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PROTECTING THE WORKPLACE FROM POLITICS: CAN PUBLIC EMPLOYERS CONSTITUTIONALLY LIMIT THEIR EMPLOYEES' OFF-DUTY POLITICAL SPEECH?

by Sheila Gladstone and Emily Linn

With November midterm elections fast approaching and politics being an increasingly polarizing topic, employers are asking now, more than ever, how they can keep their workplaces free from divisive political discourse.

The First Amendment of the United States Constitution protects citizens' freedom of speech against government intrusion.

As a preliminary note, the First Amendment protects only public employees' speech. Private employers in Texas are free to prevent political dialog in the workplace and prohibit outside political activities by employees. For example, a private employer has the right to terminate an employee who attends a white nationalist rally. Similarly, a private employer could enact a policy banning political bumper stickers on employees' personal vehicles in its parking lot, without First Amendment repercussions.

The same cannot be said for public employers. The First Amendment protects a public employee's on- and off-duty political speech when several conditions are met. First, the employee's speech must relate to a matter of public concern. The Supreme Court has held that political speech inherently satisfies this requirement. Second, the speech must be made as a private citizen, rather than a public employee. Third, the speech must not create an unreasonable disruption to the operation or mission of the public employer. When a public employee, for example, puts a campaign sign in her yard, it is unlikely to disrupt her official job duties.

There are additional constitutional limitations for policies that restrict speech. Any policy limiting employee political activity must be based on a compelling state interest that is narrowly tailored to achieve that purpose. Both the U.S. Supreme Court and Fifth Circuit have recognized that a substantial disruption to the functioning of a public employer is a compelling interest. However, an employee policy not only must be tied to a legitimate employment need, but it must also be the least restrictive method to further that purpose. Generally, policies with blanket prohibitions on political speech are void for lack of narrow tailoring.

There are rare cases where speech threatens the operation of the public employer such that constitutional protections must give way to the effective operation of the government. Most off-duty speech will not meet this high burden, by nature of it being done while an employee is outside the workplace.

For example, a city mayor is up for reelection. While browsing through his newsfeed, he sees that his secretary has "liked" the opponent's Facebook page and volunteered over the weekend to distribute yard signs for the opponent. The mayor is shocked by this act of betrayal and now wants to terminate the secretary, believing that office harmony and overall productivity will be improved with her termination.

This termination likely violates the secretary's First Amendment rights. While the mayor is understandably upset, private acts of support—such as liking

Protecting the Workplace continued on 4

IN THIS ISSUE

Firm News	**p. 2**
Municipal Corner	**p. 3**
The Stormwater Remand Rule: Anticipating Impacts to the Phase II MS4 Permit Renewal *Stefanie Albright and Jacqueline Perrin*	**p. 5**
Water Supply Planning: Jurisdictional Determinations – When is Federal Jurisdiction Triggered *Nathan E. Vassar*	**p. 6**
Ask Sheila *Sheila B. Gladstone*	**p. 7**
In the Courts	**p. 8**
Agency Highlights	**p.14**

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

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

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FIRM NEWS

Ashley Thomas will discuss "Medical Leave and Accommodation Issues" at the Texas Business Conference on July 20 in Arlington.

Sheila Gladstone will present "Sexual Harassment and Employment Investigations in the #MeToo Era" at the Texas State Bar Advanced Government Law 2018 on July 20 in San Antonio.

Cody Faulk will present "Is Change Coming? Transmission Rate Filings at the PUC" at the Texas Public Power Association 2018 Annual Meeting on July 24 in Austin.

José de la Fuente will discuss "Inverse Condemnation/Takings" at the 30th Annual Environmental Superconference on August 2 in Austin.

Georgia Crump will discuss "Latest Topics in the Water Utility Industry" at the State Bar of Texas Public Utility Law Section Seminar on August 10 in Austin.

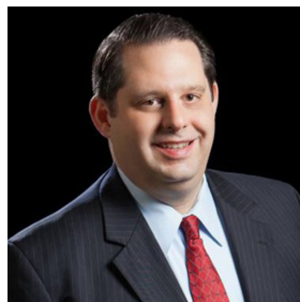
Nathan Vassar will present "Averting Down Pipe Scrutiny: Water Quality Approaches and Strategies" at the EPA Region 6 Stormwater Conference on August 21 in Albuquerque.

Sheila Gladstone will give an "Employment Law Update" at the Texas Business Conference on August 24 in Round Rock.

Ashley Thomas

Sheila Gladstone

Cody Faulk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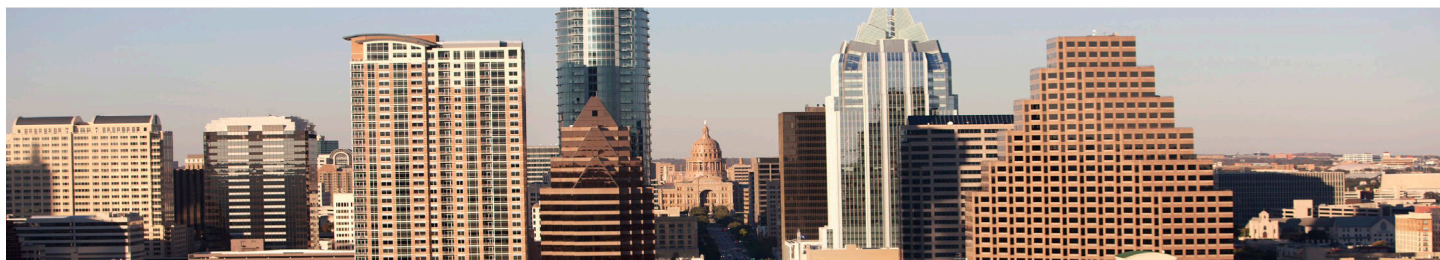
MUNICIPAL CORNER



The Texas Commission on Environmental Quality is required under Section 382.112 of the Health and Safety Code to consider a local government's recommendation on a standard permitting determination only to the extent that the recommendation concerns the statutory and administrative requirements of the Texas Clean Air Act. Tex. Att'y Gen. Op. KP-0190 (2018).

The Texas Attorney General ("AG") was asked whether, and to what extent, the Texas Commission on Environmental Quality ("TCEQ") must consider a recommendation from a local government to deny a permit application for a facility due to the facility's incompatibility with that local government's zoning or land use ordinances. Specifically, the City of Fort Worth (the "City") submitted to the TCEQ a resolution recommending denial of a permit issued under the Texas Clean Air Act (the "Act") for a concrete crushing plant. The resolution was submitted pursuant to Section 382.112 of the Texas Health and Safety Code, which provides that a "local government may make recommendations to the [TCEQ] concerning a rule, determination, variance, or order of the [TCEQ] that affects an area in the local government's territorial jurisdiction" and that the TCEQ "shall give maximum consideration to a local government's recommendations."

Upon receiving notification of the request for an opinion, TCEQ provided briefing to the AG stating that the TCEQ gives "maximum consideration to recommendations from local governments on whether to approve an air quality permit," that its permitting decisions are limited to the requirements and prohibitions as specified in the Act, and thus the TCEQ "does not review or consider whether an applicant is compliant with any other ... local requirement" outside of the Act.

The AG begins its analysis by citing to and discussing various provisions of the Act, particularly Section 382.036(4), which states that in implementing its regulatory authority under the Act, the TCEQ must "advise, consult, and cooperate with ... political subdivisions of the state ... concerning matters of common interest in air quality control." The AG then turns to Section 382.05195, which authorizes the issuance of general "standard" air permits, and also cites §§ 382.05198(a) and 382.05199(h), which state that the TCEQ shall issue permits for certain concrete plants (like the one at issue in this request) that meet certain statutorily-listed criteria.

Importantly, the AG notes that under these provisions of the Act, neither the general standard permit provision nor the specific standard permit provision applicable to certain concrete plants requires consideration of factors outside of the Act, i.e. local zoning or land use ordinances. The AG states that Section 382.112 "requires the [TCEQ] to consider a local government's recommendation only to the extent that the recommendation concerns the statutory and administrative requirements of the Act."

Regarding the alternative questions posed—whether the Act outright precludes the consideration of local zoning or land use ordinances and whether the TCEQ is authorized to deny the issuance of a permit on those factors—the AG concludes that "the statutory language appears to preclude the consideration of (and denial due to) zoning, land use, and other ordinances for section 382.05198 [concrete plant] permits and is silent regarding section 382.05195 [general standard] permits." The AG concludes that in the end, the judicial review of TCEQ approval of the type of permit at issue focuses on "whether the action is invalid, arbitrary, or unreasonable," and such a determination involves a factual inquiry that is beyond the scope of the AG opinion process.

The Texas Transportation Commission may not spend state highway funds received pursuant to Propositions 1 and 7 to fund any toll road, and the Commission may not withdraw such funds from the state highway fund and place them into a general fund for a partially tolled project with no mechanism for ensuring that it spends the funds as constitutionally required. Tex. Att'y Gen. Op. KP-0197 (2018).

The AG was asked whether the Texas Transportation Commission ("TTC") may use Proposition 1 and Proposition 7 funds on highway "projects" that implement a toll. The AG first notes that Proposition 1 was a constitutional amendment proposed by the Texas Legislature in 2013, approved by Texas voters in 2014, that revised Article III, Section 49-g of the Texas Constitution to require the Texas Comptroller to transfer to the state highway fund revenue received from oil production taxes above a certain amount. The AG notes that Article III, Section 49-g(c) relevantly provides that revenues transferred to the state highway fund under this subsection may only be used for construction, maintenance, and right-of-way acquisitions for public roadways "other than toll roads."

As to Proposition 7, the AG states that a constitutional amendment proposed by the Legislature and approved by Texas

voters in 2015 added Article VIII, Section 7-c to the Texas Constitution, requiring the Comptroller to transfer to the state highway fund up to $2.5 billion in general sales tax proceeds in excess of $28 billion. Similarly, the AG notes that this new subsection contains restrictions on the use of money transferred to the state highway fund, specifically that funds received may only be used to "construct, maintain, or acquire rights-of-way for public roadways other than toll roads" or to "repay the principal of and interest on general obligation bonds issued as authorized by Section 49-p, Article III." Thus, the AG concludes, the Texas Legislature "plainly expressed its intent that the Commission not use the money transferred to the state highway fund under Proposition 1 or Proposition 7 on toll roads."

The final determination for the AG to address was a construction of the term "toll road" itself, as the request letter specifically references "toll projects" (i.e. not toll "roads"). To begin this analysis, the AG notes that Texas courts construe constitutional provisions in the same manner as they construe statutory provisions, and they will attempt to discern and give proper effect to the drafters' intent. *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). The AG notes that courts will rely heavily on the "literal text" of the provision at issue to guide this determination. *Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 344 (Tex. 2001). Lastly, the AG observes that if the plain language of a constitutional provision is "clear and unambiguous," then Texas courts will give the language of the provision its common everyday meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008).

The AG importantly notes that neither the Texas Constitution nor the Legislature have defined "toll road" for purposes of the Transportation Code. The AG then turns to Webster's Dictionary to provide that the term "toll road" means "a road for the use of which a toll is collected." WEBSTER'S THIRD NEW INT'L DICTIONARY 2405 (2002). The AG concludes that funds received under both Propositions 1 and 7 may not be used to fund any road "for the use of which a toll is collected"; however, further construction of the term is complicated due to "realities of toll roads today" because many toll roads in Texas are only tolled for certain portions of the road and/or for the use of certain lanes. Because the restrictions on the use of funds do not directly address whether the TTC may use the funds on roads that have both tolled and non-tolled components, and because the AG can find no caselaw or applicable statute interpreting the term "toll road," the AG concludes that it cannot finally determine whether a Texas court would construe Propositions 1 and 7 to allow those funds to be used for "toll projects" when those provisions restrict the use of funds on "toll roads."

The AG next provides that "unquestionably" the TTC cannot move Proposition 1 or 7 funds from the state highway fund into the general fund for a partially tolled project with "no mechanism for ensuring that it spends the funds as constitutionally required, that is, only on non-tolled roads." The request letter observes that the TTC is funding current projects with Proposition 1 and 7 funds that have both tolled and non-tolled components. However, the AG notes that after the request letter was submitted, the TTC took action to remove the tolled components from several of its current projects. Ultimately, the AG states, it appears that until the Texas Legislature and Texas voters "have an opportunity to clarify their intent regarding the appropriate use" of these funds, the TTC has chosen to delay the use of those funds on projects with tolled components.

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.*

Protecting the Workplace continued from 1

a political page or displaying a campaign sign—are not overly disruptive to the government's operation.

Changing the facts a bit, what if this time it is the mayor's chief of staff who "likes" the opponent's Facebook page and distributes yard signs? The chief of staff is responsible for attending public functions with the mayor and making statements on behalf of the city office.

This is a closer case. In this instance, the chief of staff's activities in support for the opponent, while still done outside of work, have a closer nexus to her official job duties and have the potential to cause a disruption to the operation of the office. While this is ultimately a fact-specific analysis, it is not difficult to imagine the issues that could result from the incumbent mayor's first-in-command speaking out against him in the midst of a political race.

Overall, most public employees' political statements are protected under the First Amendment. Typical activities like displaying a candidate's yard sign, donating to a political party, or marching for a particular partisan agenda are outside the scope of a public employer's control. Even if an employee's actions are antithetical to the employer's views and even if the employer believes the office would function more cohesively absent political speech, an employee cannot be silenced unless the speech becomes so pervasive that it hampers the employer's operations, or is truly disruptive to the mission of the agency. For example, if a police officer posts racially divisive speech online, even in the context of a political campaign, the employer can likely show that the speech unreasonably interferes with the mission of the police department, and thus is not constitutionally protected. Often, those with direct interaction with the public, such as teachers, firefighters and police officers, will be held to a higher standard because of the higher potential for disruption.

Now, what if instead of showing support for a political candidate, a city employee decides to run for city office? May the employee be terminated or suspended during the campaign? The answer with regard to cities only is usually no. Although the Fifth Circuit

held in *Philips v. City of Dallas* that a policy prohibiting city employees from seeking political office was constitutionally permissible because "effective operation of the government… justifies regulation of partisan political activities of government employees," the Texas Legislature later passed a statute explicitly granting city employees the right to run for election without fear of discipline or termination, unless running makes them unable to perform their job. 781 F.3d 772 (5th Cir. 2015); Tex. Loc. Gov't Code § 150.041. If the employee-candidate wins, then that person can be terminated when taking office. However, other, non-city public employers may rely on the *Phillips* case and enact a general policy prohibiting employees from running for local office, so long as the policy meets the general First Amendment analysis discussed above.

If the employee is elected into office, then the employer should be aware of state funding limitations. The Texas Constitution provides that public employees who receive any part of their compensation from state funds shall not be barred from serving in political positions, but they cannot receive any additional salary for their service. Employers should confirm that any such employee who is serving in a political office is not receiving a compensation for both their general employment and political position.

While public employers stand largely powerless to control the off-duty political speech of their employees, the First Amendment does provide narrow spaces for regulation, based on the level of disruptive effect of such speech. Understanding the general presumption of free speech for public employees, while also appreciating the limited situations where management can restrict political behaviors, is critical for public employers striving to protect their workplaces from hostile political rhetoric.

Sheila Gladstone is the Chair of the Firm's Employment Practice Group and Emily Linn is a to-be-licensed Associate in the Firm's Employment Practice Group. If you have any questions related to this article or other employment law matters, please contact Emily at 512.322.5889 or elinn@lglawfirm.com, or Sheila at 512.322.5863 or sgladstone@lglawfirm.com.

THE STORMWATER REMAND RULE: ANTICIPATING IMPACTS TO THE PHASE II MS4 PERMIT RENEWAL

by Stefanie Albright and Jacqueline Perrin

What is the Stormwater Remand Rule?

The Stormwater Remand Rule (the "Rule") changed how small municipal separate storm sewer systems ("MS4s") obtain coverage under National Pollutant Discharge Elimination System ("NPDES") general permits (or TPDES permit, when issued by the State of Texas).

The new rule became effective in January of 2017 and will have an impact on future stormwater permit issuances.

Why did the rule change?

A number of environmental and industry groups complained about the Environmental Protection Agency's ("EPA") previous Phase II stormwater rule because of what they alleged were inadequate public notice and reviewing requirements. These complaints resulted in the 9th Circuit Court of Appeals case, *Environmental Defense Center, et al. v. Envtl. Prot. Agency*, 334 F.3d 832 (9th Cir. 2003).

The Ninth Circuit agreed with some of these complaints, and held that the previous rule left room for MS4 operators to fail to comply with the Clean Water Act's ("CWA") "maximum-extent requirement." This requirement provides that discharge permits must include controls to reduce the discharge of pollutants to the maximum extent practicable. Instead, under the previous rule, MS4 operators could be deemed to have complied with the maximum-extent requirement as long as they implemented their stormwater management programs ("SWMP").

The Ninth Circuit held that because the regulations did not require permitting authorities to ensure provisions in the SWMPs would in fact reduce discharges to the maximum extent practicable, there was a real risk that the measures would reduce discharges by some degree less than the "maximum extent practicable." In

other words, the court determined that evidence of compliance with SWMPs did not necessarily equate to demonstration of a reduction of discharges.

The EPA responded by adopting a "Permitting Authority Choice Approach," under which the permitting authority chooses between: (a) The Comprehensive General Permit Approach; and (b) The Two-Step General Permit Approach. Texas has adopted the "Two-Step" approach for small MS4s, where the Texas Commission on Environmental Quality ("TCEQ") includes required permit terms and conditions in the general permit applicable to all eligible small MS4s and, during the process of authorizing small MS4s to discharge, establishes additional terms and conditions to satisfy one or more of the general permit requirements for individual small MS4 operators.

The general permit must specify that any small MS4 operator must submit a Notice of Intent ("NOI"). The NOI must contain necessary additional information for the permitting authority to develop additional requirements for each permittee.

In the second permitting step, the permitting authority satisfies its obligation to review the NOI for adequacy, determine what additional requirements are needed for the MS4 to meet the MS4 permit standard, provide public notice and an opportunity for the public to submit comments, and request a hearing. After these steps have been completed, the permittee is authorized to discharge, subject to the terms of the general permit and the additional requirements that apply individually to that MS4.

What is the impact to the Texas Phase II MS4 Permit?

Because the Rule is procedural, there are no substantive modifications to the Phase II MS4 requirements. The most significant shift affects the content of the SWMP, requiring that all permits be written with "clear, specific, and measurable" terms. In other words, the permit language must readily allow for the assessment of compliance and of whether measurable goals have been met.
"Clear" means using mandatory terms such as "must" and "shall"; eliminate uncertain terms like "if practicable", "as necessary", and "should." The phrase "if feasible" may not appear unless it is defined. "Specific" means providing enough detail to accurately convey the level of effort necessary to comply. Finally, "measurable" requires using language that allows for a straightforward assessment of compliance.

See the following example of the mandatory-language requirement in action. The struck language leaves only mandatory language, such as "must" and "shall," to leave only clear, specific, and measurable terms:

"The permittee shall conduct inspections as determined appropriate, in response to complaints, and shall conduct follow-up inspections as needed to ensure that corrective measures have been implemented by the responsible party."

The 2013 TPDES general permit for small MS4s expires on December 13, 2018. MS4 operators can anticipate the Phase II renewal permit will include changes to ensure compliance with the Rule, and that revisions to SWMPs will be necessary to ensure compliance with the renewed permit.

Stefanie Albright is a Principal in the Firm's Districts and Water Practice Groups. Jacqueline Perrin is a to-be-licensed Associate in the Firm's Districts Practice Group. If you have any questions related to this article or other employment law matters, please contact Stefanie at 512.322.5814 or salbright@lglawfirm.com, or Jacqueline at 512.322.5839 or jperrin@lglawfirm.com.

WATER SUPPLY PLANNING: JURISDICTIONAL DETERMINATIONS – WHEN IS FEDERAL JURISDICTION TRIGGERED?*

by Nathan E. Vassar

As outlined in our last article, our ongoing Water Supply Planning series will pivot from its earlier focus on technical and state-centric considerations to the broader federal overlay that can impact various water supply projects significantly. A logical starting point for any project is to ask whether federal resources are impacted at all? Put another way – will the project's activities require some federal authorization (in addition to state regulatory requirements)? While later articles will examine impacts to federally-listed species and their habitats, a foundational question for many water supply projects is whether impacted waters (or areas nearby) fall within the federal purview. To that end, a jurisdictional determination may be necessary in order to know whether a project will require federal authorizations to proceed, such as a Clean Water Act Section 404 permit that authorizes the dredge and fill of federal waters (a "404 permit").

Whether a project impacts jurisdictional waters—commonly referred to as "Waters of the United States"—is not as straightforward a question as some might expect. For decades, courts, Congress, and agencies have grappled with the extent and distance of "Waters of the United States." Since two U.S. Supreme Court decisions in 2001 and 2005, the analysis has been even less certain, which drove a controversial (and heavily litigated) "clarification" rule in 2015, which is still winding its way through the courts. In short, the jurisdictional question is not an easy one, but yet it is often that a project's costs, permits, and, of course, timelines, depends upon the answer.

For larger projects, such as reservoirs and certain dredging efforts, the impacts

to jurisdictional waters are obvious, and the resulting mandates follow: either an individual 404 permit from the U.S. Army Corps of Engineers (the "Corps"), or (as applicable) a nationwide permit relevant to the types of activities undertaken.

For other projects, however, a more searching technical and legal analysis is warranted. Seeking a formal jurisdictional determination from the Corps is an effort that should be undertaken with scrutiny as to past practices of the agency, applicable case law, and the facts on the ground for a particular project. Framing the determination request appropriately can be the difference between a decision of no impact to jurisdictional waters on the one hand, and a lengthy individual permitting process at the opposite end of the spectrum. Several considerations should be evaluated. What is the proximity of the project area to nearby streams? What is the nature of such water bodies (intermittent? ephemeral? constant flow?)? Is there a man-made impact to the waters (such as a ditch or canal), or is the project affecting natural systems? Are wetlands involved or nearby? Is there a hydrological connection between waters impacted and other, more permanent waterbodies? These are the types of questions that should be considered prior to seeking the analysis of the Corps.

At this stage, we know that the regulatory definition of "Waters of the United States" will likely remain uncertain for years into the future. Water suppliers, however, rarely have the luxury of time or resources to await a final rule. As such, before embarking upon a project that questionably impacts jurisdictional waters, it is important to give a thorough evaluation to possible impacts on federal waters, as the framing of the issue for the Corps may ultimately determine whether a project proceeds on a schedule and budget that manages the entity's plans and expectations.

Nathan Vassar is a Principal 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 supply issues, federal requirements, or the use of water supply planning tools, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com.

**This article is the tenth 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:

The county has a job opening in the courthouse cafeteria for a dishwasher. One of the applicants is deaf and does not communicate verbally at all. Although we hired a sign language interpreter for the interview, the manager has serious concerns about how we will employ this person on a day-to-day basis. For example, kitchen employees must attend weekly safety meetings, and all of our orientation and health code training is on video. There are also concerns about providing instructions while the employee is working. This is a low-wage job; do we have to incur the expense of accommodation?

Sincerely,
Hear Me Out

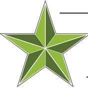
Dear Hear Me Out:

If the applicant is the most qualified but for the hearing impairment, then you will need to hire him and provide accommodation under the Americans with Disabilities Act ("ADA"). The Equal Opportunity Employment Commission ("EEOC") views most positions as requiring accommodation for hearing impairments when the job does not require direct, face-to-face customer communication. Recently, the EEOC settled a case against a restaurant chain involving a dishwasher who was deaf, stating that the restaurant should have used closed captioning for training videos and a sign language interpreter for important meetings. Further, the supervisor can use written instructions, texts, emails and notes for daily communications. The employer cannot consider the cost of the accommodations when determining reasonableness, unless they would create an extreme hardship for the employer, a difficult test to meet.

Safety considerations are relevant to whether accommodation is reasonable, but employers should carefully consider how real the risk is, and not base the concern solely on assumptions about the particular disability. Several years ago, a city was found to have violated the ADA when it refused to hire an otherwise qualified deaf applicant to a lifeguard position. The city cited safety concerns in that the lifeguard would not be able to hear a drowning person's calls of distress, but the applicant was able to present evidence that 1) drowning people are unable to scream or yell, and 2) the lack of other noise distractions makes a deaf lifeguard better able to concentrate visually on the swimmers.

When analyzing whether reasonable accommodation is possible, engage in the interactive process with the disabled person before assuming that it can't be done. Start with the assumption that accommodation is possible. Find out what the person needs from the employer so that he or she can adequately perform the essential functions of the job. If necessary, review medical recommendations and suggestions from the Job Accommodation Network (www.askjan.org) before making a final determination.

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the Firm's 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

Bosque Disposal Sys. v. Parker Cty. Appraisal Dist., No. 17–0146, WL 2018 2372810 (Tex. May 25, 2018).

Plaintiffs, a group of Parker County taxpayers, each own land containing saltwater disposal wells used to permanently store wastewater from oil and gas operations. Plaintiffs sued the Parker County Appraisal District ("PCAD"), arguing that PCAD violated (1) Article VIII, section 1(b) of the Texas Constitution by double taxing their land by appraising the value of the land and the value of the wells separately even though the estates are not severed from one another and (2) the Texas Tax Code's definition of "real property." The Texas Supreme Court found in favor of PCAD, holding that its practice of appraising the land and the wells separately did not conflict with the Tax Code's definition of "real property" and was not an unconstitutional double taxation of the wells. The Court relied on *Matagorda Cty. Appraisal Dist. v. Coastal Liquids*, 165 S.W.3d 329 (Tex. 2005), and held that PCAD's decision to separately assign and appraise the surface and disposal wells was not legally improper because the Plaintiffs' wells constituted "an improvement, an estate or interest in land, or some combination of these" and the "taxpayer's wells are part of their real property and contribute significantly to the properties' overall market value, which [PCAD] must appraise."

Crystal Clear Special Util. Dist. v. Marquez, No. 1:17-CV-254-LY, 2018 WL 2407701] (W.D. Tex. Mar. 29, 2018).

In July 2016, Las Colinas San Marcos Phase I, LLC ("Las Colinas") filed a petition for expedited release from the water certificate of convenience and necessity ("CCN") of Crystal Clear Special Utility District (the "District"), which the Public Utility Commission of Texas ("PUC") granted on September 28, 2016. In addition to filing an appeal of the order in state court, the District filed suit in the United States District Court for the Western District of Texas arguing that decertification under Texas Water Code ("TWC") §§ 13.254(a-5) and (a-6) (the latter of which expressly forbids the PUC from denying a petition for expedited release based on the fact that a CCN holder is a borrower under a federal loan program) is preempted by 7 United States Code ("U.S.C.") § 1926(b), which protects a utility that is a recipient of federal loans from curtailment of its service area, and are therefore unconstitutional. Both the PUC and Las Colinas filed motions to dismiss. The federal court, however, granted the District's motion for summary judgment in part, holding: (1) the District is federally indebted under § 1926(b); (2) the District has "provided or made available" service under § 1926(b) by virtue of its legal duty to provide service as defined by its CCN; (3) the PUC's order granting the petition to decertify Los Colinas' disputed property from the District's CCN necessarily curtailed the District's rights under § 1926(b); and (4) § 13.254(a-6) is preempted by § 1926(b). For more information on this matter, see the January 2018 edition of *The Lone Star Current*.

Georgia v. Pruitt, No. 2:15-cv-79, 2018 WL 2766877 (S.D. Ga. June 8, 2018).

On June 30, 2015, Plaintiffs States of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky (collectively, "the Plaintiffs") filed a lawsuit against the United States Environmental Protection Agency ("EPA") and United States Army Corps of Engineers ("USACE") (collectively, the "Agencies") in the United States District Court for the Southern District of Georgia, contending that the final waters of the United States rule ("WOTUS Rule"), issued by the Agencies on June 29, 2015, violated the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), and the Commerce Clause and Tenth Amendment of the U.S. Constitution. In order to enjoin enforcement of the WOTUS Rule before its original August 28, 2015 effective date, Plaintiffs filed a motion for preliminary injunction on July 21, 2015. On August 27, 2015, the Court denied the preliminary injunction, holding that original jurisdiction lay with the Courts of Appeals.

Since that time, however, things have changed. Similar lawsuits were brought around the country, and on the same day that this Court decided it lacked jurisdiction (August 27, 2015), the District of North Dakota granted a preliminary injunction to thirteen other states challenging the WOTUS Rule. *North Dakota v. Envtl. Prot. Agency*, 127 F.Supp.3d 1047 (D.N.D. 2015). In addition, a number of similar lawsuits filed in federal courts of appeal were consolidated and moved to the Sixth Circuit, which issued a nationwide stay of the WOTUS Rule and a divided opinion holding that jurisdiction lay with federal appellate courts. *In re U.S. Dept. of Def. & U.S. Envtl. Prot. Agency, U.S. E.P.A.* Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261

(6th Cir. 2016).The Sixth Circuit opinion was appealed to the United States Supreme Court, which, on January 22, 2018 held that litigation challenging the 2015 WOTUS Rule must be filed in federal district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617 (2018). As such, Plaintiffs' motion for preliminary injunction was properly before the federal district court. In *Georgia v. Pruitt*, on June 8, 2018 the Southern District of Georgia found for the Plaintiffs, granting a preliminary injunction of the 2015 WOTUS Rule in the Plaintiff States, holding that three of the four factors required to receive a preliminary injunction (substantial likelihood of success on the merits, balance of harms, and public interest) weighed overwhelmingly in Plaintiffs' favor, while the last factor (substantial threat of irreparable injury) was a "closer call," but had also been satisfied. No. 2:15-cv-79, 2018 WL 2766877 (S.D. Ga. June 8, 2018).

Over this time, the Agencies also proposed and adopted a rule to extend the applicability date of the 2015 WOTUS Rule to February 6, 2020, thus maintaining the status quo under *Rapanos v. U.S.,* 547 U.S. 715 (2006) until that date (or sooner if a new definition of "waters of the United States" is promulgated by the Agencies). On June 13, 2018, however, the Center for Biological Diversity and several other organizations filed suit against EPA and USACE, alleging a wide range of claims to challenge the 2015 WOTUS Rule as well as the subsequent rule delaying its effective date. *Waterkeeper Alliance, Inc. v. Pruitt*, No. 18-cv-03521 (N.D. Ca. June 13, 2018). Separate and apart from the applicability date extension, the Agencies have also undertaken a two-step process to rescind and replace the 2015 WOTUS Rule. Public meetings were held in fall 2017 to hear stakeholders' recommendations regarding revision of the definition of "Waters of the United States," and the EPA also initiated a "Federalism consultation," which required the Agencies to conduct pre-rule-proposal discussions with state and local governments. Currently, the Agencies are considering the comments received through these processes before submitting a proposed rule (step two). Once published in the Federal Register, the public will have an opportunity to provide comments to the proposed rule.

State v. Morello, No. 16-0457, 2018 WL 1025685 (Tex. 2018).

Morello purchased property containing a pipe manufacturing facility formerly owned and operated by Vision Metals, Inc., which had caused groundwater contamination under a hazardous waste permit and compliance monitoring plan from the Texas Commission on Environmental Quality ("TCEQ"). Morello created White Lion Holdings, LLC to hold title to the property, and Vision Metals transferred the property, the permit, and the compliance plan to White Lion. TCEQ approved the transfer of the permit and compliance plan in July 2004. In December 2004, the TCEQ first notified White Lion and Morello of ongoing violations to the compliance plan, and continued to notify White Lion and Morello until April 2006. The State then sued White Lion, and later added Morello as a defendant, arguing that both Morello and White Lion were required, and failed, to comply with the compliance plan and provide assurance of financial capability to fulfill it. The State first sought summary judgment against White Lion, which was granted, and which the court of appeals affirmed. The State then separately sought summary judgment against Morello, which he appealed, asserting that the State failed to establish that he was personally liable. The Court of Appeals reversed and the State appealed to the Supreme Court of Texas, which found for the State, holding that Texas Water Code §§ 7.101 and 7.102 apply directly to Morello individually because of his own actions and liability under the statute. When Morello argued that he was not individually liable because he was acting as an agent for White Lion, the Court held that "under an environmental regulation applicable to a 'person,' an individual cannot use the corporate form as a shield when he or she has personally participated in conduct that violates the statute."

Oncor v. Chaparrel Energy, No. 16-0301, 2018 WL 1974336 (Tex. 2018).

Chaparral Energy ("Chaparral") sued Oncor Electric Delivery Company ("Oncor") in Texas district court, alleging breach of contract, after Chaparral and Oncor agreed that Oncor would provide electricity to two of Chaparral's wells. In September 2007, Oncor allegedly represented that it could complete the work in ninety days or sooner, but the work was not completed until December 2008. Chaparral allegedly incurred over $300,000 from providing the necessary power to the wells before December 2008.

Ultimately, the Texas Supreme Court held that the Texas Public Utility Regulatory Act ("PURA") grants the Texas Public Utility Commission ("PUC") exclusive jurisdiction to resolve issues underlying a customer's claim that a PUC-regulated utility breached a contract by failing to timely provide electricity services. The Court reasoned that the PUC has exclusive jurisdiction because of the comprehensive regulatory scheme PURA creates and the express language in 32.001(a) grants the PUC "exclusive jurisdiction over the rates, operations, and services of an electric utility." The Court concluded that the PUC has exclusive jurisdiction over all matters involving an electric utility's rate, operations and service. Only once the PUC has exercised its jurisdiction and resolved issues related to operations and services, then may a party seek damages in trial court based on the PUC's finding.

The Court reversed the court of appeal's judgment and dismissed the case without prejudice for want of jurisdiction. The Court noted that Chaparral may re-file its claim after the PUC has exercised its exclusive jurisdiction.

R.E. Janes Gravel Co. v. Tex. Comm'n on Envtl. Quality, No. 14–15–00031–CV, 522 S.W.3d 506 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, pet. denied).

The City of Lubbock has been authorized since 1983 to reuse surface water-based effluent imported from the Canadian River Basin. The City applied for authorization in 2004 under § 11.042(c)

of the Texas Water Code to convey effluent it began discharging a year prior down a tributary of the Brazos River for diversion and reuse. The TCEQ granted the Application. Janes Gravel, the holder of a downstream water right issued in 1968, protested the decision. The 419th District Court in Travis County affirmed the TCEQ's decision. Janes Gravel appealed the trial court's ruling to the Texas Court of Appeals. Janes Gravel argued, among other things, that if discharges of effluent had already commenced, then the TCEQ could not grant a bed and banks authorization without either (1) subordinating the authorization to Janes Gravel or (2) determining that the bed and banks authorization would not adversely affect senior rights downstream. The Court of Appeals also affirmed the TCEQ's order, basing its decision upon the fact that the City's effluent had originated as imported water. Janes Gravel then appealed to the Texas Supreme Court, which, on February 16, 2018, denied the petition for review. For more information on this matter, see the January 2018 edition of *The Lone Star Current*.

Litigation Cases

With the judicial year ending, we thought we'd do something a little bit different and give you a foreshadowing of what's to come next year.

But first—a quick look at important developments from the last couple months in the Supreme Court, first in the employment context and second in the area of governmental immunity:

Alamo Heights Indep. Sch. Dist. v. Clark, 544 S.W.3d 755 (Tex. Apr. 6, 2018).

In this case, the Texas Supreme Court addresses when a hostile work environment is "because of sex," and is thus actionable workplace sexual harassment. Clark sued the school district for sexual harassment and retaliation, alleging she was harassed by another female coach, Monterrubio, and fired in retaliation for reporting the harassment. Clark alleged Monterrubio harassed and bullied her over four dozen times, some of which were sexual in nature, including commenting repeatedly about Clark's breasts and buttocks, dirty dancing at faculty parties, grabbing her own parts for photos, making vulgar comments about sex, and grabbing Clark's behind once during a group photo.

After discovery, the school district pleaded that its governmental immunity was not waived because Clark did not present evidence of a statutory violation under the Texas Commission on Human Rights Act ("TCHRA"). The District Court denied the school district's plea, which the Court of Appeals affirmed on interlocutory appeal, concluding Clark established a *prima facie* case of sexual harassment and retaliation sufficient to invoke the THCRA's immunity waiver.

The Texas Supreme Court reversed and dismissed Clark's case, holding the school district's immunity had not been waived because Clark did not raise a fact issue on her harassment or retaliation claims. The court explained that Clark failed to raise a fact issue on her harassment claim because she did not present evidence that she was harassed "because of" her gender, since she did not present evidence that Monterrubio was motivated by sexual desire, was generally hostile to females, or was comparatively discriminatory to females over males. The Court further stated that comments about gender-specific anatomy do not alone raise an inference of discriminatory harassment.

Regarding the retaliation claim, the Court held that the Court of Appeals erroneously limited its jurisdictional inquiry to the first step of the burden-shifting framework. Instead, "when jurisdictional evidence negates the prima facie case, or . . . rebuts the presumption it affords, some evidence raising a fact issue on retaliatory intent is required to survive a jurisdictional plea." Following this standard for Clark's retaliation claim, the Court held she did not present a fact issue that she would not have been terminated but for her filing the Equal Employment Opportunity Commission charge.

State ex re. Best v. Harper, --- S.W.3d ---, 2018 WL 3207125 (Tex. June 29, 2018).

Best involves a unique set of circumstances under which the Defendant, Paul Harper, filed a motion to dismiss under the Texas Citizens' Participation Act ("TCPA"), Tex. Civ. Prac. & Rem. Code §27.001, et seq., and sought fees against the State. The State claimed that Harper cannot obtain fees against it under the doctrine of sovereign immunity. The Supreme Court disagreed, holding that immunity is abrogated in claims for attorneys' fees under the TCPA.

Harper was elected to the Somervell County Hospital District Board (the "District") on a promise to eliminate the tax that funds the District. Based on his alleged incompetence, Somervell County resident George Best sued Harper under Chapter 87 of the Texas Local Government Code, which authorizes district courts to remove county officials from office for "incompetency, official misconduct, habitual drunkenness, and other causes defined by law." The Somervell County Attorney appeared on behalf of the State, and ultimately opted to adopt Best's allegations.

Harper moved to dismiss under the TCPA, alleging that the State could not establish a *prima facie* case for removal. The Waco Court of Appeals concluded that the State had failed to establish a *prima facie* case for removal, and it held the State liable for attorneys' fees under the mandatory fee-shifting provisions of the TCPA. The State sought review from the Supreme Court, claiming that it could not be held liable for attorneys' fees under the doctrine of sovereign immunity.

The Supreme Court disagreed. The Court held that "[b]ecause the state should not be suing to prevent its own citizens from participating in government—especially when it lacks even a *prima facie* case against them—and because when it does sue, it risks paying only attorneys' fees (rather than damages or some other uncapped sum), abrogating the state's sovereign immunity in the TCPA context does not present any grave danger to the

public fisc." Accordingly, the Court held that immunity does not bar a claim for fees under the TCPA.

The effect of *Best* may be limited. Governmental subdivisions have very few opportunities to have a TCPA claim filed against them, as they cannot sue for defamation or business disparagement (neither of us thought of the removal statute). But in light of other cases before the Court (discussed in detail below), the prospect that the Supreme Court is skeptical of governmental immunity is concerning.

But the notion that *Best* may reflect a growing skepticism of immunity on the part of the Supreme Court is undermined by the Court's decision in *Nazari v. State*, --- S.W.3d ---, 2018 WL 3077659 (Tex. June 22, 2018). In *Nazari*, the Court concluded that sovereign immunity bars a counterclaim against the State when the State seek to recover overpayments and associated penalties under the Texas Medicaid Fraud Prevention Act. So Best probably reflects the Supreme Court's vigorous defense of the TCPA, rather than any greater movement in the area of sovereign/governmental immunity.

From a practitioner's standpoint, the TCPA is something that must always be considered before filing suit. *Best* confirms that governmental lawyers should also keep the TCPA in mind before filing (or intervening in) any lawsuit.

In the fall, the Supreme Court is scheduled to hear two other cases affecting governmental immunity. Here's a preview of a couple:

City of San Antonio v. Hays Street Bridge Restoration Gp., No. 04–14–00886–CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017, pet. granted).

In June, the Texas Supreme Court granted the petition for review in *Hays Street Bridge Restoration Group v. City of San Antonio*. The *Hays Street Bridge* petition questions whether governmental immunity is waived for the remedy of specific performance under the Local Government Contract Claims Act (the "Act"), Texas Local Government Code §271.151, et seq. We have always said "no," and in a recent case we argued before the Austin Court of Appeals, the court seemed to agree. See *West Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*. For more information on that case, see the October 2017 issue of *The Lone Star Current*.

But in granting the petition for review in *Hays Street Bridge*, the Supreme Court has called that conclusion into question.

As has become familiar to governmental entities, the Act waives governmental immunity to certain breach-of-contract claims. On most claims, the Act waives immunity only for specific damages: (1) the balance due and owing; (2) reasonable attorney's fees; and (3) pre- and post-judgment interest.

Specific performance—i.e., a court order requiring the breaching party to perform under the contract—is only available under the Act with respect to claims arising from a contract for the delivery of large volumes of reclaimed water by a local governmental entity intended for industrial use. But there is no statutory language indicating that immunity is waived for specific-performance claims on other contracts, which makes the Supreme Court's action in *Hays Street Bridge* so concerning.

The case arises out of a contract to restore a bridge and create a surrounding recreational park. The Restoration Group agreed to raise matching funds for the project in return for the City's promise to allocate those funds. The City leased a parcel of land, which the Restoration Group claims was intended for its use, to a private company—Alamo Brewery. The Restoration Group sued, seeking specific performance of its agreement with the City. The San Antonio Court of Appeals concluded that immunity is not waived for specific performance, and the court has no jurisdiction to grant that remedy. The Restoration Group petitioned the Supreme Court to review that decision, and the Supreme Court has agreed to consider the appeal.

The Restoration Group argues that the Act's limitation on damages only pertains to monetary damages, and that nothing in the Act bars the alternative remedy of specific performance. The City argues that the Act does not expressly waive immunity for specific performance, and therefore it is unavailable. The City notes that the Legislature knows how to explicitly waive immunity for specific performance and did so in the narrow instance of contracting for reclaimed water.

The Supreme Court's review may be an opportunity to clarify the ambiguous language in *Zachry Construction Corporation v. Port of Houston Authority*. *Zachry* opened the door to widening the waiver with its broad language that the Act "allow[s] recovery of contract damages." In the wake of *Zachry*, courts have struggled with interpreting the Act's limitation on damages. So the court may want to slam shut the door it opened in *Zachry*, and hold that not all "contract damages"—in this case specific performance—are available under the Act. But there is also a risk—the Supreme Court may intend to expand the scope of the Act's waiver to grant an additional remedy (which is what it arguably did in *Zachry*).

Either way, it is reasonable to expect that the court has granted review with an eye toward one outcome or another.

The risk that specific performance may soon become a viable remedy in contract suits against governmental entities is a serious one. And for that reason, governmental entities will want to pay close attention to this case as it winds through the Supreme Court. Oral argument has not yet been set, but we anticipate that it will be scheduled for late fall.

Hughes v. Tom Green Cty., No. 03-16-00132-CV, 2017 WL 1534203 (Tex. App.—Austin Apr. 20,2017, pet. granted).

On June 22, 2018, the Texas Supreme Court granted review of this

case that addresses when a government's immunity is waived for breach of a settlement agreement to split proceeds of a claim to property.

Hughes's uncle, through his will, gave his mineral rights to two individuals for their lifetime benefit, with the remainder to Southern Methodist University ("SMU") to establish an endowed chair for the English Department; his home and rare book and music collection to the County, to establish the home as a library; and the residuary estate to the County, for the County to pay for the home/library. Later, SMU applied in probate court to use the funds for purposes other than to fund the chair position, as the chair had become fully funded by this time. The County intervened, arguing that because the chair was fully funded, it was entitled to the excess funds as part of the residuary estate. Hughes then intervened, arguing that the residuary to the County lapsed because the County had sold the home by this time. Hughes and the County settled, agreeing to split equally the proceeds of any settlement received from SMU. The County, Hughes, and SMU then entered into a settlement whereby SMU agreed to pay the County and Hughes $1M total.

Hughes then sued the County for breach of the Hughes-County settlement. The County filed a plea to the jurisdiction on grounds that it was immune from Hughes's suit, which the trial court granted and the Court of Appeals affirmed. The Court of Appeals explained that the County did not waive its immunity by voluntarily intervening in SMU's suit because it did not seek affirmative relief from Hughes, and did not make any claims for which Hughes filed defensive claims to invoke the waiver established by the Texas Supreme Court in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006) (holding a governmental entity that asserts claims for affirmative relief waives its immunity from suit as to related, defensive, claims, to the extent necessary to offset the governmental entity's claims). Because the County's immunity remained intact, the County was immune from a claim for breach of the settlement agreement, in accordance with the Texas Supreme Court's holding in *Texas A&M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002) (holding immunity is waived for a governmental entity's breach of a settlement agreement when the agreement resolved a claim for which the governmental entity's immunity was statutorily waived). The Court of Appeals also refused to apply a "waiver by conduct" exception to governmental immunity, rejecting Hughes's argument that the County waived its immunity by its conduct of breaching the settlement.

The Texas Supreme Court is considering two issues: (1) Does immunity from suit extend to mutually exclusive claims of title to mineral interests and proceeds of production passing in probate?; and (2) does immunity from suit extend to claims for breach of settlement agreements of mutually exclusive claims of title to mineral interests and proceeds passing in probate?

The Court's decision on this case may have an impact on governmental entities, as the decision will address the limits of governmental immunity when the government settles claims, and is alleged to have breached a settlement agreement. Further, the Court may address whether a government can waive its immunity by its conduct. Oral argument is scheduled for this fall.

Air and Waste Cases

AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality, 543 S.W.3d 703 (Tex. 2018).

In *AC Interests*, the Texas Supreme Court held that failure to meet the Texas Clean Air Act's ("TCAA") 30-day deadline for service of citation on the TCEQ did not require dismissal of the case. In this case, an applicant for emission-reduction credits appealed TCEQ's denial of its application and properly filed its petition in Travis County District Court by the 30-day filing deadline. In addition to the 30-day filing deadline, the TCAA requires that "[s]ervice of citation on the commission [TCEQ] must be accomplished within 30 days after the date on which the petition is filed" in district court. Although the applicant provided TCEQ with a copy of its petition two days after filing the petition in district court, the applicant did not formally serve citation on TCEQ until 58 days after filing. TCEQ moved to dismiss the case because the applicant failed to meet the 30-day service deadline, and the district court granted the motion, dismissing the case. When the applicant appealed, the Houston Court of Appeals affirmed the district court's dismissal. However, when the applicant appealed to the Texas Supreme Court, the Court granted review and reversed the judgments of the lower courts. The Court reasoned that because the TCAA does not specify a consequence for failing to meet the 30-day service deadline, dismissal of the case for failure to meet the service deadline is not necessary. Furthermore, the Court reasoned that the purpose of the service deadline—to ensure expediency in appeals—is not hindered by allowing cases to proceed when the service deadline is missed. For these reasons, the Court held that the service deadline is "directory" not "mandatory." In closing, the Court's opinion notes that while failure to meet the service deadline does not require dismissal, TCEQ can still argue that it was prejudiced by

the missed deadline. Upon a finding of prejudice, a court can order "abatement, attorney's fees, or expediting subsequent proceedings as appropriate," and, in "extreme situations" where TCEQ is prevented from adequately presenting its case, a court can still order dismissal.

In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. 16–cv–2210, No. 16–cv–5649, MDL No. 2672 CRB (JSC), 2018 WL 1796659 (N.D. Cal. Apr. 16, 2018).

On April 16, 2018, the U.S. District Court for the Northern District of California dismissed claims by counties in Florida and Utah that Volkswagen had violated Florida and Utah state law when it made post-sale software changes to a "defeat" device that allowed vehicles to perform better on emissions tests than during normal operation. This case came at the tail end of consolidated litigation over Volkswagen's defeat device. Volkswagen had already paid $9.23 billion in penalties and restitution plus $10.033 billion to establish a funding pool for buying back vehicles with the defeat device. Following this settlement, the state of Wyoming sued Volkswagen seeking penalties for violating a Wyoming law that prohibited the use of defeat devices in vehicles driven in the state. The district court dismissed this claim because the federal Clean Air Act ("CAA") explicitly preempted this law by providing that "[n] o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." The court's decision turned on the fact that installation of the defeat device occurred prior to the sale of vehicles. After Wyoming's claim was dismissed, counties in Florida and Utah sued Volkswagen under Florida and Utah laws that prohibited manufacturers from tampering with emission-detection devices after vehicles were sold. The district court held that this suit, too, should be dismissed. While the text of the CAA does not expressly preempt these state tampering laws, the court held that the structure and purpose of the CAA preempts them. The regulatory scheme that Congress created under the CAA gives the EPA authority to regulate vehicle emissions on a model-wide basis. States and local governments, on the other hand, regulate vehicle emissions only on an individual-vehicle basis. Thus, the CAA implies that states cannot regulate vehicle emissions on a model-wide basis, and the CAA preempts state law when it creates penalties for a manufacturer's post-sale software updates.

Union Pac. R.R. Co. v. Oglebay Norton Minerals, Inc., EP–17–CV–47–PRM, 2018 WL 1722175 (W.D. Tex. April 9, 2018).

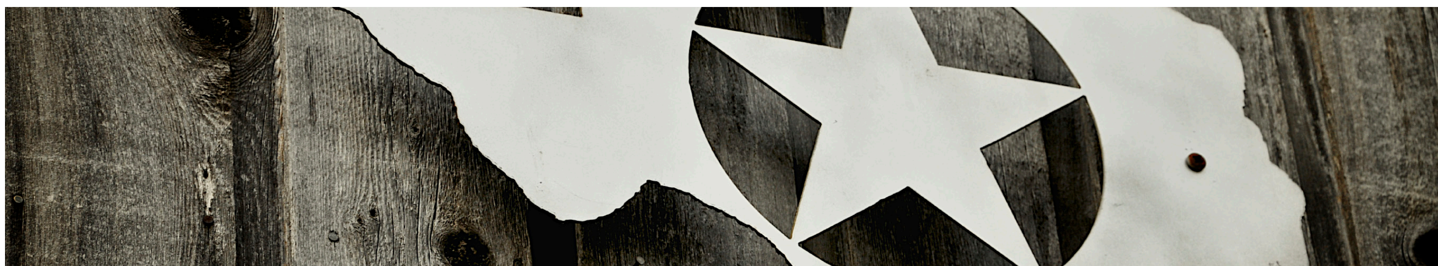
In *Oglebay Norton*, the U.S. District Court for the Western District of Texas held that a parent company was liable for environmental clean-up costs as an "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") after the parent company attempted to remediate a site and then abandoned it. In this case, Oglebay Norton Minerals, Inc. ("ONM") leased land from Union Pacific Railroad Co. ("UPR") and used the land to store copper slag. When TCEQ notified ONM that its storage of the slag was violating state environmental regulations, ONM began remediation efforts. ONM's parent company, Oglebay Norton Co. ("ONC") took over those efforts years later and conducted periodic remediation activities on the site. After failing to find a buyer for the slag, ONM terminated its lease with UPR and vacated the site, leaving the slag behind. UPR spent over four million dollars cleaning up the site and sued ONC under CERCLA to recover some of these costs. In response to UPR's claim, ONC argued that it was not an "operator" under CERCLA and that it had not "disposed" the slag at the site. Nevertheless, the district court held that because (1) the parent company's attempts to remediate hazardous waste at the site constituted operation of the site, and (2) abandoning the hazardous waste at the site constituted disposal of the waste, ONC was liable as an "operator" to UPR for the costs of environmental cleanup.

City of Laredo v. Laredo Merchs. Ass'n, No. 16-0748, 2018 WL 3078112 (Tex. June 22, 2018).

In *Laredo Merchants Association*, the Texas Supreme Court held that a state statute preempts the City of Laredo's (the "City") "bag-ban" ordinance. The City's ordinance made it "unlawful for any 'commercial establishment' to provide or sell certain plastic or paper 'check out' bags to customers." Section 361.0961(a)(1) of the Texas Solid Waste Disposal Act (the "Act") states that a local government may not adopt an ordinance that limits, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law. The City argued that this standard did not apply to the ordinance because (1) the ordinance was a form of "source reduction" rather than "solid waste management," (2) a bag is not a "container or package," and (3) the ordinance is "authorized by state law." The Court disagreed, holding that because "management" is defined in the Act as "the systematic control of the activities of generation, source separation, collection, [etc.] of solid waste," systematically limiting the generation of check-out bags falls within the meaning of "for solid waste management purposes." The Court also held that, in the absence of a statutory definition, the term "bag" fell within the plain language definition of "container or package." Lastly, the Court noted that, under the Act, cities are authorized to limit the sale or use of a container or package if the "manner" of limiting the sale or use is "authorized by state law." Thus, the Court held that in the absence of an express authorization by the Legislature to implement bag bans via ordinance, the ordinance was unauthorized and preempted by the Act. In a concurrence, Justice Guzman (joined by Justice Lehrmann) agreed with the Court's reasoning, but "urge[d] the Legislature to take direct ameliorative action" to address the impacts of check-out bags on the environment and industries, such as the cotton-ginning industry.

In the Courts *is prepared by Maris Chambers in the Firm's Districts and Water Practice Groups, James Parker in the Firm's Litigation and Employment Law Practice Groups, Tricia Jackson in the Firm's Air and Waste Practice Group, and Jamie Mauldin in the Firm's Energy and Utility Practice Group. If you would like additional information, please contact Maris at 512.322.5804 or mchambers@lglawfirm.com, James at 512.322.5878 or jparker@lglawfirm.com, Tricia at 512.322.5825 or tjackson@lglawfirm.com, or Jamie at 512.322.5890 or jmauldin@lglawfirm.com.*

AGENCY HIGHLIGHTS



Environmental Protection Agency ("EPA")

On May 14, 2018, the EPA promulgated new FAQs for the Dental Amalgam Rule. The Dental Amalgam Rule is codified at 40 Code of Federal Regulations ("CFR") Part 441. According to EPA, dental clinics are the main source of mercury discharged into publicly owned treatment works ("POTWs"), and collectively discharge 5.1 tons of mercury into POTWs each year. The Dental Amalgam Rule requires dental clinics that place or remove amalgam to operate and maintain an amalgam separator, to use certain types of cleaners, and to refrain from discharging scrap amalgam. EPA's newly promulgated FAQs address topics such as whether a dental discharger is considered an "industrial user," the oversight and enforcement responsibilities of "control authorities," record-keeping requirements, and the regulatory consequences for dental dischargers that fail to comply with 41 CFR Part 441. The FAQs also include a link to EPA's sample on-time compliance report for control authorities, and may be accessed at: https://www.epa.gov/sites/production/files/2018-05/documents/final_faqs_for_control_authorities_dental_category_final_rule_may_2018.pdf.

EPA Administrator proposes to "Strengthen the Science" in EPA regulations, 83 Fed. Reg. 18768; comment period extended, 83 Fed. Reg. 24255. On April 30, 2018, the EPA proposed a regulation, Strengthening Transparency in Regulatory Science, to be codified at 40 Code of Federal Regulations Part 30. 83 Fed. Reg. 18768. The regulation provides that when EPA develops regulations, the data must be made public in a manner sufficient for independent validation. This rulemaking effort is geared towards a growing recognition that a significant proportion of published research may not be reproducible, commonly known as the "replication crises." The EPA is extending the comment period on the proposed rule, which was scheduled to close on May 30, 2018, until August 16, 2018. 83 Fed. Reg. 24255. Interested parties may also submit written comments, identified by Docket ID No. EPA-HQ-OA-2018-0259, to the Federal eRulemaking Portal: http://www.regulations.gov.

EPA Drinking Water Needs Survey and Assessment Report to Congress. In March 2018, the EPA submitted the sixth Drinking Water Infrastructure Needs Survey and Assessment ("Assessment") report to Congress. The assessment concludes that "the nation's drinking water utilities need $472.06 billion in infrastructure investments over the next 20 years for pipes, treatment plants, storage tanks, and other key assets to ensure the public health, security, and economic well-being of our cities, towns, and communities." The Assessment breaks down total national need by System Size/Type, with Large Community Water Systems ("LCWS") defined as systems serving over 100,000 people, Medium Community Water Systems ("MCWS") defined as systems serving between 3,301 people and 100,000 people, and Small Community Water Systems ("SCWS") defined as systems serving fewer than 3,300 people. The Assessment reports the total national 20-year infrastructure need (in billions of January 2015 dollars) at $174.4 billion for LCWS, $210.6 billion for MCWS, and $74.4 billion for SCWS. Additionally, the total regulatory need (in billions of January 2015 dollars) for microbial regulation compliance is $37.6 billion, and the regulatory need for chemical regulation compliance is $20 billion. According to the Assessment, Texas has a total 20-year need of $45,151.3 million, with LCWS requiring $19,374 million, MCWS requiring $18,850.6 million, SCWS requiring $6,866.5 million, and not-for-profit community systems requiring $60.3 million. The Assessment may be accessed at: https://www.epa.gov/sites/production/files/2018-03/documents/sixth_drinking_water_infrastructure_needs_survey_and_assessment.pdf.

EPA Administrator Scott Pruitt resigns. On July 4, 2018, President Trump accepted the resignation of EPA Administrator Scott Pruitt. EPA Deputy Administrator Andrew Wheeler—who was confirmed by the Senate for that position in April—will serve as the acting EPA Administrator in the interim.

Texas Commission on Environmental Quality ("TCEQ")

Tucker Royall hired to serve as Committee Director and Senate Counsel for the Senate Committee on Natural Resources and Development. On May 21, 2018, Tucker Royall began his new position as Committee Director and Senate Counsel for the Senate Committee on Natural Resources and Development. Royall previously served as General Counsel at the TCEQ. The Senate Committee on Natural Resources and Development is chaired by Senator Brian Birdwell.

TCEQ has published a proposed rule relating to New Source Review Permits and Federal Operating Permits ("FOPs"), 43 Tex. Reg. 3302 (May 25, 2018). The proposed rule would amend 30 Texas Administrative Code ("TAC") Chapters 116

and 122 to revise air permitting procedures for New Source Review ("NSR") permit renewal notices and provide the option of using an electronic method to send these notices to permit holders. The proposed rule would also revise the procedures for sending FOP proposed final action notices to allow for the ability to send these notices electronically. The deadline for submission of comments on the proposed rule was June 26, 2018.

TCEQ has consolidated the permitting timeline for New Source Review Permits and Flexible Permits, under certain conditions, 43 Tex. Reg. 3379 (May 25, 2018). TCEQ has adopted a final rule amending 30 TAC Chapters 39 and 55 to implement a new Texas statute that consolidates the comment periods for a Notice of Receipt of Application and Intent to Obtain Permit ("NORI") and a Notice of Application and Preliminary Decision ("NAPD") into a single comment period when (1) the application is "administratively and technically complete" and (2) the TCEQ Executive Director prepares the permit within 15 days of receiving the application. The new, consolidated comment period is 30 days, while the former comment period was 30 days for the NORI followed by 30 days for NAPD. The 15-day turnaround that triggers this consolidated comment period will occur only in limited cases, such as when a permittee fails to renew a permit on time and wishes to reapply with no changes to the facilities that were previously permitted. A 15-day turnaround might also be achieved through use of a Readily Available Permit. If a public meeting occurs after the consolidated 30-day comment period, the comment period will automatically be extended to the date of the public meeting. The new rule does not disturb the existing general rule that an affected party must request a contested-case hearing within 30 days of a NORI. The rule became effective on May 31, 2018.

Texas has been granted Volkswagen mitigation funds, and TCEQ is developing a mitigation plan for the State. In January 2018, Texas became a beneficiary of the Volkswagen State Environmental Mitigation Trust ("the Trust") as part of Volkswagen's settlement with EPA and California following the discovery that the company had installed "defeat" devices that allowed vehicles to perform better on emissions tests than during normal operation. The Trust holds $2.9 billion, apportioned to states according to the number of affected Volkswagen vehicles registered in each state. Texas has been apportioned $209 million for use on projects that will reduce nitrogen oxide ("NOx") air emissions. Governor Abbott has assigned TCEQ as the lead agency responsible for administering these funds, and the agency is required to develop a Beneficiary Mitigation Plan that describes how the funds will be used. TCEQ is currently accepting public comments and recommendations on the use of the funds, and these may be submitted by email to VWsettle@tceq.texas.gov. No deadline is posted for submission of comments, but more information can be found on TCEQ's website under the Texas Volkswagen Environmental Mitigation Program.

The TCEQ published a final version of the revised "Guidelines for Preparing a Groundwater Sampling and Analysis Plan" for Municipal Solid Waste ("MSW") facilities. The revised guidelines were published in May 2018, and provide technical advice to owners and operators of MSW Type I landfills in developing plans for facilities in compliance with 30 TAC Chapter 330 and 40 CFR, Chapter 258. The TCEQ accepted comments on the draft revisions until August 31, 2017, and the final published document is currently available on the TCEQ's website.

The TCEQ published a final version of the revised "Surface Water Drainage and Erosional Stability Guidelines for a Municipal Solid Waste Landfill." The revised guidelines were published in May 2018, and address both hydrology and drainage issues, as well as erosional stability during all landfill stages. The guidelines also provide recommended procedures and suggestions for preparing a surface water drainage report in compliance with 30 TAC Chapter 330. The TCEQ accepted comments on the draft revisions until July 31, 2017, and the final published document is currently available on the TCEQ's website.

The TCEQ issued an Interoffice Memorandum on Administrative Updates to the Chapter 312 Sludge Rules. The memorandum was issued on May 4, 2018, and proposes to initiate the rulemaking process to clarify existing rule requirements with regard to sludge use, disposal, and transportation. The proposed rule is also intended to remove inconsistencies and improve readability of 30 TAC Chapter 312. Specifically, the proposed rule will prohibit the land application of grit trap and grease trap waste combined with domestic sewage sludge; require a processing permit to conduct initial lime stabilization at a land application site; and require that existing authorizations comply with the buffer zone requirements in § 312.44. The anticipated proposed rule date is October 17, 2018. The anticipated public comment period is from November 2, 2018 through December 5, 2018, and the anticipated adoption date is May 15, 2019. A copy of the memo is available at https://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/memos/17035312_concept_memo.pdf.

Public Utility Commission ("PUC")

Governor Abbott Appoints New Commissioner. On June 11, 2018, Governor Greg Abbott appointed Shelly Botkin to the PUC for a term set to expire on September 1, 2019. She presided over the June 14 Open Meeting. Shelly Botkin of Austin was acting as the director of Corporate Communications and Government Relations for the Electric Reliability Council of Texas, where she served since 2010. Botkin received a Bachelor of Arts in anthropology from Washington University in St. Louis.

Docket 45280, *Complaint of ExteNet Network Systems, Inc. against the City of Houston for Imposition of Fees for Use of the Public Right-of-Way*. ExteNet Network Systems, Inc.'s ("ExteNet") complaint against the City of Houston has been dismissed by the State Office of Administrative Hearing ("SOAH") Administrative Law Judges ("ALJs") in response to Houston's Motion to Dismiss for lack of jurisdiction. ExteNet filed the

complaint in October 2015, claiming that the city violated Chapter 283 of the Texas Local Government Code ("TLGC") and 16 TAC § 22.242 by imposing fees for use of the public rights-of-way. ExteNet argued that it was entitled to place its equipment in the right of way without being subject to a franchise fee because it is a Certificated Telecommunications Provider ("CTP") and subject to the provisions of TLGC Chapter 283. Chapter 283 exempts CTPs from municipal franchise fees and subjects CTPs to a state-wide regulatory scheme wherein each CTP is assessed a fee based on the number of access lines it has in a city's public right of way.

However, the 85th Legislature enacted a new chapter addressing municipal fees for network nodes, transport facilities, and node support poles, codified at TLGC Chapter 284, which became effective on September 1, 2017. Chapter 284 provides that a municipality may not require a network provider, such as ExteNet, to pay any compensation other than the explicitly authorized compensation authorized by Chapter 284. The PUC opened a generic proceeding to determine the effect the enactment of Chapter 284 has on the PUC's jurisdiction under Chapter 283 with respect to network nodes, transport facilities, and node support poles constructed by a network provider. After briefing on the legal issues, the PUC issued a declaratory order stating that as of September 1, 2017, it does not have any authority under Chapter 283 to set compensation for, or address complaints regarding, a CTP's access to municipal rights-of-way if that CTP is also a network provider and the access is for network nodes, node-support poles, or transport facilities.

After the PUC issued this declaratory order, the City of Houston filed a motion to dismiss ExteNet's complaint. The ALJs agreed with the City and PUC Staff that there were no remaining issues to be determined under TLGC Chapter 283. In Order No. 7, signed on June 7, 2018, the ALJs set a deadline of June 21 for the City to file proposed findings of fact and conclusions of law, with a responsive filing by ExteNet due on June 28. The ALJs specifically prohibited the parties from including any argument in their proposed findings and conclusions.

Likewise, Docket No. 46914, ExteNet's complaint against the City of Beaumont, has also been dismissed. This matter had been inactive while the parties awaited the PUC's order in the generic docket brought to determine the scope of the PUC's jurisdiction over matters involving Chapter 284 of the Local Government Code. During that time, ExteNet and the City were able to agree on design standards for network nodes in areas of the City with historic designation, and this agreement prompted the filing of an Agreed Motion to Dismiss with Prejudice. The Motion was granted, and the case was dismissed on June 5, 2018.

Docket 48401, *Application of Texas-New Mexico Power Company for Authority to Change Rates*. On May 30, 2018, Texas-New Mexico Power Company ("TNMP") filed an Application and Statement of Intent for Authority to Change Rates at the PUC and in affected cities. This is the first rate case TNMP has filed in over eight years. TNMP has a projected cost of service of approximately $331.9 million, which is based on its reasonable and necessary expenses and a return of 8.85% on its rate base of $851.8 million. This cost of service results in a revenue deficiency of $31.3 million on a Texas retail basis, and requires an increase of 13.18% over annualized revenues at current base rates.

TNMP has also completed execution of its Advanced Metering System ("AMS") deployment plan. The PUC previously approved reconciliation of TNMP's AMS costs through August 1, 2015. The current filing includes a reconciliation of AMS costs incurred between September 1, 2015 and March 31, 2018. With those costs reconciled, TNMP proposes to include ongoing AMS costs in base rates, to eliminate the AMS surcharge, and to amortize under-collected AMS costs.

In addition, TNMP seeks to recover the restoration costs that TNMP incurred as a result of Hurricane Harvey's impact to TNMP's Gulf Coast customers. TNMP also requests the PUC to approve Rider AVM that will allow TNMP to move to a cycle-based vegetation management program.

A prehearing conference was held June 19 and parties have begun discovery.

Railroad Commission of Texas ("RRC")

GUD No. 10669, *Statement of Intent of CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas to Increase Rates in the South Texas Division*. On June 5, 2018, the RRC approved a unanimous stipulation in CenterPoint's South Texas Division. On November 16, 2017, CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint") filed a Statement of Intent to change gas rates in its South Texas service territory. Within its South Texas Division, CenterPoint provides service to 142,288 customers (132,129 residential customers). CenterPoint requested a rate increase of $540,000, which is a 1.0% increase in revenues, excluding gas costs. CenterPoint also asked for a $0.39 surcharge related to Hurricane Harvey. Together, these proposed increases would have raised the average residential bill by $1.13. On January 1, 2018, the Tax Cut and Jobs Act of 2017 went into effect, lowering the corporate tax rate from 35% to 21%. On January 9, 2018, CenterPoint filed an Errata to its testimony, which reduced CenterPoint's requested rate increase to $490,778.

Two different coalitions of cities intervened, along with RRC Staff. The parties conducted extensive discovery and eventually came to a unanimous negotiated settlement. Parties agreed to a $3.0 million decrease in CenterPoint's annual revenues. This is a $3.5 million reduction to the $490,778 increase requested by CenterPoint in its Errata to its Statement of Intent. The Settlement also approves the Company's proposal to recover $675,992 in expenses related to Hurricane Harvey restoration of service via a surcharge until the full amount is recovered. The Settlement Agreement also increases the residential monthly customer charge to $19.00, and approves the recovery of reasonable rate case expenses through a surcharge on customers' bills.

GUD No. 10679, Statement of Intent of SiEnergy, LP to Increase Gas Utility Rates in Central and South Texas. On June 19, 2018, the RRC approved a unanimous

stipulation in SiEnergy, LP's ("SiEnergy") rate case. On January 5, 2018, SiEnergy filed a Statement of Intent seeking to increase gas utility rates within the incorporated areas served by SiEnergy in Central and South Texas. The affected municipalities include Conroe, Fulshear, Missouri City, and Sugar Land. In the filing, the Company asserted it was entitled to a $400,000 revenue increase in the incorporated areas or a 35% increase over current adjusted revenues, excluding gas costs.

All four affected cities and the RRC Staff intervened and conducted extensive discovery. Parties ultimately came to a unanimous negotiated settlement agreement, which increased SiEnergy's adjusted test-year revenues by $1.771 million—a reduction of SiEnergy's original request of $2.27 million. The settlement agreement also reduces the company's corporate income tax rate from 35 percent to 21 percent to reflect changes in the Federal Tax Code due to the Tax Cuts and Jobs Act of 2017.

Electric Reliability Council of Texas ("ERCOT")

ERCOT Files State of the Market Report. In May, ERCOT filed its annual State of the Market report prepared by the Independent Market Monitor ("IMM"). The report reviews and evaluates the outcomes of the wholesale electricity markets in 2017. The report also includes assessments of the incentives provided by the current market rules and analyses of the conduct of market participants.

The report finds that overall, the ERCOT wholesale market performed competitively in 2017 and includes several key findings and results from 2017.

First, higher natural gas prices led to higher energy prices in 2017. The ERCOT-wide load-weighted average real-time energy price was $28.25 per megawatt hour ("MWh") in 2017, which was a 14.7% increase from 2016 prices. The report shows that market conditions were rarely tight and that real-time prices did not exceed $3,000 per MWh in 2017. Market conditions exceeded $1,000 per MWh for only 3.5 hours cumulatively for the year.

Additionally, the peak hour demand in ERCOT was 69,512 megawatts ("MW") in 2017, a 2.2% decrease from the all-time hour demand record of 71,110 MW set on August 11, 2017. However, the report finds that average demand increased 1.9% in 2017.

The total congestion costs in the real-time market increased 95% in 2017, totaling $967 million. Three factors contributed to this substantial increase over 2016 costs: (1) continued limitations on export capacity from the Panhandle; (2) planned outages associated with construction of the Houston Import Project; and (3) unusual operating conditions in the aftermath of Hurricane Harvey.

Net revenues provided by the market were less than the estimated amounts necessary to support new greenfield generation investment, which is not a surprise given that planning reserves were above the minimum target and shortages were again rare in 2017. The report states that the Operating Reserve Demand Curve ("ORDC"), combined with a relatively high offer cap, should increase net revenues when shortages become more frequent.

The report finds that though the market performed competitively, the IMM recommends a number of key improvements to ERCOT's pricing, resource commitment process, and dispatch. All but one of the recommendations are repeated recommendations from prior years.

The IMM's new recommendation is to pay locational prices to all generators with output that affect a transmission constraint. Generators less than 10 MW and connected to the transmission systems do not have the same obligations as larger generators and are settled at the load zone price, not a location-specific price. The load zone prices are much lower than locational prices. The report states that current zonal pricing for smaller generators fails to provide efficient incentive to relieve a transmission constraint. This change would result in all generators with output affecting a transmission constraint to receive a locational price.

The IMM's repeat recommendations include: (1) improving real-time operations and resource performance by evaluating policies and programs that create incentives for loads to reduce consumption for reasons unrelated to real-time energy prices; (2) modifying the real-time market software to better commit load and generation resources that can be online within 30 minutes; (3) considering marginal losses in locational marginal pricing; (4) pricing future ancillary services based on the shadow price of procuring the service; and (5) evaluating the need for a local reserve product.

The IMM again urged implementing real-time co-optimization of energy and ancillary services as its highest priority recommendation. The PUC approved ERCOT's proposed plan to further assess the benefits of implementing real-time co-optimization and marginal losses in December of 2017 in PUC Project No. 47199. The IMM has developed software to estimate the benefits of co-optimization by simulating it in historic periods and will conduct this simulation for 2017 using publicly available data. The IMM expects to submit its results to the PUC this month and will make the software, input data, and results available to all market participants to facilitate transparency and understanding of the results. A copy of the IMM report can be accessed at https://www.potomaceconomics.com/wp-content/uploads/2018/05/2017-State-of-the-Market-Report.pdf.

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