") for action if each person who requested a contested case hearing ("CCH") has withdrawn the request for a CCH without condition; withdrawn the request for a CCH conditioned only on the withdrawal of all other hearing requests; or agreed in writing to the action to be taken by the ED.

  The bill also adds a procedure to file a petition for review of a decision to delegate an application or request to the ED. An affected person may submit a petition to review, set aside, modify, or suspend such a ruling, order, or decision no later than either: (1) 30 days after the effective date of the decision; or (2) if the decision was appealed to the full commission, the earlier of the date the commission denied the appeal or the date the appeal is overruled by operation of law. Effective Date – 9/1/2017.

- **HB 3735 (Frank)** – "Chapter 11 Clean-Up" – HB 3735 is a TWCA consensus bill that amends TWC Chapter 11 and serves as a water rights application "clean-up" bill. HB 3735 amends the map and plat requirements for an application for appropriation of state water by authorizing TCEQ to prescribe the form and necessary information for the submission of a map or plat. HB 3735 amends TWC § 11.128 to eliminate any reference to an exemption from the fee associated with a permit application to use state water. The bill also amends TWC § 11.134 to provide that, in determining whether an appropriation is detrimental to the public welfare, TCEQ must consider only the factors that are within the jurisdiction and expertise of TCEQ as established by Chapter 11. Lastly, HB 3735 includes provisions from HB 2894/SB 1430 that failed to pass, which add language to § 11.122 to grant the holder of a water right that begins using desalinated seawater after acquiring the water right a right to expedited consideration of an application to make certain amendments to the water right. Effective Date – 9/1/2017.

- **SB 347 (Watson)** – "Open Government Laws & RWPGs" – SB 347 requires that Regional Water Planning Groups ("RWPG"), and any committee or subcommittee of a RWPG, be subject to the Open Meetings Act and the Public Information Act as they are embodied in the Texas Government Code. Effective Date – 9/1/2017.

- **SB 1511 (Perry)** – "Water Planning & Chapter 16 Amendments" – SB 1511 amends TWC Chapter 16 to require the State Water Plan ("SWP") to include information on projects deemed high priority by TWDB to receive financial assistance in the previous SWP, including discussing the extent to which projects were implemented in the decade in which they were needed and identifying impediments to implementing projects not implemented in the decade in which they were needed. SB 1511 also adds representatives from the State Soil and Water Conservation Board as *ex officio* members of each Regional Water Planning Group ("RWPG").

  The bill requires RWPGs to amend approved their regional plans to exclude water management strategies or projects that become "infeasible," and consider substitution of another strategy/project that will meet the need. The bill

provides that a project is "infeasible" if its sponsor has not formally approved expenditures to construct related infrastructure or filed applications for permits required on a schedule consistent with the implementation of a strategy/project by the time it is needed as identified in a Regional Water Plan. Lastly, SB 1511 authorizes "simplified" planning of every other 5-year planning cycle if no significant changes to water availability, supply, and demand have occurred. Effective Date – 9/1/2017.

Legislation that failed to pass:

- HB 3742 (Phelan) – Surface Water Right Contested Case Hearing Clean-up
- SB 696 (Perry) –Water Availability Modeling Update

III. Air & Waste

Many bills pertaining to air and waste regulation, including the regulation of landfills and tire scraps, were filed but failed to pass or were vetoed by Governor Abbott. Language continuing the life of the Texas Emissions Reduction Plan ("TERP") was finally passed, after several attempts, through the passage of SB 1731 (Birdwell).

Legislation finally passed but vetoed by Governor Abbott:

- **SB 570 (Rodriguez)** – Omnibus Scrap Tire Bill. SB 570 required a used or scrap tire generator, which included a tire dealer, junkyard, or fleet operator, to store used or scrap tires in a secure manner that locks the tires during nonbusiness hours. A seller could have contracted for the transportation of used or scrap tires only with a transporter or tire processor who was registered with TCEQ and had filed evidence of financial assurance. A civil penalty for a violation of not less than $500 a day could have been imposed for each violation and a separate penalty imposed for each day a violation occurred. Additionally, the bill required a transporter of used or scrap tires and certain tire processors to register annually with TCEQ, maintain and submit transportation records to TCEQ, and provide evidence of financial assurance to TCEQ, unless they met one of several exceptions.

Legislation that failed to pass:

- HB 2958 (Thompson) – As filed, this bill would have created a two-year moratorium on all permitting activity for municipal solid waste facilities in Texas. This bill was later revised and required the TCEQ to conduct a study on the permitting and regulatory process for municipal solid waste facilities in Texas.

Conclusion

The Texas Legislature will begin its interim work once the Legislature has completed its work in one or more Special Sessions. Legislators will begin to hold committee hearings this fall to work on the interim charges assigned to the various House and Senate committees by the Speaker and Lieutenant Governor. Legislators will also invest significant amounts of time in the election process with party primary elections fast approaching in the spring of 2018 and the general elections occurring in November 2018. We will keep you informed of the legislative developments that occur in Austin until the legislators convene in January 2019 for the next Regular Session.

Ty Embrey is a Principal in the Firm's Water and Districts Practice Groups and Troupe Brewer is an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com, or Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

TIME TO GET READY FOR SEPTEMBER 1 AND S.B. 1004

by Georgia N. Crump

Senate Bill ("SB") 1004, enacting a new Chapter 284 in the Texas Local Government Code, was signed by the Governor on June 9, 2017. With an effective date of September 1, 2017, this new law imposes strict limitations and prohibitions on cities' regulation of what are commonly referred to as "small cell antennas" or "distributed antenna systems" (defined in the bill as "Network Nodes," "Node Support Poles," and "Transport Facilities"). The maximum amount of compensation cities can demand from the providers of wireless services using these facilities is also prescribed by the new law. The effective date is crucial to cities—by this date cities must have ordinances and processes in place or else find themselves unable to influence the location and appearance of these facilities in the public right-of-way ("ROW").

What kinds of wireless facilities are covered?

The new law covers Network Nodes, Node Support Poles, Micro Network Nodes, and Transport Facilities:

- A Network Node includes equipment at a fixed location that enables wireless communications between user equipment and a communications network. Commonly known as "small cell antennas" or "distributed antenna systems," the Network Node includes the equipment, the antenna, the radio transceiver, and the fiber or coax cable at the location—everything that is mounted on a pole, light standard, or other structure in the ROW. The Network Node does not include a generator, a pole, or a macro tower (pole higher than 55 feet with antennas). And there are size limitations for the nodes, antennas, "other" equipment, and ground- and pole-mounted enclosures.
- A Node Support Pole is just that—a pole installed by a network provider to support the Network Node. Height limitations on poles are allowed under

the new law. The pole height cannot exceed the ***lesser*** of 10 feet above the tallest existing utility pole located within 500 linear feet of the new pole in the same ROW ***or*** 55 feet above ground level.

- Micro Network Nodes are small boxes that are usually hung on wires between poles and can be no larger than 24 inches x 15 inches x 12 inches.
- Transport Facilities are the physical lines (usually fiber) between Network Nodes connecting the Network Nodes to the network.

Chapter 284 contains other important definitions that distinguish between Service Poles (such as city-owned poles supporting traffic control devices, signs, and street lights) and Utility Poles (poles supporting electric distribution lines or phone lines).

Are any preexisting ordinances or agreements grandfathered?

Yes, but only to a limited extent. If a city has previously adopted an ordinance regulating the size, location, and appearance of Network Nodes and Node Support Poles, or if it has entered into license or ROW agreements with the providers of these facilities, the ordinance or agreement can remain in effect ***only*** if the facilities covered by the ordinance or agreement have ***both*** been installed and are operational before September 1, 2017. Otherwise, that ordinance or agreement has to be revised to conform to Chapter 284 no later than March 1, 2018, regardless of the effective date of the ordinance or the agreement.

Can a city adopt and enforce installation and construction standards?

Yes! A city can, and should, adopt design manuals applicable to the installation and construction of Network Nodes and new Node Support Poles. And this design manual should be in place by September 1, 2017. Construction standards can ensure that the providers do not: obstruct, impede, or hinder the usual travel or public safety on a public ROW; obstruct the legal use of the ROW by other utility providers; violate nondiscriminatory applicable codes; violate or conflict with the city's publicly-disclosed public ROW design specifications; or violate the federal Americans with Disabilities Act of 1990.

The design manual can include installation and construction details that do not conflict with Chapter 284 and can protect historic areas and areas with special design characteristics. In these areas (that are so zoned or are identified by ordinance), the design manual can require camouflage measures for the nodes, poles, and ground equipment. Cities can also require compliance with nondiscriminatory undergrounding requirements and can prohibit the installation of the wireless facilities in parks and certain residential areas. The best option is for a city to also have in place a comprehensive ROW management ordinance that applies to all entities using or occupying the public ROW, as the wireless providers are subject to all applicable codes and ordinances.

Can a city require a permit and an application process?

Yes. A city can require a network provider to get a permit to install a Network Node, a Node Support Pole, and a Transport Facility in the ROW, but a provider may file a consolidated permit for up to 30 Network Nodes at a time. However, the new law also imposes a "shot clock" on the city's processing of applications. Deficiencies in the applications must be timely brought to the attention of the provider, and the city must grant or deny a permit within specific time frames or the application will be **deemed granted**. Importantly, the time requirements cannot be tolled or extended pending adoption or modification of a design manual.

In addition to the application and permit requirement, if a provider wants to install Network Nodes on city-owned Service Poles, the city can require a separate pole use agreement and can impose a rental fee of not more than $20 per year, per Service Pole.

Can a city charge an application fee?

Yes. A city can charge an application fee if it also requires an application fee for "similar types of commercial development" inside the city unless such fees are not allowed by law. The application fee cannot exceed the lesser of: (i) the city's actual, direct, and reasonable costs it determines are incurred in granting or processing an application (cannot include costs of third-party legal or engineering review); or (ii) $500/application (for up to 5 network nodes), $250 for each additional network node per application, and $1,000/application for each pole.

Can a city receive compensation for the use of the ROW by the providers?

Yes, although the amount of the compensation is very limited. With regard to activities related to Transport Facilities for Network Nodes, activities of a network provider locating Network Nodes in the public ROW or installing, constructing, operating, modifying, replacing, and maintaining Node Support Poles in a public ROW, a city may charge an annual public ROW fee. The fee may not exceed $250 for each Network Node in the public ROW. A city may, at its discretion, charge a lower fee if it is non-discriminatory, is related to the use of the ROW, and is not a prohibited gift of public property. The annual fee may be adjusted by the city no more often than once a year by an amount equal to ½ of the annual change in the consumer price index.

The maximum fee a city can charge for use of the public ROW for Transport Facilities is $28 per node serviced by the Transport Facilities, per month, not to exceed the aggregate amount received by the city on a per-node basis.

Does a municipally-owned electric utility have to allow the Network Nodes on its poles?

Yes. The municipally-owned utility ("MOU") must allow access to its poles by network providers. But the terms and conditions of such access are to be governed by a negotiated pole attachment agreement, including any permitting requirements of the MOU. The annual pole attachment rate is to be based on the pole attachment rate charged to other attachers, consistent with § 54.204, Texas Utilities Code.

What must a city do before September 1, 2017?

1. If the city intends to exercise design/appearance/aesthetic

controls over the Network Nodes, it must have a design manual in place before September 1, 2017.

2. If the city has areas that are of historic importance, or if it wants to control the appearance of facilities in certain areas, it should consider adopting, by ordinance, standards for a historic district or a design district, and have those standards in place before September 1, 2017. Design and aesthetic standards on decorative poles within a design district should also be in place by that date.

3. If the city wants to adopt standards for when new Node Support Poles might be allowed in public parks or in residential areas, it should have those non-discriminatory standards in place prior to September 1, 2017.

4. The city should develop and adopt permit processing procedures to ensure that the shot clock requirements can be met. Procedures must be in place by September 1, 2017, as no delays or moratoria are allowed.

5. The city should determine the city's actual, direct, and reasonable costs likely to be incurred in granting or processing a permit application. These costs should be reasonably related in time to the time they are incurred. Once the costs are determined, the city may impose a fee that is the lesser of its actual costs or $500/application (for up to 5 network nodes), $250 for each additional network node per application, and $1,000 for each pole.

Without a doubt, SB 1004 presents some challenges. Cities should take advantage of the lead time available this summer to get ready for this new chapter in the continuing saga of public right-of-way management and communications providers.

Georgia Crump is the Chair of the Firm's Energy and Utility Practice Group. Georgia assists cities with developing and implementing right-of-way management practices relating to telecommunications, gas, and electricity. If you have any questions related to these areas or would like additional information, please contact Georgia at 512.322.5832 or gcrump@lglawfirm.com.

LEGISLATION FROM THE 85TH LEGISLATIVE SESSION AFFECTING WATER DISTRICTS AND OPEN GOVERNMENT STATUTES

by Stefanie Albright

Legislation Affecting Water Districts

Districts governed by the Texas Water Code ("TWC"), including, but not limited to, municipal utility districts and water control and improvement districts, may be affected by legislation passed during the 85th Legislative Session. Below is a brief overview of some of the legislation passed this session that may have an impact on water districts.

- **House Bill ("HB") 999 (Israel)**. HB 999 amends TWC Chapter 49 to allow a district to hold a director's election on a general election date authorized by other statute. This law allows certain water districts to utilize changes to the Texas Elections Code in 2011 that would allow for director elections to be held in November.

- **HB 1701 (Parker)**. HB 1701 addresses the requirement that a written copy of the investment policy of a governmental entity be provided to any "business organization" offering to engage in an investment transaction by excepting transactions of the entity that are not made through accounts or other contractual arrangements over which the business organization has accepted discretionary investment authority.

- **Senate Bill ("SB") 554 (Kolkhorst).** SB 554 requires that all TWC Chapter 49 water districts that do not have a meeting place within the district's boundaries to, on the first meeting agenda of each year, include a notice statement of the Chapter 49 petition process to establish a meeting place in the district.

- **SB 622 (Burton).** This legislation amends the Texas Local Government Code to require political subdivisions to include in a proposed budget a line item indicating planned expenditures for notices required by law to be published in a newspaper. This line item must allow a clear comparison between a proposed budget and actual expenditures in the prior budget year.

- **SB 625 (Kolkhorst).** SB 625 creates the "Special Purpose District Public Information Database" to make available certain information on special purpose districts and to be created and maintained by the Comptroller. The database will include various information on each district, including: (1) the names of board members; (2) contact information; (3) information relating to bonds authorized and issued; and (4) tax information. Noncompliant districts may be subject to up to two $1,000 fines that may be enforced by the Attorney General.

- **SB 1987 (Lucio).** SB 1987 amends the Texas Government Code and several sections of the TWC pertaining to the notice and procedural requirements for the creation of or annexation of land to certain special purpose districts with provisions mostly applicable to municipal management districts. However, provisions in TWC Chapters 49 and 54 (Chapter 49 being applicable to all districts and Chapter 54 specifically to municipal utility districts) are amended to remove the requirement that a proposal for creation or

annexation of certain territory into a special purpose district must be signed by 50 holders of title to land in the territory at issue.

- **SB 2014 (Creighton).** SB 2014 addresses provisions relating to the administration of water districts, including TCEQ oversight over bond issuances by water districts in certain circumstances and over construction contracts.

This new law requires that if the TCEQ determines that an application for the approval of bonds complies with the requirements for financial feasibility, and the district submitting the application is not required to comply with rules regarding project completion, the TCEQ may not disapprove the issuance of bonds or require that the funding be escrowed solely on the basis that the construction of the project is not complete at the time of the TCEQ's determination. The legislation also exempts from TCEQ rules expenses regarding continuous construction periods or the length of time for the payment of expenses during construction periods.

Additionally, this bill requires TCEQ to approve an application to issue bonds to finance the following costs:

1. payment of creation and organization expenses. The bill establishes that expenses are creation and organization expenses if the expenses were incurred through the date of the canvassing of the confirmation election;
2. for levee improvement districts, spreading and compacting fill to remove property from the 100-year floodplain if the application otherwise meets all applicable requirements for bond applications; and
3. for municipal utility districts and districts with the powers of a municipal utility district, spreading and compacting fill to provide drainage if the costs are less than the cost of constructing or improving drainage facilities.

If a district is approved for the issuance of bonds by TCEQ to use a certain return flow of wastewater, the approval applies to subsequent bond authorizations unless the district seeks approval to use a different return flow of wastewater.

SB 2014 allows a governmental body to approve change orders for applicable contracts to include certain changes the governing body determines are "beneficial to the district" and certain changes in the scope of work. Finally, this legislation amends TWC § 49.273 to allow change orders increasing the original contract price by more than 25 percent in certain circumstances and exempts change orders from certain advertising and competitive bid soliciting requirements.

Legislation Relating to Open Government

In the 85th Legislative Session, several bills relating to open government were approved that will have an impact on governmental entities and public officials. Below is a brief overview of legislation passed this session relating to the Texas Open Meetings Act ("TOMA") and the Texas Public Information Act ("TPIA").

- **HB 3047 (Dale).** HB 3047 amends the TOMA to require a member of a governmental body who participates in a meeting by videoconference to be considered absent from any portion of the meeting during which audio or video communications with the member is lost or disconnected. In such situations, the governmental body may continue the meeting only if a quorum of the body remains present at the meeting location or if the presiding member is physically present at a location open to the public during the meeting and a quorum is available via video conference.

- **HB 3107 (Ashby).** HB 3107 amends the TPIA to establish that a public information request is considered withdrawn if: (1) the requestor fails to inspect or duplicate the information in the offices of the governmental body on or before the 60th day after the information is made available; or (2) the requestor fails to pay charges before the 60th day after the date the requestor is informed of charges. This new law also allows a governmental body to treat as one request (for cost estimate purposes) all requests for public information received in one day from an individual, and provides a process to establish monthly and yearly limits on time spent responding to TPIA requests for a particular requestor. HB 3107 also provides that until any unpaid invoices for previous requests are paid by a requestor, the governmental entity is not required to produce the responsive documents.

- **SB 532 (Nelson).** SB 532 makes confidential under the TPIA "information directly arising from a governmental body's routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log." This legislation also creates the "Information Technology Infrastructure Report" and requires reporting regarding information technology infrastructure and security from state agencies.

- **SB 564 (Campbell).** SB 564 amends the TOMA to allow governmental bodies to meet in closed session to deliberate: (1) security assessments or deployments relating to information resources technology; (2) network security information; or (3) the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.

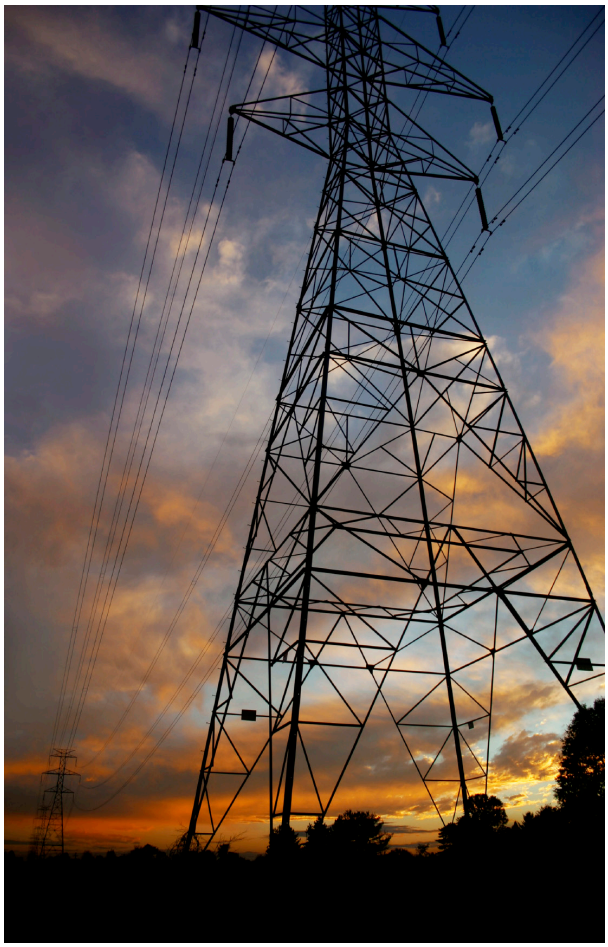
- **SB 1440 (Campbell).** SB 1440 amends the TOMA to state that attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate is excepted from the definition of a "meeting." This exception is applicable only if no formal action is taken and discussion of public business is incidental to the event.

Stefanie Albright is a Principal in the Firm's Districts and Water Practice Groups. If you would like additional information on this legislation or other matters, please contact Stefanie at 512.322.5814 or salbright@lglawfirm.com.

ELECTRIC AND GAS UTILITY LEGISLATIVE WRAP-UP: CITIES WIN SOME, LOSE SOME

by Thomas Brocato and Hannah Wilchar

On May 29, 2017, the Texas Legislature adjourned *sine die* ending the 85th Legislative Session. More than 100 bills relating to gas and electric utility consumers were filed, with many affecting municipalities. Although cities faced challenges on numerous issues, the Session was an overall success with respect to utility issues. This legislative wrap-up provides status reports on bills Lloyd Gosselink was actively engaged on or monitored on behalf of the Steering Committee of Cities Served by Oncor, Steering Committee of Cities Served by Atmos, and the Texas Coalition for Affordable Power (collectively, "Cities").



One of Cities' biggest successes this Session was the passage of Representative Rick Miller's House Bill ("HB") 931, which helps cities build hike and bike trails within electric transmission line corridors. This bill has been on Cities' legislative agenda for several years and is important to many municipalities with limited green space available for parks within their city limits. After multiple floor amendments, a 30-minute debate, and a last-minute motion to reconsider, HB 931 was the final bill passed by the 85th Legislature on May 30th and signed by the Governor on June 15th.

A couple of high-profile utility bills were also passed this Session. The Railroad Commission Sunset Bill, HB 1818, by Representative Larry Gonzales, was signed in the House on May 10th and by the Governor on May 22nd. This bill authorizes the continuation of the agency for several more years, and also spells out various adjustments to the agency's operations. However, HB 1818 does not include several of Cities' recommended reforms, such as the use of independent administrative law judges for the adjudication of gas utility cases, which were included in versions of this bill during previous legislative sessions. It also does not change the name of the Railroad Commission, an issue that has long been contested and considered at the Legislature. Senator Kelly Hancock's Senate Bill ("SB") 735 was also passed minus many of its more impactful provisions. Originally an omnibus electric utility reform bill, SB 735 was trimmed down to establishing a schedule for mandatory electric utility rate cases. It also includes other changes to rate-setting procedures that, taken collectively, would be something of a mixed bag for consumers. This bill was signed by the Governor on May 27th.

Other bills of interest that passed include SB 1976, by Senator John Whitmire, and Senator Hancock's SB 736. SB 1976 ensures the continuation of a process under which the Public Utility Commission identifies low-income customers and which is important for maintaining various customer protections. SB 1976 was signed into law on May 19th. SB 736 prohibits the General Land Office ("GLO") from selling electricity. It was adopted by the Senate on April 12th with an amendment allowing the GLO's electric sales program to continue through 2022.

Electric bills that ultimately did not pass include Representative Tan Parker's HB 787 and Senator Bob Hall's SB 83, both relating to electric grid security. HB 787 would have authorized the investigation of threats to the electric grid from cyber-attacks, while SB 83 would have established a number of potentially expensive measures to strengthen the grid against cyber and electro-magnetic attacks. Although the bills made clear that a future legislature would determine whether grid enhancements would actually be implemented and how they would be paid for, the bills stalled in committees. Likewise, HB 1427, sponsored by Representative Pat Fallon, was strongly supported by Cities but did not pass. This bill would have clarified the proposition that a city's zoning authority extends over electric cooperatives. HB 1427 was adopted on May 2nd by the House Urban Affairs Committee but stalled in House Calendars.

Overall, Cities experienced a successful 85th Legislature with favorable outcomes for important electric and gas utility bills impacting municipalities.

Thomas Brocato is a Principal in the Firm's Energy and Utility Practice Group and Hannah Wilchar is an Associate in the Firm's Energy and Utility Practice Group. If you have any questions concerning these legislative issues or other matters, please contact Thomas at 512.322.5857 or tbrocato@lglawfirm.com, or Hannah at 512.322.5811 or hwilchar@lglawfirm.com.

CONSERVATION EFFORTS: MEETING REGULATORS' AND CUSTOMERS' NEEDS WHILE EXTENDING SUPPLIES*

by Nathan E. Vassar

Effective water conservation is among the most important water development practices for water suppliers and their customers. While its value for water suppliers includes environmental stewardship and being respectful of a limited natural resource, it is also a critical planning tool that can be used to extend the useful life of existing supplies. In fact, the Texas Commission on Environmental Quality's ("TCEQ") definition of "conservation" focuses on the use and effective management of water supplies for the purpose of future or alternative uses. Further, for water rights holders and for permitting purposes, TCEQ requires the adoption and implementation of conservation plans. To date, the water supply planning series has mostly focused on regulatory tools and water right application strategies that can be useful in managing and stretching water supplies. Conservation, however, should be a part of every water supply strategy discussion, regardless of the particular effort(s) being pursued, and in light of both regulatory expectations and conservation's far-reaching impacts on water supply management.

TCEQ requires Water Conservation Plans to be submitted every five years for most surface water right holders and for retail public water suppliers with at least 3,300 or more connections. Specific requirements are found in Chapter 288 of the Texas Administrative Code (Title 30), but they include a set of minimum expectations for record/data management, specific targets for water savings (including reductions in gallons per capita per day ("GPCD")), public education programs, enforcement practices, and rate structures that encourage reasonable water use, among others. As part of their Chapter 288 obligations, utilities must provide TCEQ with implementation reports demonstrating conservation measures implemented, along with supporting data. For some entities, plans must include leak detection/water loss accounting, as well as contracting mandates that require wholesale customers to adopt and implement their own water conservation plan in their wholesale water purchase agreements.

TCEQ's conservation plan requirements are also relevant in the context of water rights applications, where an applicant must include its water conservation plan (along with drought contingency plans, which are developed for a completely different purpose—addressing water management during times of water shortages), in order to meet requirements of Chapters 295 and 297 of the Texas Administrative Code (Title 30). Such requirements include compliance with the base Chapter 288 mandates, and where applicable, plans that describe technologies and techniques to "reduce the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water." In order to appropriate new or additional state water, an applicant must demonstrate that it has evaluated "any other feasible alternative to new water development." Further, it is the applicant's burden to show that there is no feasible alternative to the proposed appropriation.

As TCEQ examines water rights applications, it reviews water conservation plans to determine if the requested appropriation is necessary in light of practicable alternatives, whether the requested quantities are reasonable and necessary, and if reasonable diligence will be employed to avoid water waste. Further, on certain federal water permitting efforts (including Clean Water Act Section 404 permitting for water supply projects), the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency conduct similar analyses of conservation practices before they can approve applications.

Water suppliers face a number of challenges in their implementation of water conservation plans, whether technical, legal, or on the public relations front. As recommended throughout the series, the right team can help identify best practices that have been employed across Texas and those that have secured regulatory approval. Given the climate diversity in Texas, a one-size fits all approach is neither wise nor mandated by law when it comes to determining appropriate conservation tools, their implementation, and the resulting impact on a community's water use and GPCD. Indeed, water conservation initiatives and GPCD expectations in rural Texas have differed significantly from those in urban areas, and such variations will continue. The courts have recognized and endorsed such differences. In the specific context of interbasin transfer applications, the Texas First Court of Appeals recently determined that the statutory requirement that an applicant's water conservation plan result in the "highest practicable levels of water conservation and efficiency" does not mean satisfying a fixed standard, but whether an applicant is "capable of putting into practice and carrying out [such water conservation measures] in its jurisdiction."[1] As such, meeting the needs of a particular region/customer base, and doing so in a manner that accounts for the area's or the customer's unique circumstances, is important in developing and implementing sound and effective water conservation plans.

Effective implementation also requires more than just meeting regulators' needs, particularly as water usage and rates are impacted. Public perception challenges are driven by many factors, often including, the public's lack of appreciation of the true value of water, the realities of weather pattern change, and the rate hikes that are sometimes necessary to cover a utility's financial obligations when conservation may have resulted in water usage declines (resulting in reduced revenues from sales of water), among

others. Accordingly, well-executed public relations and education efforts are also critical in order to explain the importance of water conservation and the water supplier's own costs for infrastructure used to serve its customers.

As this series continues, our focus will next pivot to water supply contract strategies and approaches that can be useful as water suppliers manage their portfolios. The next article will highlight ways suppliers and their customers can structure contracts to meet both sides' needs and in a manner that supports cooperative, collaborative partnership approaches, while meeting applicable regulatory requirements.

Nathan Vassar is an Attorney in the Firm's Water Practice Group. Nathan's practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to water conservation, the development of a strong water supply team, or the use of water supply planning tools, please contact Nathan at (512) 322-5867 or nvassar@lglawfirm.com.

[1] *Upper Trinity Reg'l Water Dist. v. Nat'l Wildlife Fed'n*, 514 S.W.3d 855, 863 (Tex. App.—Houston [1st Dist.] 2017), reh'g denied (Mar. 30, 2017).

[*] This article is the seventh in an ongoing series of water supply planning and implementation articles to be published in *The Lone Star Current* that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.

ASK SHEILA

Dear Sheila,

How important are updated job descriptions? I am a county HR manager, and I'm looking at a stack of projects, trying to figure out where to prioritize this project to update job descriptions. It seems daunting, as our job descriptions haven't been updated in years. Any advice on whether to do this sooner or later, and tips on making the process easier?

Harried in HR

Dear Harried,

Hate to tell you, but updated job descriptions are crucial, not only in providing employees accurate guidance on job expectations, but also to defend claims of disability discrimination.

A case in point: recently, a federal appeals court found that an updated job description was key evidence in determining whether an employer could be liable for firing an employee. In that case, the plaintiff was a pharmacist who was fired for refusing to administer immunization injections to customers. The pharmacist sued the pharmacy for failing to accommodate his disability, trypanophobia (fear of needles), when it required him to administer the injections. The jury awarded him about $2M, but was reversed on appeal because performing immunization injections was an essential job duty, and plaintiff's inability to do them, with or without reasonable accommodation, made him unqualified for the job.

How did the pharmacy prove the essential function? It had updated the pharmacist job description as soon as it began to require pharmacists to perform immunizations. *Stevens v. Rite Aid Corporation*, 851 F.3d 224 (2d Cir. Mar. 21, 2017).

So, yes, updated job descriptions are important. Evidence of essential functions is much more convincing when it existed before the employee's claim of discrimination. Also, accurate job descriptions are crucial roadmaps to use when posting a job opening, interviewing candidates, and evaluating job performance.

One tip for updating job descriptions is to get the employees who actually do the job on a day-to-day basis to make the first pass at revision. Create a questionnaire for employees to assess whether the current job description accurately reflects what they do every day, what they need to know how to do, and what skills and background it takes to do the job right. We have found that many employees take this responsibility seriously, and want the document to fully reflect to management their full duties. You can then collect these, compare them with others in the same job and with the supervisors' assessments, and then simply edit them to get a more up-to-date job description.

Remember to list essential functions of the job separately from ancillary functions. Essential functions include not only what the employee does frequently, but also important tasks that the employee must be able to do, even if it is not required very often. For example, a maintenance worker hopefully does not have to deal with chemical spills very often, but the ability to handle the situation and accompanying safety protocol is still an essential function. A worker may not need to wear a respirator often, but if it is possible in the job, it may be an essential function to be without facial hair for a proper respirator fit. Without this requirement in a job description, an employee may be able to argue failure to reasonably accommodate religious requirements to wear a beard.

Give us a call if you want help in reviewing your job descriptions so that they are most beneficial to your employees and to the organization.

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

IN THE COURTS

Water Cases

Complaint, Tex. Gen. Land Office v. Fish & Wildlife Serv., No. 1:17-CV-538 (W.D. Tex. June 5, 2017).

On March 1, 2017, the Texas General Land Office ("GLO") provided a 60-day notice of intent to file a lawsuit to the U.S. Fish and Wildlife Service to delist the golden-cheeked warbler from the Endangered Species List. On June 5, 2017, the GLO filed their formal complaint claiming violations under the National Environmental Policy Act and that the warbler should have been delisted due to recent scientific data that suggests that the warbler's habitat range and population numbers are significantly larger than once thought. Because of the presence of golden-cheeked warblers on GLO land, the GLO has allegedly suffered harm due to the warbler's presence and its impact on market value for several GLO properties.

S. Cal. All. of Pub. Owned Treatment Works v. Envtl. Prot. Agency, No. 2:16-CV-2960 (E.D. Cal. 2017).

An amended complaint was filed on May 30, 2017 in ongoing litigation challenging the Environmental Protection Agency's ("EPA") efforts to impose certain testing requirements for whole effluent toxicity ("WET") on dischargers without first establishing rules pursuant to the Administrative Procedure Act ("APA"). The litigation, filed last December, arose after EPA pressured state agencies to adopt the Test of Significant Toxicity ("TST"), even though the applicable regulations do not identify TST as an acceptable methodology. Moreover, stakeholders have raised significant technical questions about the validity of TST. The plaintiffs' concern is that once the TST is used in California domestic wastewater discharge permits for publicly-owned treatment works ("POTW"), it will be more broadly applied in other states. Therefore, the litigation directly challenges the TST, which plaintiffs allege may increase the risk of false failures and result in higher incidences of alleged noncompliance and resulting enforcement. Furthermore, the litigation underscores that rulemaking without notice and comment violates the APA, stifles public participation, and harms POTWs as well as the public in general.

Upper Trinity Reg'l Water Dist. & Tex. Comm'n on Envtl. Quality v. Nat'l Wildlife Fed., (Tex. App.—Houston [1st Dist.] Jan. 26, 2017).

The Texas Court of Appeals in Houston affirmed the Texas Commission on Environmental Quality's ("TCEQ") order granting the Lake Ralph Hall reservoir permit to the Upper Trinity Regional Water District on January 26, 2017. Lake Ralph Hall is the first major reservoir authorized by the TCEQ in decades. This reservoir permit will allow the District to divert up to 45,000 acre-feet of water per year from the North Sulphur River in the Sulphur River Basin and to transfer its diversions through an interbasin transfer authorization. The permit was challenged by the National Wildlife Federation, but the appellate court found in favor of the District. A request for rehearing was denied on March 30, 2017, and the deadline for appeal to the Texas Supreme Court has now expired, meaning that the court of appeals judgment will remain final. For more information on this case, see the April 2017 Edition of *The Lone Star Current*.

Borcik v. Crosby Tugs, L.L.C, 858 F.3d 936 (5th Cir. 2017).

In this case, an employee brought a whistleblower suit, alleging that he had been fired in retaliation for reporting environmental violations. Under the law, any reports must have been submitted in good faith. Expounding on the meaning of "good faith," the U.S. Court of Appeals held that the term merely means that, when the report was submitted, the employee was acting with an honest belief that a violation of an environmental law, rule, or regulation occurred. The motive of the employee in reporting the violation is irrelevant, even if the motive may be viewed as improper (e.g., seeking to take unfair advantage of—or cause harm to—the employer or another employee).

Defenders of Wildlife v Zinke, No. 15-55806 (9th Cir. 2017).

This case arose from the planned construction of an industrial solar project on federal lands in Nevada. The project was planned in a way that would reduce connectivity between two different habitat locations used by the endangered desert tortoise. Although none of the construction was planned within a critical habitat zone, it would have narrowed the connection between two different critical habitat areas. The Defenders of Wildlife ("DOW") brought suit, alleging that narrowing the corridor between the habitats constituted an adverse modification of the critical habitat, and therefore, ran afoul of the Endangered Species Act ("ESA") because of the effect it would have on the critical habitats' recovery value. However, the district court disagreed, and the Ninth Circuit affirmed. The Court of Appeals

held that, because none of the construction would have caused an actual alteration of the critical habitat, the construction was permissible under the ESA.

Air and Waste Case

Waterkeeper All. v. Envtl. Prot. Agency, No. 09-1017 (D.C. Cir. 2017).

The Court of Appeals for the D.C. Circuit ruled that concentrated animal feeding operations ("CAFOs") cannot be exempted from requirements in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Emergency Planning and Community Right-to-Know Act ("EPCRA") to report air releases from animal waste. A 2008 Environmental Protection Agency ("EPA") rule exempted CAFOs from the CERCLA and EPCRA reporting requirements, reasoning that "reports are unnecessary because, in most cases, a federal response is impractical and unlikely." The Court stated that "[i]t's not at all clear why it would be impractical for the EPA to investigate or issue abatement orders" and that the record in the case "suggests the potentiality of some real benefits."

Litigation Cases

Engelman Irrigation Dist. v. Shields Bros., Inc., No. 15-0188 (Tex. Mar. 17, 2017).

Over the past decade, the Texas Supreme Court's jurisprudence on waiver of governmental immunity has changed radically. Before 2006, it was generally assumed that statutory authorization to a governmental entity to "sue and be sued" waived that entity's governmental immunity. But the Supreme Court squelched that assumption in *Tooke v. Mexia*, 197 S.W.3d 325 (Tex. 2006), holding that the statutory authorization to the City to "sue and be sued" did not waive its immunity.

In *Engelman*, the Supreme Court addressed the issue of what happens when a pre-*Tooke* case comes back to life in the post-*Tooke* world. *Engelman* derives from a 25-year old suit involving the same parties. In 1992, Shields Brothers sued the Engelman Irrigation District for breach of a water-delivery contract. Relying on pre-*Tooke* precedent, the district court overruled Engelman's plea to the jurisdiction and, after trial, rendered judgment for Shields in the amount of $271,000 (plus attorneys' fees and interest). That judgment, however, went unpaid for more than 20 years.

Having refused to pay the judgment, Engelman brought suit in 2010 for declaratory judgment that the original judgment was void in light of the Supreme Court's decision in *Tooke*. Engelman observed that a judicial decision generally applies retroactively, and *Tooke* is no exception. Hence, Engelman argued, the original judgment was always void because the district court never had jurisdiction to adjudicate Sheilds Brothers' claim against it.

The Supreme Court, however, disagreed. While *Tooke* has retroactive application to cases pending at the time of that decision, it cannot be used to reopen ancient judgments. As the Supreme Court observed, "retroactivity must be limited by the need for finality," and as a result "this long-final judgment cannot be upended via collateral attack."

Litigants in pre-*Tooke* cases are therefore assured that their cases will not be reopened to new litigation applying *Tooke*. Final judgments are, after all, final.

Pidgeon v. Turner, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017).

Before the United States Supreme Court legalized gay marriage in *Hodges v. Obergefell*, two Houston taxpayers filed suit against the City of Houston alleging that it violated the Texas Constitution and the Texas Family Code by providing marriage benefits to same-sex couples who were legally married in other states. The district court agreed and granted an injunction barring the City from providing spousal benefits to same-sex couples.

After the *Obergefell* decision, Texas's 14th Court of Appeals reversed the injunction and sent the case back down to the trial court to be decided "consistent with" *Obergefell and DeLeon v. Abbott*, a 5th Circuit case striking down Texas' Defense of Marriage Act as unconstitutional. The Texas Supreme Court, in a unanimous decision, disagreed and held that *Obergefell*, while requiring states to license and recognize same-sex unions, does not address and resolve the "specific issue" of state spousal benefits. Therefore, the 14th Court of Appeals erred in ordering the trial court to resolve the case consistent with *Obergefell*. Now the district court will be required to decide on its own what benefits *Obergefell* requires the State of Texas to provide (or not, as the case may be) to same-sex couples.

As a side issue, the Texas Supreme Court addressed the fact that the City and the Mayor both filed pleas to the jurisdiction before the *Obergefell* decision was handed down. None of the immunity arguments were addressed in either the district court or the Court of Appeals' decision. The Texas Supreme Court was careful to point out that *Obergefell* represented a "shift in the law" and that the parties should have an opportunity to brief and argue their immunity claims in light of *Obergefell* at the district court level.

The likely effect of all this is that, whatever the district court decides, this case will return to the Texas Supreme Court, with a very-possible appeal to the United States Supreme Court, some years from now. In the immediate term, *Pidgeon* does not provide political subdivisions with any guidance as to what same-sex marriage benefits are mandated, permitted, or barred by state law. So, *Pidgeon* does not compel any action on the part of political subdivisions at this time.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

WOTUS Rule Re-Write Update. The EPA has taken the first step in a two-step process to revise the contentious 2015 Clean Water Rule—known as the "Waters of the U.S." ("WOTUS") Rule. EPA proposed a rule to withdraw the current rule and adopt the definition of "waters of the U.S." that existed prior to the WOTUS Rule's passage. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017). Comments are due on August 28, 2017. Once withdrawn, EPA will publish its revised version of the rule, which is expected to incorporate Justice Scalia's test from the *Rapanos* plurality opinion. Under Scalia's test, Clean Water Act jurisdiction would only extend to "relatively permanent, standing or flowing bodies of water." Wetlands areas would only be regulated if they have a "continuous surface connection to traditionally navigable waters." A number of definitions have been suggested for the phrases "relatively permanent" and "continuous surface connection". Current practice considers waters directly abutting wetlands as well as wetlands that have a defined, continuous surface connection to jurisdictional waters to be "waters of the U.S." regardless of distance. It has also been suggested that the term extend only to wetlands that directly touch jurisdictional waters or to waters that have some degree of connectivity as quantified by metrics such as distance or flow. The EPA is soliciting and aggregating comments for these definitions.

The Supreme Court is continuing its review of the jurisdictional questions raised by the WOTUS Rule (see *Nat'l Assoc. of Mfr. v. Dep't of Defense*, Docket No. 16-299). Additionally, the House Energy-Water Appropriations Subcommittee's fiscal 2018 spending bill contains a policy rider that would authorize the EPA to "withdraw the Waters of the United States rule without regard to any provision of statute or regulation that establishes a requirement for such withdrawal", apparently exempting the WOTUS repeal from the legal requirements of the Administrative Procedure Act (e.g., public comment period) and expediting the withdrawal process. For more information on the WOTUS re-write, see the April 2017 Edition of *The Lone Star Current*.

EPA Office of Water Receives New Appointment. A former National Aeronautics and Space Administration official, Dennis Lee Forsgren, has recently been appointed to serve as the new Deputy Assistant Administrator for the EPA's Office of Water. Forsgren is an experienced water and natural resources attorney, and in recent years, he has focused his practice around oil pollution, the Clean Water Act, and the Endangered Species Act.

Guidance Document Suggests Using Nature to Harness Stormwater Runoff. In a new guidance document released June 8, 2017, the EPA recommends using native plants and grasses and porous pavements to harness polluted stormwater runoff. The EPA, which has been promoting green infrastructure use within municipalities since 2011, asserts that the approach will work in parks because it is "attractive, effective, and beneficial" and requires minimal maintenance. The guidance discusses how stormwater agencies can use their own funds or state funds to install green infrastructure at parks. It also provides links to other EPA documents that on other green infrastructure resources.

Omnibus Spending Bill Passes Congress. Congress and the Trump Administration have reached agreement on an omnibus spending bill to keep the Federal Government funded through the end of September. Funding levels for many important clean water projects have been maintained, and in some cases even increased, relative to levels enacted in Fiscal Year 2016 (FY16). Specifically, the Omnibus would provide $1.394 billion for the Clean Water State Revolving Fund (equal to FY16), $171 million for nonpoint source control grants (increase of $6 million compared to FY16), and $231 million for state clean water grants (equal to FY16). The Gulf of Mexico geographic program also received almost $8 million (increase of $4 million compared to FY 16). These spending increases may be a sign of good news for the upcoming congressional budgeting process as Congress decides whether to honor the Trump Administration's proposed EPA budget cuts. For more information on the proposed EPA budget cuts, see the April 2017 edition of *The Lone Star Current*.

Proposed EPA Budget Cuts. On June 15, 2017, EPA Administrator Scott Pruitt went in front of the House Appropriations Interior and Environment Subcommittee to defend the Trump Administration's new proposed EPA budget cuts. The President's preliminary plans included a 31% decrease in EPA funding, which would cost the agency over 3,800 employees. According to a recent proposed memo, as many as 1,228 EPA employees will still be eligible for buyout offers that would need to take place before September 2, 2017. However, Congress has suggested that it will still give the EPA more than the Trump Administration has asked for. It is likely that a number of EPA programs will still be cut, but the cuts may not be as drastic as originally thought. For more information on the proposed EPA budget, see the April 2017 edition of *The Lone Star Current*.

Landfill Emissions Guidelines Put On Hold. As part of President Obama's Climate Action Plan, the EPA promulgated a new final rule that established emissions guidelines and new source performance standards for both new and existing municipal solid waste landfills. The new rule was meant to identify and reduce methane gas emissions from landfill sites throughout the United States. However, as of May 22, 2017, the new rule has been subjected to a 90-day implementation freeze pending further reconsideration by the EPA.

New Policy Prohibits Third-Party Payments in Federal Settlement Agreements. Attorney General Jeff Sessions has issued a new policy, effective immediately, which prohibits Justice Department attorneys from entering into settlement agreements that include payments to non-governmental organizations or third-party organizations that were not parties to the dispute. Following in the wake of the recent Volkswagen emissions scandal—whose settlement included several billion dollars for state supplemental environmental projects ("SEPs")—Session's new policy appears to be aimed at ending the use of SEPs in future federal settlement agreements. However, a few exemptions to the moratorium are specifically permitted. These exceptions include payments to provide restitution to victims or to directly remedy the harm the case sought to redress (including harm to the environment); payment for legal or professional services rendered in connection with the case; or where such payments are explicitly authorized by statute. Through these exceptions, some in the environmental sector are arguing that Session's memo applies to payments made to third parties but doesn't explicitly address supplemental environmental projects. Therefore, the fact that SEPs are designed to benefit the environment impacted by the alleged violation makes these projects consistent with the Department of Justice memo. However, it is still unclear whether this ambiguity will permit federal agencies to continue to use SEPs in future settlement agreements.

New EPA Water Financing Assistance for Cities. This fiscal year will be the first in which the Water Infrastructure and Finance Innovation Act ("WIFIA") program, first authorized by Congress in 2014, will begin awarding funding to cities. Unlike other federal grant or loan programs, the WIFIA program is designed to provide only a portion of the cost of a given infrastructure project. Water systems can then use this funding as seed money to secure additional private financing at more affordable borrowing rates. EPA is authorized to distribute $17 million in WIFIA funding in its initial year. WIFIA works in tandem with the existing federal low-interest state revolving fund programs that are designed to tackle wastewater and drinking water projects that typically cost under $100 million, and this financing can also be combined with tax-exempt municipal bonds.

Flushable Wipes Rules Face Opposition. The District of Columbia has proposed new legislation that it hopes will address the problems caused by flushable and non-flushable wipes. The proposed legislation would require the issuance of new rules that establish "flushability" standards for flushable wipes and new labeling requirements for non-flushable wipes. If passed, the bill would be the first of its kind in the United States to establish standards for flushable wipes.

EPA Stays Implementation of Landfill NSPS and EG Rules. On May 23, 2017, EPA announced a 90-day stay of the New Source Performance Standards ("NSPS") Emission Guidelines ("EG") rules related to air emissions from landfills that it approved in August 2016. EPA is reconsidering certain aspects of its NSPS and EG rules, including requirements related to surface emissions monitoring. EPA announced that it expects to prepare new proposed rules, which will allow for new public comment. See related item, TCEQ Issues State Plan Concept and Initiation Memo on Landfill NSPS and EG Rules, below.

EPA Sends Proposal to Reconsider Clean Power Plan to OMB. On June 8, 2017, EPA sent a proposal to the Office of Management and Budget ("OMB") to reconsider the Obama Administration's Clean Power Plan. The Clean Power Plan would limit carbon dioxide emissions from power plants, and EPA's proposal to OMB is the first step in either revising or rescinding the rule.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Issues State Plan Concept and Initiation Memo on Landfill NSPS and EG Rules. On April 6, 2017, the TCEQ issued notice that it would initiate a rulemaking to bring TCEQ rules related to landfill air emissions into conformity with recently issued EPA New Source Performance Standards ("NSPS") Emission Guidelines ("EG") rules. However, after TCEQ issued the notice, EPA stayed implementation of its NSPS and EG rules. TCEQ has not announced a timeline for issuing rules since EPA announced the stay.

Texas Parks and Wildlife Department ("TPWD")

Zebra Mussels Confirmed in Lake Travis and Canyon Lake. TPWD biologists and game wardens have recently confirmed the presence of zebra mussels in Canyon Lake and Lake Travis. These invasive species are known to cause serious harm to the environment and recreational water users, clogging public water intakes, damaging underwater infrastructure, and littering shorelines with sharp-edged shells. Because they have been located in Canyon Lake, the TPWD has also issued a warning for other downstream users on the Guadalupe River since zebra mussel larvae typically disperse downstream. Other potentially affected lakes include Lake Dunlap, Lake McQueeney, Lake Placid, Meadow Lake, Lake Gonzales, and Lake Wood.

Public Utility Commission ("PUC")

Utility Distribution Cost Recovery Filings. AEP Texas ("AEP") and CenterPoint Houston Electric, LLC ("CenterPoint") filed applications for a Distribution Cost Recovery Factor ("DCRF") with the Public Utility Commission of Texas ("PUC") in early April 2017. Public Utility Regulatory Act ("PURA") and PUC rules permit an electric utility to file an annual, limited-issue rate proceeding to adjust its rates to reflect increased distribution investment since its last full base-rate case. The resulting charge is called a DCRF.

This is the third DCRF filing for CenterPoint and the second for AEP. In these applications, CenterPoint sought to increase its DCRF by $44.6 million, and

AEP asked for a $21.4 million increase for the Central division and a $6.6 million increase for the North division. City groups intervened in both utility proceedings, on an expedited schedule.

Cities were able to reach a final settlement agreement with the parties to the AEP Texas DCRF whereby AEP would reduce its requested DCRF by $3.5 million in the Central Division and $1 million in the North Division, and would pay the participating Cities their reasonable rate case expenses within 30 days of the PUC approving the settlement. The parties are also working on a settlement in the CenterPoint DCRF, but a final agreement has not yet been reached.

Utility Energy Efficiency Cost Recovery Filings. Pursuant to the PUC's energy efficiency rules, electric utilities made their annual Energy Efficiency Cost Recovery Factor ("EECRF") filings at the end of May to adjust their rates during the following year to reflect changes in program costs and performance bonuses. The filings also true-up any prior energy efficiency costs over- or under-collected pursuant to PURA § 39.905 and 16 Tex. Admin. Code § 25.181.

AEP is seeking to adjust its EECRF to collect $11,618,997 ($9,488,449 for the Central Division and $2,130,548 for the North Division) in 2018. CenterPoint is seeking to collect $46,397,825, Texas-New Mexico Power Company is seeking to collect $5,950,438, and Oncor is seeking to collect a 2018 EECRF of $56,462,432.

As in past years, City groups have intervened in these EECRF proceedings to review the utilities' demand and energy goals, program incentive costs, evaluation, management, and verification expenses, and performance bonuses. Like the DCRFs, these cases are also limited in review and will proceed on an expedited schedule with hearings slated throughout August.

Docket 45848, City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified From Aqua Texas, Inc. in Denton County. On April 13, 2017, the PUC issued an order related to the decertification of a 128-acre tract from Aqua Texas, Inc.'s ("Aqua") water and sewer certificates of convenience and necessity ("CCN") resulting from an application filed under TWC § 13.254. After the tract was removed from Aqua's CCN areas, the City of Celina filed its intent to provide water and sewer service to the tract, and Aqua intervened claiming that it was owed compensation resulting from the earlier decertification. The PUC determined that no compensation was due to Aqua because no property had been rendered useless or valueless as a result of decertification. In addressing Aqua's claims to the contrary, the PUC pointed out that TWC § 13.254(g) does not identify actual property interests themselves, but rather, identifies the factors that should be considered in determining the adequate compensation owed to the decertificated entity for property that is rendered useless and valueless by decertification. The PUC, in explaining its decision, noted that when Aqua Texas, Inc. made expenditures for designing, planning, legal, professional, and other services for the decertified property, they no longer had a property interest in the money that was spent. For similar reasons, the PUC noted that lost economic opportunities are not property as Aqua had claimed. As a result, the PUC held that Aqua was not entitled to any compensation, and the City was allowed to provide retail water and sewer service to the tract. Aqua filed a motion for rehearing in this matter, which the PUC considered on June 29, 2017. However, the PUC in the hearing on that motion only clarified its prior order and did not change the ultimate outcome.

Docket 47306, Proposed Amendments to 16 TAC § 24.114. On June 16, 2017, the PUC Staff initiated the process to amend its substantive rule relating to the requirement of water and sewer service providers to provide continuous and adequate service, 16 Texas Administrative Code § 24.114. The stated purpose of the rule amendment is to conform the rule with TWC § 13.250(d), which prohibits retail public utilities that have not been granted a CCN from discontinuing, reducing, or impairing retail water or sewer service to a ratepayer except under certain conditions. The rulemaking may indicate a desire by the PUC to take jurisdiction over governmental entities that are not required to hold CCNs and to prevent those entities from disconnecting service without abiding by PUC rules, which have previously only applied to CCN holders.

Docket No. 46957, Application of Oncor Electric Delivery Company LLC for Authority to Change Rates. The Steering Committee of Cities Served by Oncor ("OCSC") acted to require Oncor to initiate a rate case on March 17, 2017. OCSC originally passed show-cause resolutions for Oncor in anticipation of its acquisition by the investor group led by Ray L. Hunt and transformation to a REIT. After that deal fell through, OCSC suspended their show-cause action. However, because NextEra's application to purchase Oncor proposed no benefits to ratepayers, OCSC lifted its suspension. NextEra's application declared that Oncor would file a rate case on or before July 1, 2017. However, OCSC initiated the earlier rate case to benefit ratepayers by forcing Oncor's regulatory assets, which now total close to $900 million and grow each month, to be dealt with sooner, and to seek commitments from NextEra, including how these regulatory assets will be treated.

Oncor filed its Statement of Intent to Increase Rates on March 17th, requesting to increase rates by $317 million, or 7.5%. OCSC intervened in this proceeding along with the Texas Industrial Energy Consumers, the Texas Solar Power Association, the Environmental Defense Fund, and various other interested stakeholders. The intervenors conducted extensive discovery on Oncor and have engaged in numerous settlement discussions. The parties continue to work on a settlement as a final agreement has not yet been reached.

Docket No. 45259, Appeal of Centerpoint Energy Houston Electric, LLC from an Ordinance of the City of League City, Texas and Application for Declaratory Relief. The dispute over the City of League City's undergrounding ordinance continues to be litigated at the PUC. League City has been fighting CenterPoint Energy Houston Electric, LLC ("CenterPoint") since October 2015, when CenterPoint appealed the City's land use ordinance requiring developers to request underground distribution service and non-wooden electric poles be installed in new subdivisions. CenterPoint claims the ordinance conflicts with CenterPoint's tariff because the ordinance removes the

customer's "right" to request standard service. CenterPoint also claimed the ordinance is illegal under PURA because it mandates the utility's operations.

After extensive briefing from the parties, the ALJ issued a Proposal for Decision ("PFD") recommending the City's ordinance be overturned. The Commission took up the PFD at its March 9th Open Meeting but did not issue a final decision. Instead, the PUC remanded the case to SOAH for a final fact-determination on whether the ordinance applies only to customer-specific distribution lines and does not apply to transmission lines.

The parties submitted supplemental stipulated facts and additional briefs on May 26th, with League City arguing, again, that its Ordinance is a proper exercise of municipal authority over land use that does not alter CenterPoint's tariff. However, the ALJ issued a supplemental PFD on July 5th reaffirming his recommendation that the Commission overturn the City's ordinance because it conflicts with PURA, Commission rules, and CenterPoint's tariff. The parties filed exceptions to the PFD on July 20th, and the PUC will take up this matter again on August 17, 2017 to issue a final decision.

Docket No. 45175, Appeal of Brazos Electric Power Coopeartive, Inc. and Denton County Electric Cooperative Inc. D/B/A Coserv Electric from an Ordinance of the Colony, Texas, and, in the Alternative, Application for a Declaratory Order. The Colony is once again asking the Commission to reconsider its decision in the City's land use dispute with Brazos Electric Cooperative ("Brazos") and Denton County Electric Cooperative's ("CoServ").

This case began in September 2015, when Brazos and CoServ appealed the Colony's zoning ordinance after the City refused to grant the electric cooperatives a special use permit to build a substation on a certain piece of land. The City's zoning ordinance prohibits certain land use activities in the property's zone, including substation use.

A hearing on the merits was held in September 2016, and the administrative law judge issued a PFD in December 2016 recommending that the Colony's ordinance violates PURA because it regulates the services of Brazos and CoServ. The Commission issued an order adopting the PFD on May 4, 2017.

In a memorandum agreeing with the PFD, PUC Commissioner Anderson stated that the Colony's ordinance violates PURA "because it regulates the cooperatives' services by dictating where it may construct a transmission substation," and that "the City undermined PURA's pervasive regulatory scheme when it prohibited the construction of substation facilities because the location of the substation becomes intertwined with the provision of the service." Commissioner Anderson clarified that the Commission's decision invalidating the ordinance pertains only to its application against the electric cooperatives and that it is not voiding the ordinance outright.

On May 30, 2017, the Colony filed a motion for rehearing that was denied in part and granted in part, but ultimately the Commission's Order on Rehearing did not alter the outcome of the case. The City then filed another Motion for Rehearing on the Commission's Order on Rehearing on July 19, 2017.

Railroad Commission of Texas ("RRC")

GUD No. 10580, Statement of Intent to Change the Rates of City Gate Service (CGS) and Rate Pipeline Transportation (PT) Rates of Atmos Pipeline – Texas (APT). On January 6, 2017, Atmos Pipeline—Texas ("APT"), a division of Atmos Energy Corporation, filed a Statement of Intent to change its rates at the Railroad Commission. APT seeks to increase its annual revenues by $72.9 million. APT claims that the rate increase is necessary due to increases in operating expenses since APT's last general rate case, which was seven years ago. The proposed rate increase will affect eight firm transportation customers and 70 fully interruptible transportation customers. The Atmos Cities Steering Committee ("ACSC") intervened and played an active role during the litigation of this case.

The ALJ issued a PFD on June 16, 2017, recommending granting APT an increase in annual revenues of $30.6 million and an 11.5% return on equity ("ROE"). Parties filed exceptions to the PFD on July 11th and replies to exceptions on July 20th. All parties who filed exceptions argued that the PFD erred in its ROE finding—intervenors arguing the Commission should have set the ROE significantly lower because APT is less risky than the interstate pipeline companies to which it compared itself, and APT arguing that the Commission abandoned precedent by changing its method for calculating ROE. The Railroad Commission will consider the PFD at its August 1, 2017 Open Meeting.

GUD No. 10567, Statement of Intent of CenterPoint Energy Resources Corp. D/B/A CenterPoint Energy Entex and CenterPoint Energy Texas Gas to Increase Rates in the Houston Division and Texas Coast Division. The Gulf Coast Coalition of Cities ("GCCC") was able to reach a successful settlement agreement in the CenterPoint Gas case. CenterPoint Gas filed a statement of intent to increase its gas utility rates within the Houston and Texas Coast Divisions in November. CenterPoint requested a $31 million, or 10.7%, rate increase and proposed to consolidate the Houston and Texas Coast divisions into a single Texas Gulf Division.

In addition to GCCC, the City of Houston and Texas Coast Utilities Coalition intervened in this docket. Along with the proposed rate increase, CenterPoint's proposal to consolidate the two service areas proved to be a contentious issue. However, the parties eventually reached a settlement agreement in early April. Overall, the settlement reflects a 47% reduction to the company's requested overall revenue increase, and the customer charge has been reduced for all residential customers. The parties also agreed to the service area consolidation, but CenterPoint Gas will continue to make separate interim rate adjustment filings in the Houston and Texas Coast divisions.

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