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WAVE OF ELECTRIC UTILITY RATE CASES EXPECTED IN 2019

by Patrick Dinnin

The Public Utility Commission of Texas (PUC) has recently begun reviewing electric utilities' base rates, and it is expecting a busy 2019. In April 2018, the PUC adopted a new rule in 16 Texas Administrative Code § 25.247 (the Rule), requiring nine electric utilities to file rate case proceedings pursuant to the schedule listed in the rule. The filing schedule lists deadlines ranging from August 2018 to October 2021, and AEP Texas, Inc. (AEP Texas) and CenterPoint Energy Houston Electric, LLC (CenterPoint) are both due to file this year. The PUC has also ordered Southwestern Public Service Company (SPS) to file a rate case during 2019, which is not included in the new Rule's schedule. As these agencies and interested parties participate in the ongoing rate cases and prepare for these upcoming filings, it is helpful for cities to have an understanding of what these cases may mean for municipalities who are regulatory authorities with rate setting power as well as ratepayer citizens.

Recent Rate Cases

Texas-New Mexico Power Company (TNMP) was the first utility required to file its rate case under the new PUC Rule. Accordingly, on May 30, 2018, TNMP filed its application for authority to change rates in Commission Docket No. 48401 (ahead of its August 31 deadline). Cities Served by TNMP participated throughout the rate making proceedings. The PUC issued a final order on December 20, 2018, approving an increase in TNMP's rates by $31.3 million.

Next, Wind Energy Transmission Texas, LLC (WETT) is required by the PUC's Rule to file a rate case by October 1, 2019. However, due to its reported $16.4 million over-earning in 2017, WETT was ordered by the PUC on October 16, 2018 to file a base rate proceeding by February 13, 2019, sooner than the rule requires. The PUC later rescinded that order when the company came to an agreement with PUC Staff to decrease its transmission cost of service and wholesale transmission service rate by $16 million in Docket No. 48874. The decreased rate took effect on January 1, 2019. This was the second time in six months that WETT agreed to voluntarily reduce its rates.

Rate Cases Expected to be Filed in 2019

As noted above, the PUC is anticipating rate case filings from AEP Texas, CenterPoint, and SPS in 2019.

AEP Texas serves more than one million customers throughout the deregulated Texas marketplace, with transmission facilities covering nearly 100,000 square miles in south and west Texas. Pursuant to the schedule in the PUC's Rule, AEP Texas is required to file its rate case by May 1, 2019. This will be AEP Texas' first rate case filing since 2006.

CenterPoint serves more than 2.5 million customers in the greater Houston area. While CenterPoint is required by the PUC's Rule to file before July 1, 2019, we expect that it will file its rate case early, around the beginning of April 2019. This will be CenterPoint's first rate case filing since 2010.

Additionally, pursuant to the PUC's Order in Docket No. 47527, SPS must file its next base-rate case no later than December 31, 2019. We expect that SPS will file sooner than the December deadline, likely in the spring or summer of 2019. This will be SPS's first rate case filing since 2016.

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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

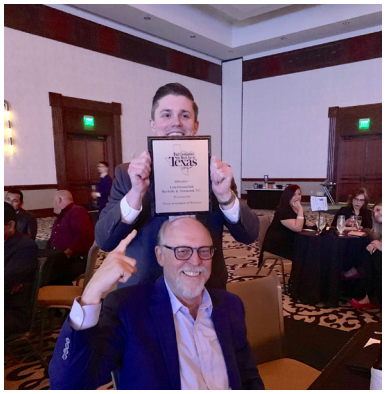
Lloyd Gosselink Celebrates 35 Years!

What started as a four-attorney law firm has grown to 30 attorneys and a total of more than 75 team members. We have expanded beyond the firm's initial practice areas (environmental and utility law), and have grown to include practices in litigation, employment law, and business transactions, with a long history of serving public and private clients throughout Texas. We have remained faithful to our founding mission of delivering top-quality, cost-effective legal representation and working with clients to develop innovative solutions to legal problems, while maintaining the highest professional standards.

Lloyd Gosselink has been named one of the Best Places to Work in Texas every year since 2012 and we have fostered the growth of numerous young Rising Stars. Our ranks are filled with Super Lawyers, Best Lawyers, and lawyers who have achieved the highest ranking in legal ability/ethical standards by Martindale-Hubbell.

More important than any of these recognitions, however, is the trust and confidence our clients have placed in us. We know that successes over time are only possible because of collective efforts. Therefore, we take this opportunity to thank you for your support you have shown us over the years.

We look forward to many more years of service and extend a heartfelt appreciation to all the people who have made the firm a great success.



We are proud to announce that for the eighth year in a row, Lloyd Gosselink has been selected for inclusion in the Texas Association of Business' list of 100 Best Companies to Work For in Texas. The awards program is a project of Texas Monthly, Texas Association of Business, Texas SHRM, and Best Companies Group. In the Small Companies category, we were #10 and the highest-ranked law firm in that category. Since 1984, we have dedicated ourselves to building a culture where people are happy to come to work. The result? We retain excellent employees, attract the brightest minds, and create the best teams to serve our clients. Our greatest thanks go out to our employees and clients for their support over the years -- without you, we wouldn't be us.

Samuel L. Ballard has joined the Firm's Air & Waste and Compliance & Enforcement Practice Groups as an Associate. Sam assists clients with matters involving air permitting and enforcement; solid waste management permitting and enforcement; environmental due diligence in real estate transactions; and Innovative Technology

Evaluation Applications concerning Best Management Practices. Prior to joining the Firm, Sam worked at a civil litigation defense firm in Houston. While in law school, Sam clerked for the Environmental Protection Agency Office of Regional Counsel and also interned with the Texas Commission on Environmental Quality in college. Sam now relies on his past experiences in defending clients in compliance and enforcement actions against these same agencies. Sam received his doctor of jurisprudence from Texas Tech University School of Law and his bachelor's degree from Baylor University.

Sarah T. Glaser has joined the Firm's Employment Law and Litigation Practice Groups as an Associate. Sarah represents employers in all aspects of employment, including hiring, administration of leave programs, performance counseling, work-place safety, and the many issues that may arise as a result of the termination of an employment relationship. Sarah advises her clients with the goal of providing efficient, cost-effective representation rooted in an understanding of the business. Although litigation avoidance is always a goal, Sarah also represents clients in front of federal and state courts and administrative agencies, such as the EEOC. Sarah was named a Texas Super Lawyers 2019 Rising Star in the area of Employment Litigation Defense. Sarah received her doctor of jurisprudence from the University of Texas School of Law and her bachelor's degree from Washington University in Saint Louis.

Hanna E. Campbell has joined the firm as a Paralegal in our Energy & Utility Practice Group. Hanna came to us with over four years of experience as a Litigation Paralegal performing in-depth trial preparation, drafting, and research across a wide range of subject matters including family law, personal injury, and medical malpractice. She was Valedictorian of her Paralegal Certification program at the University of Texas, and she graduated *cum laude* from Trinity University in San Antonio with a bachelor's degree in English.

Hayley M. Napier has joined the firm as a Paralegal in our Water Practice Group. Prior to joining the firm, Hayley worked for an asbestos defense firm as a Legal Secretary. She has experience conducting legal research and managing large caseloads. Hayley received her bachelor's degree in Criminal justice with a Minor in Psychology from Radford University.

Congratulations to our 2019 Texas Rising Stars!

STEFANIE ALBRIGHT
ENERGY & NATURAL RESOURCES

NATHAN VASSAR
ENVIRONMENTAL

SARAH GLASER
EMPLOYMENT LITIGATION

We are proud to announce the selection of **Stefanie P. Albright**, **Nathan E. Vassar**, and **Sarah T. Glaser** to the 2019 Texas Rising Stars list. Only 2.5% of attorneys in Texas receive this distinction, so this is quite an honor for these attorneys and our Firm.

The Rising Stars list is compiled by Super Lawyers, a rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Attorneys designated as Rising Stars are up-and-coming attorneys who are 40 years old or younger or who have been in practice for 10 years or less. Super Lawyers selects attorneys using a patent multi-phase selection process that includes independent research, peer nominations, and peer evaluations.

We are proud of Stefanie, Nathan, and Sarah for this outstanding achievement. It is an honor and we thank them for always providing excellent legal representation to our esteemed clients.

A three to zero vote may be valid under a particular city's charter when three of the six city councilmembers do not vote by reasons of absence, resignation, and recusal required by law. Tex. Att'y Gen. Op. KP-0231 (2019).

The City of Fulshear (City) sought an opinion by the Attorney General (AG) to determine whether the City Council had violated the City's Charter by allowing three of the six councilmembers to vote on and pass an agenda item.

Of the six councilmembers, only four were physically present for the vote in question, as the fifth councilmember was absent and the remaining seat was vacant due to a resignation. Importantly, one of the four present members recused herself on the agenda item in question due to a filed conflicts disclosure statement (the Conflicted Member). The agenda item passed by a vote of three to zero, and thereafter, the City put the validity of the vote into question due to certain provisions in the City's Charter.

The City's Charter requires that each vote or action taken by the City Council receives a majority vote of the full Council, "provided that any abstention not required by law should be counted as a vote against the matter . . . [and] provided that any one or more Council Members required by law to abstain from voting on a particular matter shall be excluded for purposes of determining the majority." FULSHEAR, TEX. CITY CHARTER, art. III, § 3.09(c) (2016).

Because a majority of the full City Council would be four, the AG reasoned that the question of whether a vote of less than four constitutes a majority depends on whether any Council member was "require[d] by law to abstain from voting" on the matter. As the Charter did not define this phrase, the AG pointed to several state statutes as examples of laws requiring local government officials to abstain from voting on particular matters. See, e.g., Texas Local Government Code (TLGC) § 171.004 (requiring a local public official with a substantial interest in a business entity or real property in a matter before the governmental body involving the interest to file an affidavit and abstain from voting in certain circumstances).

The Conflicted Member claimed to have filed her disclosure statement pursuant to two separate laws. The first, TLGC § 176.003, requires a local government officer to file a conflicts disclosure statement with respect to a vendor if the vendor has certain employment or business relationships with the local government officer. However, as § 176.003 does not contain a specific requirement that the local government officer abstain from voting on a contract, the AG determined it does not qualify as a law requiring abstinence from voting.

The second source the Conflicted Member relied upon in her filed disclosure statement was Texas Disciplinary Rules of Professional Conduct 1.10(e)(1). Because the Conflicted Member was a licensed attorney at the time of the vote, she was bound by the Texas Disciplinary Rules of Professional Conduct, which are promulgated by the Texas Supreme Court. Rule 1.10(e)(1) provides that a lawyer serving as a public officer "shall not . . . [p]articipate in a matter involving a private client when the lawyer had represented that client in the same manner while in private practice or nongovernmental employment . . . . " Texas Disciplinary Rules of Professional Conduct R. 1.10(e)(1), *reprinted* in Texas Government Code (TGC), tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

Unlike the first source, the AG determined that the second source of law relied upon by the Conflicted Member qualified as a law requiring abstinence from voting. First, rules promulgated by the Texas Supreme Court have "the same force and effect as statutes." *In re Silver*, 540 S.W.3d 530, 534 (Tex. 2018). Thus, if the Conflicted Member was expressly required by Rule 1.10(e)(1), or any other such rule or statute, to abstain from voting on the matter at issue, the Conflicted Member could be considered as being "required by law to abstain from voting" under the Charter.

In other words, the recusal of the Conflicted Member would result in a valid three-zero vote only in the event that it was a response to a particular law explicitly requiring that she abstain from the vote. Thus, the three-zero vote withstood the AG's analysis under the Charter's majority definition.

Although the "Nepotism Statute" prohibits public officials from employing relatives within a certain degree of consanguinity or affinity, the employment is allowable to the extent that the employed relative worked in the office for at least one year prior to the appointment or election of the related public official. Tex. Att'y Gen. Op. KP-0238 (2019).

The so-called "Nepotism Statute," TGC § 573.041, generally prohibits a public official from appointing a person, compensated from public funds, who is related to the public official within the specified degree of consanguinity or affinity. This issue has

also been addressed in a 2006 opinion where the AG stated that "Section 573.041 applies to an officer who 'may exercise control over hiring decisions, even if the officer refrains from confirming, appointing, or voting in a particular case.'" Tex. Att'y Gen. Op. No. GA-0419 (2006) at 2. The AG also opined that "in the case of an at-will employee, it is presumed that a public official makes a new decision each month to retain the employee." Tex. Att'y Gen. Op. No. GA-0121 (2003) at 3.

Here, the AG addressed whether a county tax assessor-collector may employ her sister-in-law. Given that relationships within the third degree of consanguinity or second degree by affinity are prohibited, a sister-in-law is within the prohibited degree of affinity. TGC §§ 573.023, .024(a)(2), and .025(a).

Thus, ordinarily, the sister-in-law would be prohibited from being supervised or employed under her tax assessor-collector relative. However, the AG noted that this was a situation in which the relative tax assessor-collector had not yet been appointed; rather, the current tax assessor-collector merely planned to retire prior to the end of her term, and one of the people seeking appointment to fill the vacancy was the relative tax assessor-collector (Related Public Official). The sister-in-law (Related Employee) had already been employed by the tax office for over six years.

Interestingly, the law carves out an exception for precisely these circumstances. The exception applies when people have been continuously employed for certain periods of time, depending on the nature of the office of the public official. TGC § 573.062. Under this law, the person must be "employed in the position immediately before the . . . appointment of the public official to whom the [person] is related in a prohibited degree," and the employment must be continuous for "one year, if the public official is elected at the general election for state and county officers." TGC § 573.062(a)(l), (2).

The office of the Related Public Official was the office of county tax assessor-collector, which is an elective office, elected at the general election for county officers. See TEX. CONST. art. VIII, § 14 ("The qualified voters of each county shall elect an assessor-collector of taxes for the county, except as otherwise provided by this section."); TLGC § 87.041(a)(8) (authorizing a commissioners court to appoint a county tax assessor-collector to fill a vacancy until the next general election); see also Tex. Att'y Gen. Op. No. JM-253 (1984) at 1 (recognizing that the county tax assessor-collector holds an elective office but that the commissioners court is authorized to fill a vacancy in the office until the next election). Thus, the relevant period under § 573.062(a) was one year for the Related Employee. TGC § 573.062(a)(l), (a)(2)(C).

The AG went on to explain that the starting date for calculating the continuous employment was the first day the tax office employed the Related Employee in her position, citing Tex. Att'y Gen. Op. Nos. GA-1024 (2013) at 2 and GA-1016 (2013) at 3. The ending date for calculating the continuous employment was the date the Related Public Official assumed office. See *Bean v. State*, 691 S.W.2d 773, 775 (Tex. App.—El Paso 1985, pet. ref'd); see also Tex. Att'y Gen. Op. No. GA-1016 (2013) at 3. Thus, the AG determined that there had to be at least one year between the date of the Related Employee's employment and the date the Related Public Official assumed the office of tax assessor-collector.

To the extent that the Related Employee had at least one year of continuous employment in her position in the tax office prior to the Related Public Official's appointment to tax assessor-collector, the Related Employee's continued service satisfied the requirement under TGC § 573.062, and her continued employment did not violate the Nepotism Statute.

Municipal Corner *is prepared by Jacqueline Perrin. Jacqueline is an Associate in the Firm's Districts Practice Group. If you would like additional information or have any questions related to these or other matters, please contact Jacqueline at 512.322.5839 or jperrin@lglawfirm.com.*

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What Cities can Expect

With each of these rate proceedings, municipalities can expect higher rates for electric service. When utilities file base rate cases, they most often file to raise rates in order to cover increasing costs required to run the utility.

City groups who intervene in rate cases analyze the utility's filings and make specific, targeted recommendations to ensure reliable service and reasonable rates. Recently, city groups successfully negotiated a lower increase with TNMP in its base rate proceedings than it originally requested. In fact, cities' participation regularly reduces the authorized increase from the original utility request. In sum, all ratepayers benefit from municipal participation in rate cases, as these city groups are often the most powerful consumer advocates and affect the most change in overall authorized rate increases.

Conclusion

Calendar year 2019 will be an eventful and contentious year for the PUC, as it navigates its way through the first wave of base rate proceedings required by its new Rule. These proceedings will impact municipalities acting as regulatory authorities, as well as ratepayer citizens. Municipalities must remain vigilant of these proceedings for not only how the proceedings impact them directly, but how ratemaking precedent may be established that could have far-reaching impacts on future rate cases. If you think your city will be affected by one of these rate cases, please contact us for more information.

P*atrick Dinnin is an Associate in the Firm's Energy and Utility Practice Group, and his practice focuses on a wide range of utility regulatory and ratemaking matters. If you would like additional information or have questions related to this article or other matters, please contact Patrick at 512.322.5848 or pdinnin@lglawfirm.com.*

PERFLUORINATED CHEMICALS IN THE ENVIRONMENT: HOW THE EPA'S PFAS ACTION PLAN EXPANDS LIABILITY FOR POTENTIALLY RESPONSIBLE PARTIES

by Samuel L. Ballard

Introduction

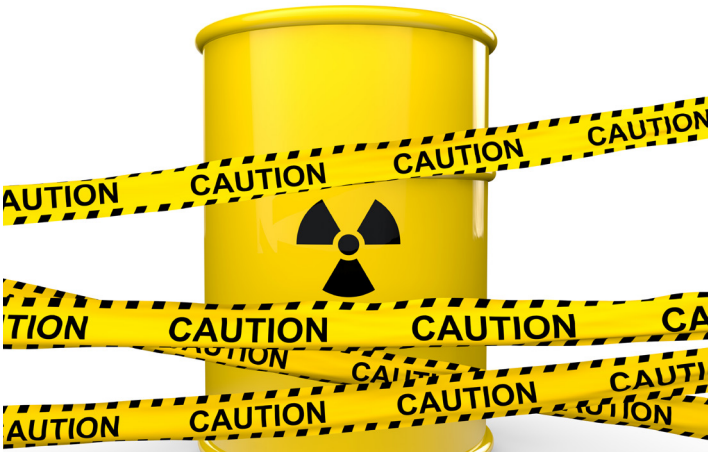
On February 14, 2019, the United States Environmental Protection Agency (EPA) released its much-anticipated PFAS Action Plan (the Plan), concerning the regulation of per- and polyfluoroalkyl substances (PFAS). Pursuant to the Plan, EPA initiated the regulatory development process to list PFAS as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which could dramatically expand the number of potentially responsible parties and cleanup costs at CERCLA sites.

EPA historically addressed these chemicals through a stewardship program under which companies that manufactured PFAS agreed to voluntarily halt their production, and companies that used PFAS agreed to stop importing them. However, based on data collected in 2016 from EPA's third unregulated contaminant monitoring rule, the Agency found that 66 different public water systems, which serve six million people, had PFAS drinking water concentrations above EPA's Lifetime Health Advisory. As a result, EPA put forth the current Plan, calling it "the most comprehensive, cross-agency action plan for a chemical of concern ever undertaken by the Agency." At this stage, the PFAS Action Plan serves as a guide for future rulemaking, as EPA has not yet proposed any rule changes pursuant to the Plan. However, the Agency plans to engage in rulemaking as early as this year to begin carrying out the Plan's short-term goals, at which time industry and the public will have an opportunity to comment.

What are PFAS?

PFAS are comprised of a diverse group of man-made chemicals, which are used in a variety of industries for their stain-resistant, waterproof, and nonstick properties. Specific PFAS-based products include water resistant clothing and athletic equipment, non-stick cookware, stain-proof and waterproof carpets, water and grease resistant food packaging, fire¬fighting foam, shampoos and dishwashing liquids, and even sticky notes. PFAS also have a range of applications in aerospace, aviation, automotive, and electronic industries.

EPA has compiled a Master List of PFAS, encompassing over 5,000 different chemical compounds. Studies have shown that many PFAS are carcinogens or reproductive toxicants—which can cause fertility issues, hormone disruption, immunological deficiencies, and interfere with child learning development. Furthermore, PFAS are referred to as "forever chemicals" because they are extremely persistent in the environment and do not readily break down. As such, the Plan aims to both reduce PFAS use, contamination, and exposure to protect human and environmental health.



Plan Outline

Specifically, the PFAS Action Plan consists of 23 priority actions that generally impact four areas: (1) groundwater; (2) drinking water; (3) human health risks; and (4) chemical and consumer product regulation. The majority of these action items are short-term with a two-year completion date, including data collection and sharing, risk communication, development of improved testing and treatment methods, and Significant New Use Rules under the Toxic Substances Control Act. The Plan also lays out long-term actions, including listing PFAS in the Toxic Release Inventory, which tracks the release of chemicals into the environment, and evaluating effluent limitation guidelines for PFAS, as well as ambient water quality criteria to aid states in setting permit limits on discharges of PFAS into waterbodies. The Plan also sets a short-term goal of designating two specific types of PFAS—Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA)—as CERCLA "hazardous substances." The designation would provide EPA with additional authority to address PFOS and PFOA contamination in groundwater by forcing potentially responsible parties to implement and/or pay for groundwater cleanup actions. In addition, EPA is developing interim recommendations to guide state agencies in making site-specific cleanup determinations.

The Plan further seeks to set Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act for both PFOS and PFOA. Such a significant step will require notice and comment rulemaking.

Additionally, the Plan calls for heightened PFAS research, including the development of new analytical methods to detect more PFAS chemicals in the environment. The Centers for Disease Control and Prevention

and the Agency for Toxic Substances and Disease Registry are promoting these research efforts by assessing specific communities near current or former military installations to determine human exposure to PFAS. In fact, a military installation in Lubbock County, Texas, near the Reese Technology Center, was identified in the Plan as a research subject. The results of these exposure assessments will help communities better understand the extent of their environmental exposure to PFAS.

State Action

Although the Plan calls for a wide range of actions to address PFAS, many states have already begun to push forth their own policies.

For example, Washington, Minnesota, Michigan, Kentucky, Virginia, New York and Connecticut, have taken steps to prohibit PFAS in firefighting foam. Washington, Kentucky, New York, Connecticut, Rhode Island, Massachusetts, and Vermont have taken steps to prohibit PFAS in food packaging. In addition, Washington, Florida, California, Oregon, and Vermont are taking steps to address reporting of PFAS discharges or use in products. Furthermore, California and Michigan have established specific PFAS monitoring requirements for water systems.

And despite the Plan's call for the development of MCL standards, seven states (Alaska, California, Minnesota, New Hampshire, New Jersey, New York, and Vermont) have already implemented policies to set MCL standards that are more stringent than EPA's current health advisory of 70 parts per trillion for PFOA and PFOS.

Some states have already developed specific PFAS testing requirements for biosolids/sludge program licensees and composting facilities before any additional land application of these materials is permitted. For example, the Maine Department of Environmental Protection now requires licensed facilities that land apply, compost, or process biosolids (i.e. wastewater treatment sludge) to test this material for PFAS before application. This state requirement was implemented in response to dairy farms shutting down in Maine after they became contaminated with PFAS from sludge spread on the farmland.

Finally, a handful of states, including Minnesota, New York, and New Jersey, have brought suit against manufacturers of products that historically contained PFAS, under theories of natural resource damage, trespass, nuisance, and negligence. The New Jersey litigation is particularly interesting because it began with the New Jersey Department of Environmental Protection (NJDEP) issuing a directive to five chemical manufacturing companies that it believed contributed to PFAS contamination throughout the state. The directive requires these companies to provide a detailed accounting of their historical use and discharge of PFAS and emphasized that the companies would be held financially responsible for remediation costs of any contaminated sites. Shortly after issuing the directive, NJDEP filed suit seeking cleanup and removal costs against the potentially responsible parties.

Although the Texas Commission on Environmental Quality (TCEQ) has not yet addressed the Plan, it will be interesting to see how the agency responds.

Conclusion and Recommendations

The increasing focus of PFAS at the state and federal level may have wide-sweeping effects in the years to come. The PFAS Action Plan could significantly impact compliance obligations and costs, increase enforcement actions, and trigger future litigation. This is especially true considering that a core focus of the Plan involves designating PFAS as "hazardous substances" under CERCLA, thereby expanding the scope of potentially responsible parties that may manufacture, use, or dispose of these substances. Therefore, it is imperative that parties dealing with PFAS—including manufacturers, municipalities, utilities, buyers, and purchasers of contaminated real estate—stay informed on the regulatory changes.

Sam Ballard is an Associate in the Firm's Air & Waste and Compliance & Enforcement Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact Sam at 512.322.5825 or sballard@lglawfirm.com.

ACTION TO PROTECT ENVIRONMENTAL RESOURCES: LESSONS FROM THE CITY OF CLEBURNE AND JOHNSON COUNTY'S FIGHT TO PROTECT ITS DRINKING WATER

by James Parker, Maris Chambers, and Emily Linn

For cities, counties and other public utilities and districts, protecting environmental resources from pollution is a paramount concern. When a regulatory body issues a registration or permit that threatens a public resource, it is important to understand the full scope of legal tools that can be used to protect your environmental assets. Illustrating the tools available in a recent case, the City of Cleburne (Cleburne), in conjunction with Johnson County, engaged a multiple-venue front to protect the City's primary drinking water source. The Texas Commission on Environmental Quality (TCEQ) issued a domestic-septage registration to a Johnson County Operator (Operator) permitting the application of domestic

septage on land a few miles upstream from Lake Pat Cleburne. The most direct method of challenging a permit or regulatory action is to file an administrative appeal. An appeal of an agency's decision can be difficult, however, as courts give deference to agencies as the subject-matter experts and the burden of proof is onerous.

Cleburne filed an appeal in Travis County District Court, challenging TCEQ's Registration. The Court agreed with Cleburne and reversed the issuance of the Registration. But, TCEQ then appealed this decision superseding the District Court's ruling. So despite the District Court's decision that the Registration was improper, the Operator was still able to land apply the domestic-septage under the Registration during the pendency of TCEQ's appeal.

To protect the City's water during the interim-appeal period, Cleburne initiated two additional mechanisms to stop the polluter from applying domestic septage in violation of its Registration: first, a nuisance suit against the polluter, and second, an action under Texas Water Code (TWC) § 7.351.

The first mechanism involves a suit in the local district for nuisance against a polluter. An entity should request a temporary restraining order to stop the pollution immediately, a temporary injunction to prevent the pollution until a hearing on the merits, and a permanent injunction to bar action under the permit or registration all together.

Cleburne filed a nuisance suit in Johnson County and that district court granted the Temporary Injunction, holding that the health and safety of Cleburne's water supply was at risk. As to the terms of the Temporary Injunction, the court enjoined all application of domestic septage, thus protecting the City's water source from toxic run-off during the interim period of the TCEQ's appeal.

The TWC provides another avenue to prevent an operator from acting in violation of a permit or registration. Under TWC § 7.351, a local government can institute a civil suit for injunctive relief or civil penalty against a person that violates or threatens to violate TWC, Chapter 26. Before initiating a suit under § 7.351, written notice must be sent to the Texas Attorney General and the TCEQ stating each violation, the facts that support the claim, and the relief sought. A civil suit against the polluter can be filed 90 days from the postmark date of the notice letter.

Cleburne issued a notice letter reporting the various violations of the Operator under its domestic septage Registration. At this stage, the TCEQ has stated it will take action to prevent the Operator's continued violations under its Registration. However, if either the AG or the TCEQ had failed to act within 90 days, the City would have been able to bring an action against the Operator under TWC § 7.351. TCEQ's action may include revoking the Registration.

While the traditional administrative appeal is often the most direct avenue for protecting a public entity's environmental resources, there are a number of additional defenses that can be waged against a polluter. When the public's health and safety are at stake, having an awareness of the available legal mechanisms to protect your resources is invaluable.

James Parker is a Principal in the Firm's Litigation and Employment Law Practice Groups. Maris Chambers is an Associate in the Firm's Districts, Compliance and Enforcement, Energy and Utility, and Water Practice Groups. Emily Linn is an Associate in the Firm's Employment Law and Litigation Practice Groups. If you have questions about any of the legal defenses discussed in this article or any other legal matter, please contact James Parker at 512-322-5878 or jparker@lglawfirm.com, Maris Chambers at 512-322-5804 or mchamber@lglawfirm.com, or Emily Linn at 512-322-5889 or elinn@lglawfirm.com.

For additional news coverage on the City of Cleburne and Johnson County's fight to protect Lake Pat Cleburne, see the links below:

https://www.nbcdfw.com/news/local/Cleburne-Wants-to-Jail-Owner-of-Human-Waste-Recycling-Company-506414481.html

https://www.cleburnetimesreview.com/news/city-county-move-to-shut-down-harrington-business/article_6b2a0b94-3adc-11e9-b7fe-f7ebd3a7a606.html

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ASK SHEILA

Dear Sheila,

I am the HR Manager for a large city. We have a number of supervisors who earn $30,000 a year and perform duties that qualify for the executive exemption from overtime under the Fair Labor Standards Act. For years, I have been hearing about potential changes to the minimum salary for the overtime exemptions and even went so far as to begin reclassifying these workers during the 2016 proposed rule change under the Obama Administration, until that proposal was withdrawn. Now I hear there is a new proposed rule change. Are the rules finally changing? If so, what are the major revisions I need to be aware of? Will our supervisors still qualify for the executive exemption?

Sincerely,

Crying Wolf or Overhauling Overtime?

Dear Crying Wolf or Overhauling Overtime?:

On March 7, 2019, the United States Department of Labor (DOL) published its latest version of the Fair Labor Standards Act's (FLSA) overtime rules in the Federal Register. The 60-day public comment period is underway, after which time, the DOL's Wage and Hour Division (WHD) can make additional changes or issue a Final Rule. With the proposed rules steadily moving through the administrative rulemaking process, the WHD has stated that it anticipates the new overtime provisions taking effect in January 2020.

As you know, the FLSA requires that covered, non-exempt workers are paid overtime—one and a half times their regular rate of pay—for all time worked in excess of 40 hours within any given seven-day work week (with some work period differences for police and fire). When classifying workers as either exempt or non-exempt from overtime requirements, an employer must first determine whether an employee is paid on a salaried, and not hourly basis, and meets the salary minimum to be considered exempt under the FLSA's executive, administrative and professional exemptions, also known collectively as the "white collar exemptions".

The proposed DOL overtime rules increase the minimum salary threshold for the white collar exemptions from $23,660 ($455 per week) to $35,308 a year ($679 per week). The proposed rules also allow employers to count certain nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the minimum salary threshold. This means employers need to look both at an employee's yearly salary and any objective payments when determining their classification under the overtime rules. Additionally, the proposed rules permit an employer to make a catch-up payment at the end of the year to bring an employee up to the minimum salary threshold.

The proposed rule also increases the salary threshold for the Highly Compensated Employee (HCE) exemption from $100,000 to $147,414 per year. Employees who qualify under the HCE exemption are subject to a less stringent duties test.

One element missing from the new proposed rule is an automatic increase of the minimum salary threshold to account for inflation—a provision that was included in the 2016 Obama rule. Instead, the WHD has included an intention to review and update the salary minimum every four years using the formal rulemaking process.

The proposed rules do not change the second hurdle in qualifying for a white collar exemption: the duties test. Even if an employee's yearly earnings meet the new minimum salary threshold, an employee's duties must still meet the other requirements of the various white collar exemptions, and the employee must be paid on a salaried basis not subject to deduction except as permitted by the DOL's Regulations.

As a reminder, the new overtime rules are vulnerable to judicial challenge. Remember, the U.S. District Court for the Eastern District of Texas invalidated the 2016 Obama Administration rules, holding that the DOL exceeded its statutory authority when setting the salary at an unreasonably high threshold (then $47,476 – more than double the current level). This time, however, the DOL took a compromise position by seeking a less drastic increase.

Despite a potential challenge in the courts, some level of change to the overtime rules is expected. The current overtime rules have not been updated since 2004, and there is consensus on both sides of the aisle that an increase in the minimum threshold is necessary to reflect current economics. It appears more likely this time that the proposed rule will become final.

With this in mind, we advise that you start to prepare now for these changes so that you can make salary or classification changes as soon as the new rule takes effect. Hopefully, we will know for sure before the summer budget process.

The first priority should be to review all positions with minimum pay grades below $679/week that are currently classified as exempt. Under the new proposed rules, your supervisors earning $30,000 a year will no longer meet the minimum salary threshold to qualify for the executive exemption. You can either plan to increase their salary to meet the new minimum of $35,308, or reclassify the positions to non-exempt. For positions with a salary that is already close to the new minimum, a salary raise may be the best option. However, for lower-paid positions, or where overtime is rarely required, reclassification may make the most economic sense. For reclassified positions that do require overtime, consider an hourly rate that, including anticipated overtime, is comparable to current compensation.

You should also be ready to update the city's policies and procedures to reflect these new standards. If you decide to reclassify employees to non-exempt status, the city should conduct training on non-exempt-specific practices such as accurate timekeeping, flexing time in the same workweek to minimize overtime, the use of comp time (for public-sector employers), and travel time rules.

Ensuring that you have properly classified all of your employees is critical. If you fail to properly classify your employees, you can be liable for two to three years' worth of back wages at 1.5 times the hourly rate, as well as liquidated damages in an amount equal to the unpaid overtime. Quick reclassification after the anticipated rule change should minimize the risk of back wage liability.

"Ask Sheila" *is prepared by Sheila Gladstone, 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.*

Water Cases

Petition for Writ of Certiorari Granted, County of Maui, Hawaii v. Hawai'i Wildlife Fund, et al., 866 F.3d 737 (No. 18-260); and Petition for Writ of Certiorari Filed, Kinder Morgan Energy Partners, L.P., et al. v. Upstate Forever, et al., 887 F.3d 637 (No. 18-268).

On February 19, 2019, the U.S. Supreme Court granted certiorari in the *County of Maui* case out of the Ninth Circuit to address the question of whether a discharge of pollutants to groundwater that is hydrologically connected to surface waters of the U.S. can constitute a regulated discharge within the meaning of Clean Water Act (CWA) section 402 and is subject to the National Pollutant Discharge Elimination (NPDES) permit program. Following the Supreme Court's December 3 invitation to the Solicitor General to file amicus curiae briefs expressing the views of the U.S. on whether certiorari should be granted for *County of Maui* or *Kinder Morgan* (see January 2019 *The Lone Star Current*), the Solicitor General filed such briefs on January 3 recommending that certiorari be granted for *County of Maui* rather than *Kinder Morgan*. The Supreme Court acted consistently with that recommendation, and briefing will continue through the summer, although the case has yet to be placed on the Court's calendar for oral argument. The federal circuit split over whether the CWA applies to discharges into soil and water—in instances where there is a direct or fairly traceable hydrological connection between groundwater and jurisdictional waters—currently sits with the Fourth and Ninth Circuits answering that question affirmatively and the Fifth, Sixth, and Seventh Circuits answering in the negative.

City of Palmview v. Agua Special Utility Dist., No. 13-18-00416, 2019 WL 1066423 (Tex. App.—Corpus Christi Mar. 7, 2019) (mem. op.).

The City of Palmview (City) brought suit against Agua Special Utility District (Agua SUD) seeking to compel Agua SUD to permit the City to construct wastewater lines and facilities, including a lift station and force main, for businesses within the City limits. Agua SUD is the holder of the certificates of convenience and necessity (CCNs) for water and wastewater service in the City and had previously determined that the City's project was unnecessary, because Agua SUD's own project would provide the necessary services to the area in question and could be timely completed. It was disputed whether a complete application had yet been submitted by the City and acted upon by Agua SUD. Regardless, the City commenced construction and brought suit, and Agua SUD filed a counterclaim seeking temporary and permanent injunctive relief prohibiting the City from constructing the planned wastewater lines and facilities. The trial court temporarily enjoined the City, holding that, by initiating construction of wastewater lines and facilities without a CCN and without approval by Agua SUD's Board of Directors, the City acted "utterly without authority" and in violation of the Texas Water Code.

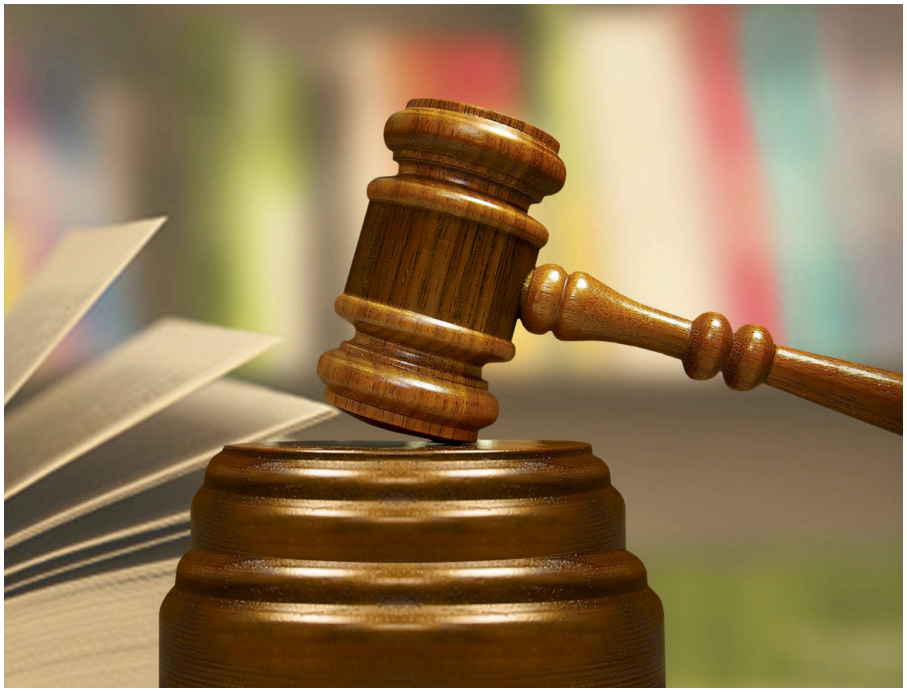
In its appeal, the City asserted that the trial court: (1) lacked jurisdiction due to governmental immunity; (2) lacked jurisdiction over Agua SUD's counterclaim, because exclusive jurisdiction over the dispute was vested in the Public Utility Commission (PUC) by Texas Water Code (TWC) § 13.252; and (3) abused its discretion by granting the injunction. On the issue of governmental immunity, the Court stressed that the scope of governmental immunity does not reach defensive counterclaims. Regarding PUC jurisdiction, the Court reasoned that the PUC has exclusive original jurisdiction only under certain circumstances that were inapplicable in this case. Finally, the Court easily held that the trial court did not abuse its discretion in granting Agua SUD's request for a temporary injunction. Thus, the Court affirmed the trial court's order issuing a temporary injunction to halt the City's construction of wastewater facilities.

Running v. City of Athens, No. 12-18-00047-CV, 2019 WL 625972 (Tex. App.—Tyler Feb. 14, 2019 (mem. op.).

Three plaintiff landowners residing downhill from a water treatment plant brought suit against the City of Athens (City) and the Athens Municipal Water Authority (AMWA) who own and operate the plant, alleging that they caused water to overflow from the plant that then flooded their homes and lots. Specifically, the plaintiffs alleged that on multiple occasions, releases of water from a holding tank of treated water at the plant (Clearwell No. 2) caused flood damages to their real property and homes. Plaintiffs brought claims under the TWC, a negligence claim, and state and federal inverse condemnation claims. The City and AMWA responded by filing a plea to the jurisdiction—asserting that governmental immunity barred the plaintiffs' suit—and the trial court partially granted the plea, dismissing all claims against

AMWA and the TWC claims against the City. The plaintiffs and the City each appealed their partial losses, and the appellate court ultimately reversed the trial court's order denying the City's plea to the jurisdiction and rendered judgment dismissing the plaintiffs' claims against the City.

Among their other claims, the plaintiffs argued that the Texas Tort Claims Act (TTCA) provided a waiver of governmental immunity, as their damages were proximately caused by the negligence of a city employee "aris[ing] from the operation or use of…motor-driven equipment"—such as pumps, valves, and water level monitoring equipment—appurtenant to Clearwell No. 2. The Court rejected this argument, concluding that the TTCA waiver does not apply in this case because evidence did not support the position that motor-driven, as opposed to mechanical, equipment caused the overflow of Clearwell No. 2. In reaching this conclusion, the Court considered the operation of the plant's components and distinguished between the operation of the motor-driven pumps that worked to open the mechanical valve, the latter of which became stuck and allowed backflow. "The defective non-motorized mechanical valve was the actual cause of any overflow, not the motor-driven high service pumps, which is insufficient to establish a waiver under the TTCA." The Court also rejected speculative evidence of what it deemed a "surmise or suspicion" by the plaintiffs that another set of motor-driven pumps created or contributed to the excessive overflow from Clearwell No. 2. Finally, the Court also determined that the plaintiffs failed to raise a viable inverse condemnation claim under the state or federal constitutions, as plaintiffs' assertions of the City's negligence in failing to prevent overflow from Clearwell No. 2 did not demonstrate the City's intent that its actions would result in harm or damage to the plaintiffs' property, as would be required to support an inverse condemnation claim. Thus, the City prevailed on appeal, and the appellate court dismissed the suit for lack of subject matter jurisdiction.



Litigation Cases

In the July 2018 issue of *The Lone Star Current*, we wrote about the Texas Supreme Court's upcoming session and identified several cases of interest. The Court last month issued its decision in two of these cases. We have included background information to remind you of the factual and procedural history, as well as the newly released holdings, and the implications of these decisions.

Second, we have highlighted three additional governmental immunity cases from the last couple months: one appellate case involving governmental immunity for a public utility agency, and two Texas Supreme Court cases evaluating governmental immunity in the employment context.

Hughes v. Tom Green Cty., ---S.W.3d ----, 2019 WL 1119904 (Tex. Mar. 8, 2019).

Breach of Settlement Agreement Opens Up New Possibility of Liability for Governmental Entities.

On March 8, 2019, the Texas Supreme Court issued its Opinion in *Hughes*, holding that governmental immunity is waived for the breach of a settlement agreement to split proceeds of a claim to property.

This case arises out of a dispute in probate over title to property devised in a will. Hughes' uncle, through his will, gave (i) his mineral rights to two individuals for their lifetime benefit, with the remainder to Southern Methodist University to establish an endowed chair for the English Department; (ii) his home and rare book and music collection to the County, to establish the home as a library; and (iii) the residuary estate to the County, for the County to pay for the home/library.

SMU applied in probate court to use the funds for purposes other than the funding of the English Department position, as the chair had already been fully funded. The County intervened, arguing that because the chair was fully endowed, 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. 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.

Later, however, Hughes sued the County for breaching a provision of the settlement between them, whereby the County

promised it would name the new library after Hughes' uncle. 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. Hughes argued that under *Lawson*, a governmental entity that settles a suit in which it lacks immunity cannot claim immunity in a subsequent suit enforcing the settlement. *Texas A&M University–Kingsville v. Lawson*, 87 S.W.3d 518, 522–23. (Tex. 2002) (plurality op.) (holding immunity is waived for 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 explained that *Lawson* did not apply to this case for two reasons: (1) the agreement between Hughes and the County was not a settlement agreement because the parties did not seek relief from each other, so there were no claims between the County and Hughes to settle, and (2) even if it was, the agreement "did not settle claims for which the County's immunity was waived." The Court of Appeals also declined to apply a "waiver by conduct" exception to governmental immunity, rejecting Hughes's argument that the County waived its immunity by its conduct of breach of the settlement agreement.

The Texas Supreme Court reversed the lower courts' decisions, holding that a governmental entity's voluntary intervention in a probate proceeding claiming title to property waives immunity to competing title claims under *Reata*. *Reata Construction Co. v. City of Dallas*, 197 S.W.3d 371, 375–76 (Tex. 2006) (holding it was fundamentally unfair for a governmental entity to petition a court for affirmative relief while simultaneously claiming immunity for a related claim). The agreement between Hughes and the County was a settlement agreement, as it settled competing rights and granted each party a 50 percent interest in the other party's claim. Further, County voluntarily intervened in probate to assert its claim under the will's residuary clause and its affirmative claim to the disputed mineral interest waived the County's governmental immunity as to the probate claims. Under *Lawson*, the County could not now claim immunity from Hughes's suit to enforce their settlement agreement.

Hughes leaves a major question unresolved. Under *Reata*, a counter-plaintiff can only sue to offset an amount due to the governmental entity. Marrying *Lawson* to *Reata*, the Court does not answer what damages are available to the Plaintiff. Can it now recover damages beyond offset that it wouldn't have been able to recover with the settlement? And if so, does that create a disincentive to settle *Reata* counterclaims?

Hays Street Bridge Restoration Gp. v. City of San Antonio, ---S.W.3d ----, 2019 WL 1212578 (Tex. Mar. 15, 2019).

Governmental Immunity Waived for Specific Performance of a Contract.

The primary issue before the Court was whether governmental immunity is waived for the remedy of specific performance under the Local Government Contract Claims Act (Act). Texas Local Government Code (TLGC) § 271.151, et seq. Prior to this case, the answer had always been no – specific performance was not an available remedy as applied to governmental entities.

To the surprise of those familiar with governmental immunity law, the Texas Supreme Court departed from settled precedent, holding that the Act waives governmental immunity for specific performance on breach-of-contract claims for providing goods and services to governmental entities.

The Act has historically been understood as waiving governmental immunity to certain breach-of-contract claims for *specific damages* (i.e. the balance due and owing, reasonable attorney's fees and pre- and post-judgment interest). Specific performance—i.e. a court order requiring the breaching party to perform under the contract—was written into the Act as available only for claims arising from a contract for the delivery of large volumes of reclaimed water by a local governmental entity intended for industrial use. There is no statutory language indicating specific performance is available for other contract claims.

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 Restoration Group argued that the Act's limitation on damages only pertains to monetary damages, and that nothing in the Act bars the equitable remedy of specific performance. The City argued that the Legislature must explicitly waive immunity for specific performance and that it did not do so, as evidenced by its explicit waiver of immunity for specific performance in the case of contracting for delivery of reclaimed water.

The Court pointedly did not address that contention, and in footnotes 2 and 65, left open the possibility that the Legislature "unwaived" immunity in passing the 2013 amendment to the Act. So whether immunity is waived for specific performance of a contract executed after September 1, 2013 is a question that remains open.

The Court's decision fundamentally alters the previously understood scope of the Act's waiver of governmental immunity and expands what remedies parties contracting with governmental entities may seek when filing for breach of contract. Contracting parties are no longer limited to claims for monetary damages and as such, special attention should be paid during contract negotiation and drafting.

City of Denton v. Rushing, ---S.W.3d ----, 2019 WL 1212188 (Tex. Mar. 15, 2019).

General Disclaimer in Employee Handbook Ensures Governmental Immunity for Breach-of-Contract Claim.

In *Rushing*, the Texas Supreme Court held that a policy manual with a general disclaimer is not an enforceable, written contract

under the TLGC, and therefore does not waive governmental immunity for the purposes of bringing a breach-of-contract claim.

This case arises out of a breach-of-contract action brought by three full-time, hourly paid employees in the City of Denton's (City) Utilities Department. The City's Policies and Procedures Manual included Policy 106.06, which outlined on-call shifts, specifying that on-call time was uncompensated. In 2013, the policy was revised to instead compensate employees for their time spent on-call.

Significantly, the policy includes a general disclaimer that states "The contents of this manual do not in any way constitute the terms of a contract of employment and should not be construed as a guarantee of continued employment."

The City notified the employees that they would not be compensated for on-call shifts worked from 2011 to 2015, despite the revised policy, and the employees promptly filed a breach-of-contract claim against the City.

The City filed a plea to the jurisdiction and alternative motion for summary judgment, arguing that it was entitled to a dismissal on the basis of governmental immunity. The trial and appellate courts denied these motions, holding that the on-call policy created a unilateral contract that could be enforced by employees under a statutory waiver of immunity. The court of appeals held that Policy 106.06 was a valid unilateral contract and that the Manual's disclaimer was only intended to preserve an employee's at-will status.

The Texas Supreme Court reversed the lower courts' decision and granted the City's plea to the jurisdiction. The City's Manual, including Policy 106.06, is not a valid written contract subject to the waiver of governmental immunity. The Manual negates the requisite contractual intent "in any way" as to the terms of employment. Thus any purported intent by the City to create an employment contract via its Manual is disclaimed by the unequivocal language in the Manual.

Rushing reinforces the employment-law principle that Employee Policies do not create a contract under which an employee can sue for contract damages. Employers, both public and private, should have a general disclaimer on the first page of their Policies, emphasized by font size and bolding, to ensure that if an employee sues for contract damages they can receive a ruling parallel to this case.

Hillman v. Nueces County, ---S.W.3d ----, 2019 WL 1231341 (Tex. Mar. 15, 2019).

Immunity Shields Governmental Entities from Wrongful-Termination Claims.

In *Hillman*, the Texas Supreme Court affirmed the lower courts' decisions holding that the legislature had not waived immunity, and therefore the court had no jurisdiction to hear, a wrongful-termination claim.

Hillman, a former assistant district attorney, was terminated after he refused to follow his supervisor's order to withhold what Hillman claimed was exculpatory evidence from a criminal defendant. Hillman sued Nueces County for actual damages alleging that he was wrongfully terminated. Hillman argued he was required to disclose the evidence under the state's Michael Morton Act and that the County only terminated him because of his refusal to withhold the exculpatory evidence.

While the general rule is employment at-will, there is a narrow exception defined in *Sabine Pilot* prohibiting employers from terminating at-will employees "for the sole reason that the employee refused to perform an illegal act." *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). The Court observes that *Sabine Pilot* could be interpreted as creating a duty on all Texas employers, including public employers, to not terminate at-will employees solely for refusing to perform an illegal act. But even if the County is subject to a duty under *Sabine Pilot*, the issue is whether the County's governmental immunity has been waived as to Hillman's wrongful termination claim.

A statute must use "clear and unambiguous language" expressing an intent to waive governmental immunity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006). The Court concluded that the Michael Morton Act did not waive the County's governmental immunity to suit as there was nothing in the Act indicating a legislative intent to waive governmental immunity for a wrongful-termination suit under *Sabine Pilot*.

Hillman made a final argument that the Court should abolish the doctrine of governmental immunity altogether. The Court declined this invitation, instead keeping with precedent and deferring to the legislature to make a decision on when waivers of immunity are appropriate.

Holms v. West Travis County Public Utility Agency, No. 03-17-00584-CV, 2019 WL 1141870 (Tex. App.—Austin Mar. 13, 2019).

Overbilled? Customers Still Can't Sue Government Retail Providers.

In *Holms*, the Plaintiff appealed the trial court's order dismissing his claims against the West Travis County Public Utility Agency (PUA) on jurisdictional grounds. On appeal, the Court addressed two questions: (1) whether the PUA was protected from suit under governmental immunity, and (2) whether the trial court erred in not allowing the Plaintiff to amend his pleadings to cure jurisdictional defects.

The PUA is a public utility agency that provides retail water service. Holms was a customer of the PUA who received a number of high water bills allegedly caused by a malfunctioning meter. The PUA's General Manager told Holms that it could not issue a

credit to reimburse him for the alleged over-billing. In response, Holms filed suit to recover his over-payments from the PUA and the PUA's General Manager, alleging breach of contract, tort, and deceptive trade practice claims.

The PUA filed a plea to the jurisdiction arguing it was immune from suit under governmental immunity. The trial court granted the PUA's motion, which Holms then appealed to the Court of Appeals in Austin.

In a Memorandum Opinion written by Judge Gisela Triana, the court affirmed the trial court's decision, finding that the PUA is immune from suit. Plaintiffs bear the burden to demonstrate a trial court's jurisdiction by alleging a valid waiver of immunity, either by reference to a statute or to an express legislative permission. Holms alleged the PUA's immunity is waived on 6 bases: (1) the PUA is not a governmental entity entitled to immunity, (2) the PUA's enabling statute is silent as to immunity and thus immunity is waived; (3) statutory waivers apply to the the PUA; (4) the PUA is being sued for "proprietary" functions to which immunity does not apply; (5) the PUA is permitted to sue its customers and, therefore, customers should be permitted to sue the PUA; and (6) dismissing Holms's claims violates his due process and equal protection rights. The Court refuted each of these claims, finding that none of Holms's arguments supported a waiver of the PUA's governmental immunity.

On the second issue, whether the lower court erred in not allowing Holms to re-plead to cure its jurisdictional problem, the court affirmed the dismissal with prejudice. The general rule is that a plaintiff is entitled to amend its pleadings before claims are dismissed with prejudice. However, there is an exception to this rule when a pleading is incurable. Each of Holms's jurisdictional bases was dismissed by the court; there is no avenue to cure Holms's pleadings and allege a viable waiver of immunity.

This case offers a succinct primer on waiver of governmental immunity and provides another illustration of when a dismissal with prejudice on a plea to the jurisdiction motion is appropriate.

Air and Waste Cases

U.S. v. Luminant Generation Company, LLC, 905 F.3d 874 (5th Cir. 2018).

In October 2018, the Fifth Circuit Court of Appeals issued a decision regarding the EPA's New Source Review (NSR) enforcement initiative. In *United States v. Luminant Generation Company*, the Fifth Circuit held that the failure to obtain a pre-construction permit is a one-time offense, so penalty claims for alleged violations more than five years prior to filing are thus barred by the statute of limitations. But importantly, the court also held that the expiration of penalty claims does not necessarily preclude the government's claim for injunctive relief. Specifically, the court reasoned that the "concurrent remedies doctrine" does not apply to governmental entities. Under this doctrine, if a court finds that a legal remedy based on monetary damages is barred by the statute of limitations, then it follows that an injunction is also not available. However, it is unclear whether facilities that changed in ownership after the violation occurred are impacted by this decision. For example, former owners may not be subject to injunctive relief because they no longer own the facility at issue and thus, have no ability to carry out injunctive relief, while new owners would argue the alleged violation occurred before their ownership. Furthermore, the court did not comment on the type of injunctive relief available in NSR enforcement cases; rather, the court only held that such relief was not barred by the statute of limitations.

Air Alliance Houston v. U.S. Chemical and Safety Hazard Investigation Board, No. 17-cv-02608 (D.D.C. Feb. 2019).

In February 2019, a D.C. District Court ruled that the U.S. Chemical and Safety Hazard Investigation Board (CSB) is required to promulgate regulations on reporting requirements for accidental chemical releases within the next twelve months. The Clean Air Act amendments of 1990 require the CSB to promulgate such regulations, but the CSB did not issue an advanced notice of proposed rulemaking (ANPR) on chemical release reporting until 2009. However, the CSB did not take further action to implement regulations since issuing the ANPR in 2009. The D.C. District Court called the CSB's actions, "an egregious abdication of a statutory obligation" for failing to promulgate regulation for nearly 28 years. Any final rule will likely have significant potential impacts on a wide range of hazardous waste facilities.

Texas v. Intercontinental Terminals Company, LLC, No. D-1-GN-19-001593 (261st Dist. Ct. filed March 22, 2019).

On March 22, 2019, the State of Texas brought suit in Travis County District Court against Intercontinental Terminals Company, LLC—a Houston-based company whose petrochemical storage facility in the suburb of Deer Park caught fire just weeks prior and burned for several days. The lawsuit, filed on behalf of the Texas Commission on Environmental Quality (TCEQ), alleges that the air pollution released during the fire is a violation of the Clean Air Act and seeks a permanent injunction with civil penalties that "could exceed $100,000." The petition alleges that the fire and subsequent plume released elevated levels of benzene, a hazardous chemical. The TCEQ is now monitoring whether any additional violations have occurred involving surface water quality. This case is currently pending in Travis County District Court.

In the Courts *is prepared by Sarah Collins in the Firm's Water and Compliance and Enforcement Practice Groups, Emily Linn in the Firm's Employment Law and Litigation Practice Groups, and Samuel Ballard in the Firm's Air and Waste Practice Group. If you would like additional information, please contact Sarah at 512.322.5856 or scollins@lglawfirm.com, Emily at 512.322.5889 or elinn@lglawfirm.com, or Sam at 512.322.5825 or sballard@lglawfirm.com.*

AGENCY HIGHLIGHTS

2019 Legislative Session

Texas Senate Approves Bills to aid in Hurricane Harvey Recovery and future flood protection. A unanimous Texas Senate approved three bipartisan Senate Bills (SB) that would, if enacted, update emergency procedures, fund flood control, and create a statewide flood plan. The first bill, SB 6, would require updated guidelines, training, and credentialing for local emergency officials. SB 7 would create the Texas Infrastructure Resilience Fund, a $1.6 billion fund to be overseen by the Texas Water Development Board (TWDB) that is intended to help fund Hurricane Harvey recovery and projects in the new state-wide flood plan. The last of the three bills, SB 8, would create a state-wide flood plan that incorporates the regional flood plans, guides flood control policy, requires the evaluation of the condition and adequacy of flood control infrastructure on a regional basis, controls a statewide ranked list of current flood control projects, analyzes development in the 100-year floodplain, and tasks the TWDB with developing a 10-year repair and maintenance plan for flood control dams. Having been approved by the Senate, the bills will now go before the Texas House of Representatives for a vote.

Disagreement about debt forgiveness stalls reauthorization of National Flood Insurance Program (NFIP). On December 21, 2018, the President signed legislation to extend the NFIP, which is intended to reduce flooding impacts by providing affordable insurance to property owners, renters, and businesses, and by encouraging communities to adopt and enforce floodplain management regulations. The most recent extension prolonged the NFIP's authorization until May 31, 2019, and was the 10th in a string of short-term authorizations for the program. A long-term renewal has not been agreed upon since the NFIP's original expiration date in 2017. Congress now has until May 31st to reauthorize the program, and a renewal bill has been proposed by Representative Maxine Waters, a California Democrat, and head of the House Financial Services Committee. If enacted, Representative Waters' bill would extend the NFIP authorization until 2024, and would borrow from the federal government to forgive all debt previously incurred by the program. The proposed debt forgiveness, however, has caused Republicans on the Committee to express concern that renewal will simply result in more later-to-be-forgiven debt.

Land and Water Conservation Fund (LWCF) permanently reauthorized. Created by Congress in 1964 and funded by royalties paid by energy companies drilling for oil and gas on the Outer Continental Shelf, the LWCF aims to safeguard natural areas, water resources, and national recreation opportunities. In the past, however, Congress has diverted such funding towards other uses, creating a substantial backlog of federal conservation needs estimated at more than $30 billion. State governments soliciting LWCF funds for eligible local parks and recreation projects have also reported needs totaling near $27 billion. Recently, however, as a part of a public land package signed into law on March 12, 2019, the LWCF was permanently reauthorized. The legislation was the culmination of a multi-year effort to reauthorize the program, and had significant bipartisan support.

This is just a sample from the current Session and a more robust summary of the Session we provided in our summer issue of *The Lone Star Current*. In the meantime, if you would like more information on this Session, please reach out to Ty Embrey at 512.322.5829 or tembrey@lglawfirm.com or Troupe Brewer at 512.322.5858 or tbrewer@lglawfirm.com.

Environmental Protection Agency (EPA)

A report commissioned by the United States Environmental Protection Agency (EPA) says the Agency should make changes to national stormwater regulations. In light of a recent settlement agreement, EPA commissioned the National Academies of Sciences, Engineering, and Medicine to review and report on the Multi-Sector General Permit (MSGP) program, with an emphasis on monitoring requirements and retention standards. The MSGP program is administered by the EPA as part of its jurisdiction under the Clean Water Act, and requires industries to manage onsite stormwater to minimize discharges of pollutants to the environment. The report, published on February 20, 2019, offers guidance to inform the next revision of the MSGP, expected in 2020. In general, the 197-page report concludes that EPA has been too slow to incorporate new data and advances in science and technology into the MSGP program. Specifically, the report recommends that EPA (i) require uniform monitoring for pH, total suspended solids, and chemical oxygen demand, and (ii) periodically review and update benchmark monitoring requirements to incorporate new scientific information. The report also recommends that the Agency adopt a tiered approach to monitoring intended to improve the overall quality of monitoring data.

EPA's public comment period for proposed "waters of the United States" definition rulemaking now open. The public comment period is now open for the proposed EPA rule that would change the definition of "waters of the United States" under the Clean Water Act (the CWA). The proposed rule would limit the role of the federal government under the CWA by defining "waters of the United States" to include only those waters that are physically and meaningfully connected to traditional navigable waters. This would serve to limit the jurisdictional scope of the CWA and jurisdictional reach of the EPA. Until the new rule goes into effect, however, the amended 2015 rule remains enjoined in 28 states, but in effect in 22 states, the District of Columbia, and the U.S. territories. Further, on March 8, 2019, the EPA withdrew its notices of appeal pending before the 4th and 9th Courts of Appeals, indicating that the Agency would not continue to fight the implementation of the previously amended rule, but would instead focus on the current rulemaking. A public hearing was held in Kansas City on February 27 and 28, 2019, and the 60-day comment period is open until April 15, 2019. Written comments may be submitted to the Federal eRulemaking Portal under Docket ID No. EPA-HQ-OW-2018-0149 at https://www.regulations.gov.

New EPA Mercury and Air Toxic Standards. (MATS) Rule. On February 7, 2019, the EPA published a proposed rule change to the Mercury and Air Toxics Standards (MATS) rule, which sets limits on power plant emissions. Following the Supreme Court's ruling in *Michigan v. EPA*, which directed the EPA to consider the costs and benefits associated with MATS compliance, the Agency indicated that it would rescind its initial finding that the regulation of hazardous air pollutants (HAPs) from power plants was "appropriate and necessary." However, the EPA's announcement was met with resistance from industry sectors that had already come into compliance with the original rule. In response, the Agency recently indicated that it will not rescind the MATS rule and clarified that HAPs will still be regulated under Section 112 of the Clean Air Act, despite rescinding the "appropriate and necessary" finding. Such a rule change could spur additional litigation and alter future agency rulemaking procedures. The comment period on this proposed rule change ended April 8, 2019.

Final EPA rule on Nitrogen Oxide (NOx) emissions monitoring. On March 8, 2019, an EPA final rule took effect, which removes state obligations to require power plants to continuously monitor summertime emissions of nitrogen oxides (NOx). Previously, power plants were required to use continuous emissions monitoring systems to track NOx emissions. The final rule does not necessarily identify alternative monitoring methods, but instead allows states to decide their own preferred alternative methods for monitoring NOx emissions or to continue to require continuous monitoring.

New EPA rule governing Pharmaceutical Hazardous Wastes. On February 22, 2019, the EPA published a final rule governing standards for the management of pharmaceutical hazardous wastes, 40 C.F.R. Part 266, subpart P. The new rule provides companies involved in generating or managing such waste a six-month window to update their compliance procedures, and increases the maximum civil penalty for hazardous waste violations under the Resource Conservation and Recovery Act (RCRA). Specifically, under the final rule, the maximum civil penalty increased from $72,718 to $74,552, which may be assessed on a per day, per violation basis. The final rule explicitly prohibits discharges of pharmaceutical hazardous wastes into public sewer systems and also requires affected facilities to meet certain notification, training, hazardous waste determination, commingling, labeling, storage, and accumulation standards. Affected industries will likely include pharmacies and drug stores, health care practitioners, veterinary clinics, reverse distributors, and even nursing care facilities.

EPA releases draft list of "high priority" and "low priority" chemicals. On March 20, 2019, the EPA released a draft list of 20 "high priority" and 20 "low priority" chemicals for the purposes of risk evaluation in accordance with the Toxic Substances Control Act (TSCA) 2016 amendments. The Agency is required to finalize the list by December 2019, at which time the "high priority" chemicals will undergo a new TSCA risk evaluation process, which will take three years to complete. On the other hand, the "low priority" chemicals will not be subject to a new risk evaluation. Under the new risk evaluation process, the EPA will determine whether the "high priority" chemicals present an unreasonable risk to human health and the environment. Most notably, the draft "high priority" chemical list includes formaldehyde, which the agency recently removed as a priority chemical under the Integrated Risk Information System (IRIS). The EPA emphasized that shifting formaldehyde to the TSCA program will enable the agency to streamline regulatory action and build the existing IRIS work. In addition to formaldehyde, the other "high priority" chemicals include seven chlorinated solvents, six phthalates, four flame retardants, a fragrance additive, and a polymer precursor. The 20 "low priority" chemicals were based on the EPA's Safer Chemical Ingredients List, which meet the agency's "safer choice" criteria. There will be a 90-day public comment period, aimed at gathering additional information from the public and industry regarding "uses, hazards, and exposure for these chemicals."

EPA issues Advanced Notice of Public Rulemaking regarding bioreactor landfills and use of liquids in Municipal Solid Waste Landfills. In December 2018, the EPA issued an Advance Notice of Proposed Rulemaking (ANPR) regarding possible revisions to the criteria for Municipal Solid Waste Landfills (MSWLFs) to support advances in effective liquids management at landfills that add or recirculate water to promote waste degradation. Specifically, the EPA is considering whether to propose revisions to: (1) remove the prohibition on the addition of bulk liquids to MSWLFs; (2) define a particular class of MSWLF units that operate with increased moisture content; and (3) establish revised MSWLF criteria to address additional technical considerations associated with liquids management from such landfills, including waste stability, subsurface reactions, and

other safety and operational issues. By removing the current restrictions on the addition of liquids, the Agency hopes to promote accelerated biodegradation of waste. This proposed rule change is tied to the Agency's consideration of developing a Resource Conservation and Recovery Act definition for "bioreactor" landfills and "wet landfill units." The comment period for the ANPR closes on May 10, 2019.

EPA retains current Sulfur Dioxide (SO2) National Ambient Air Quality Standards (NAAQS). On February 26, 2019, the EPA announced its decision to retain the current sulfur dioxide (SO2) National Ambient Air Quality Standard (NAAQS). The current primary SO2 NAAQS of 75 parts per billion (ppb) averaged over one hour was established in 2010. Under the Clean Air Act, the EPA is required to review and revise the NAAQS every five years, but the EPA did not review the SO2 NAAQS within five years of the last determination. As a result, environmental groups sued the Agency to force a review, which resulted in a consent decree obligating the EPA to retain or revise the S02 NAAQS by February 25, 2019. The EPA decision to retain the 2010 SO2 NAAQS will not trigger revisions to state implementation plans or force existing sources to install additional S02 controls. Currently, five Texas counties (Anderson, Freestone, Panola, Rusk, and Titus) are in non-attainment with the SO2 NAAQS.

Texas Commission on Environmental Quality (TCEQ)

TCEQ proposes Useful Life for Combination Short-Haul and Long-Haul Trucks. On April 1, 2019, TCEQ posted its Proposal for Useful Life for Trucks that are both combination short-haul and long-haul. Useful life is a key component used in calculating mobile source emission reduction credits. Chapter 101 of the Texas Administrative Code provides that the expected remaining useful life of a mobile source shall be determined based on models in the applicable state implementation plan (SIP) or on a case-by-case basis. TCEQ relies on the EPA's Motor Vehicle Emissions Stimulator (MOVES) model for on-road vehicles in the SIP development. However, TCEQ is now proposing to use a hybrid approach to determine useful life for combination short-haul and long-haul trucks rather than relying on the MOVES model. Combination short-haul trucks often spend the beginning of their life as long-haul trucks. Some of these trucks transition to operating as combination short-haul trucks, performing drayage type duties, when it is no longer economically feasible to continue operating as a combination long-haul truck. The EPA's MOVES model does not account for this transition, so the TCEQ has proposed its own approach for this unique set of vehicles. The public comment period ends May 1, 2019.

Public Utility Commission (PUC)

Oncor and Sharyland Discuss Settlement of Sale, Transfer, Merger Application. Oncor Electric Energy Delivery Company LLC (Oncor), Sharyland Distribution & Transmission Services, L.L.C. (SDTS), Sharyland Utilities, L.P. (Sharyland) and Sempra Energy (Sempra) filed a Joint Report and Application for Regulatory Approvals (Application) at the PUC in November.

The Application seeks approval for several transactions: (1) the exchange of transmission assets between SDTS and Sharyland and the respective CCN amendments required; (2) the acquisition of InfraREIT, Inc. (InfraREIT) by Oncor; and (3) the acquisition of a 50% indirect interest in Sharyland by Oncor and Sempra.

The Steering Committee of Cities Served by Oncor (OCSC) intervened in this proceeding, along with Texas Industrial Electric Consumers, Office of Public Utility Counsel, and several other intervenor groups. In February, PUC Staff filed a pleading asking the Commissioners to require the applicants to file complete rate cases for the two new utilities before the transactions close. The PUC took up this issue at the February 28 Open Meeting. Chairman Walker, who previously revised the Preliminary Order issued in this case to reflect rate issues implicated in these mergers, determined that this case does not touch rate issues. She then asked parties to revise the Preliminary Order to reflect this decision. Parties met after the Open Meeting to revise the Preliminary Order and the revised version was approved that afternoon.

PUC Proceeds with Real-Time Co-Optimization. Progress towards the market reform known as real-time co-optimization proceeded this month with the PUC taking up the topic at its February Open Meeting, and the Commissioners have directed ERCOT to begin the next steps in the process to implement this initiative. As a background, real-time co-optimization is a change to ERCOT's market structure that would allow ERCOT to more efficiently arrange for both energy on the grid and the standby capacity from power generators (known as ancillary services) that assist the system in running reliably. It is anticipated that real-time co-optimization will produce a cost savings for consumers in ERCOT.

In February, the PUC directed ERCOT and stakeholders to work towards implementing the concept, and directed that some additional debate and analysis regarding aspects of the concept occur. Then, at the February 28 Open Meeting, Chairman Walker of the PUC commented that she did not want to see the additional consideration and ultimate implementation of this market redesign drawn out and delayed. To that end, she proposed a June PUC workshop on the remaining issues; and, later, PUC Staff issued a request for comments on detailed issues related to the detailed design of real-time co-optimization. Initial comments were due by April 5 and reply comments are due by April 15.

SPCOA Update. The filing by Crown Castle NG Central LLC to relinquish its SPCOA has been granted. In PUC Docket No. 49044, on February 14, 2019, the Commission approved the relinquishment and cancelled the SPCOA. The business will be consolidated into Crown Castle Fiber LLC and cease to exist as a separate entity. All of the other recent petitions for revocations filed at the PUC remain pending, but none of them have been granted yet.

On February 13, 2019, the Commission on State Emergency Communications

(CSEC) filed an application to relinquish its SPCOA. CSEC is the state agency charged with coordinating the development of a state level Emergency Services Internet Protocol-enabled Network for the transport of 9-1-1 calls and caller data to Texas public safety answering points. It is not clear why CSEC obtained an SPCOA; it states in its filing that it has never provided services pursuant to its SPCOA and does not intend to, and that it has never had any customers. This filing may be the result of the general house-cleaning being undertaken by the Office of Enforcement at the Commission. We plan to update you on this matter in our next issue of *The Lone Star Current*.

PUC Concludes Substation Project, Opens Rulemaking to Review during Rate-Making. On February 7, 2019, the Commissioners of the PUC took up Project No. 48251, the electric substation rulemaking project, in which the PUC sought comments on a number of questions related to the review and certification of electric substations. Numerous entities, including the Oncor Cities Steering Committee (OCSC), filed comments in response to the questions posed. OCSC argued that the certification exemption for substations should be removed from the rule because of the resulting problems associated with siting of substations with no effective regulatory review.

A number of utilities opposed removing the existing exemption for substations based upon the requirement to obtain a CCN. The utilities and other industrial level consumers raised concerns over slowing down the process by which substation infrastructure could be completed, thus affecting economic growth.

At the meeting, Chairman Walker stated that her primary concerns, and the reason she had pushed for the opening of the rulemaking project, were the potential for overbuilding of substations and the possible lack of evidence supporting their construction. The Commissioners were presented with a summary of all the written comments. They discussed the need to avoid adding requirements that would negatively impact economic development and also avoid adding costs to ratepayers.

The Commissioners voted to terminate Project No. 48251 and open another project to review the rate-filing package and take a deeper look at transmission facilities, noting that the costs of transmission facilities estimated for certification proceedings have not matched the costs that are included in rates. Chairman Walker issued a warning to the utilities that the PUC will require proof of need of substations, and it will start denying applications for certifications if the need element is not adequately proven.

PUC Approves AEP's Hurricane Harvey Costs Settlement. On February 28, the PUC approved the settlement resolving all issues in AEP Texas' System Restoration Costs in connection with Hurricane Harvey. On August 7, 2018, AEP Texas filed an Application at the Commission seeking approval of approximately $415 million in costs associated with Hurricane Harvey. These costs were spread out by distribution and transmission functions. The cities of Corpus Christi, Penitas and Sullivan City, the Gulf Coast Coalition of Cities (GCCC), the Lower Rio Grande Valley Development Council (LRGVDC), and OCSC (collectively, Cities) intervened in the proceeding. The Cities filed testimony in this matter, recommending an adjustment of $24.2 million to reflect double-counting of distribution operations and maintenance costs, and $3.7 million for incorrectly included transmission-related costs. PUC Staff filed testimony recommending an additional disallowance of AEP Texas' litigation costs of $571,200. Ultimately, however, the Parties reached a settlement that resolved all issues in the case.

As a result of that settlement, AEP Texas will reduce its requested distribution-related costs by $5 million, remove $3.7 million of transmission-related costs, and reduce the transmission cost recovery by $5 million to account for insurance proceeds, subject to a true-up once the final insurance proceeds are received. Additionally, AEP Texas has agreed to pay Cities' litigation costs. These will be paid directly to the City groups involved in the case.

PUC Makes Decision that will Increase Pay to Generators During Peak Usage Periods. At its January 17, 2019 Open Meeting, the PUC issued a decision on a controversial change to a pricing tool known as the Operating Reserve Demand Curve (ORDC). The primary focus of the ORDC is to pay generators an additional amount when ERCOT reserves are low. Under the current design of the ORDC, no adder applies most of the time, and when the ORDC does produce an adder, it is usually small.

At its January 17 meeting, the Commissioners directed ERCOT to implement changes that will increase the ORDC now and will provide another increase in 2020. Taken together, these modifications were not as high as some generators had proposed (Exelon, for example, had pushed for a change to the ORDC that would have cost consumers $4 billion per year, by Exelon's own estimate), but they still are expected to have a significant effect on the market. By one estimate, the lesser change that the PUC directed may cost the market (and, in turn, consumers) $1.2 billion per year.

The PUC further directed that this change be in place for the peak summer energy usage season. The State's power reserve margin—the amount of capacity it has above the expected peak demand—is projected to be lower this summer than ever before. On January 7, 2019, ERCOT announced that it approved the phasing-out of a 460 MW coal plant, lowering the state's reserve margin from 8.1% to 7.4%. That is of concern, because ERCOT targets a reserve margin of 13.7%, the level that it believes it needs to run the grid reliably. Because ERCOT has not previously seen a reserve margin of 7.4%, it is unclear what the result will be, particularly during this year's peak summer season. A lower reserve margin makes rolling blackouts and/or high market prices more likely than a higher reserve margin. PUC Chairman DeAnn Walker called the 7.4% projection for 2019 "very scary."

Changes like the one endorsed by the PUC on January 17 are based on the expectation

that making the market more lucrative will incentivize generators to build additional plants in the ERCOT region. The effects of the PUC's actions remain to be seen, but over the long run, the increased ORDC should incentivize investment in new generation facilities, which, in turn, should help increase the reserve margin and limit rolling blackouts.

PUC Explores Expanding Demand Response in Emergency Reserve Service. The PUC is currently weighing alternatives to traditional electricity generation, such as demand response, in order to provide much needed relief during the high demands of the Texas summer. When demand for electricity is above the normal levels (peak periods), due to unplanned events like extreme heat, inclement weather, and transmission outages, reliability-based "demand response" programs are in place to pay participants to reduce their electricity consumption (load) for discrete periods of time.

Several small businesses, cities, schools districts, hospitals and churches could be getting paid to participate in demand response, which could provide ERCOT with a fleet of additional energy sources during tight reserve margins and emergency events.

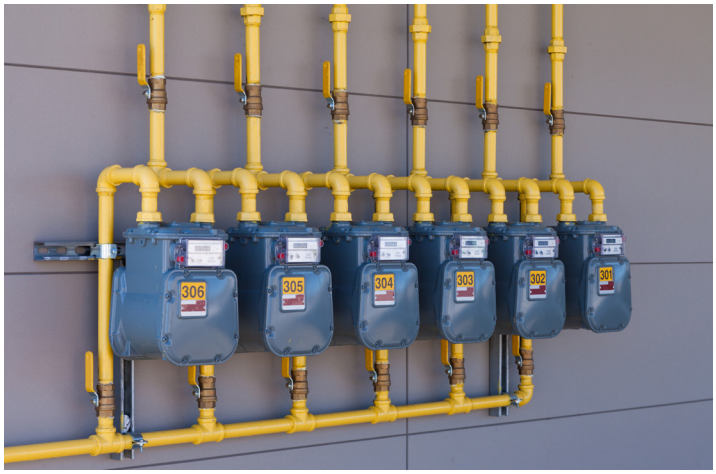
At the February 7, 2019 PUC Open Meeting, Chairman Walker directed PUC Staff to open a project in order to explore ways for load resources—or consumers of energy—to participate in Emergency Reserve Service (ERS). Pursuant to Chairman Walker's request, PUC Staff opened Project No. 49240.

This Project could provide an opportunity for municipalities and other small loads to comment on their desire to participate in ERS through demand response programs and work towards breaking down some of the barriers that currently prevent them from participating. We will monitor this Project and report back in future issues of *The Lone Star Current*.

Railroad Commission of Texas (RCT)

Atmos to file RRM for 2019. Atmos Mid-Tex is scheduled to submit its 2019 Rate Review Mechanism (RRM) tariff filing by April 1, 2019. The RRM is an annual expedited review rate proceeding utilized by Atmos in its Mid-Tex and West Texas service areas. The RRM process was created as a substitute for Gas Reliability Infrastructure Program (GRIP) cases as part of a settlement of Atmos Mid-Tex's 2007 system-wide rate case.

The RRM process allows cities to evaluate all aspects of the utility's business in order to identify unreasonable expenses. Cities can then negotiate the proposed increase with the utility. In contrast, GRIP rates



are not subject to substantive review by stakeholders outside the context of a base rate case.

While it is uncertain what to expect in the upcoming filing, a careful review of whether Atmos Mid-Tex is attempting to recover costs associated with last year's explosion and gas curtailment in Dallas will be necessary. It is likely that this next RRM filing will result in higher rates, effective in October. ACSC saw a slight decrease in rates in 2018 from the rates set in the 2017 RRM settlement attributable to a reduction in federal income tax rates. Additionally, ACSC's settlement with Atmos in its 2017 RRM directly resulted in reduced Federal income tax rates.

Atmos Energy fined $16,000 by the Railroad Commission for Irving Explosion. Atmos Energy's Mid-Tex division has been fined $16,000 by the Railroad Commission for safety violations that led to a home explosion in the City of Irving last year. A family of five escaped their home, which caught on fire on January 1, 2018, after the explosion. It is our understanding that the family members smelled natural gas, saw Atmos workers in the street outside their house and asked them three separate times if it was safe to stay in their home; and then, minutes after being told by Atmos that everything was fine and that the family did not need to evacuate, their home exploded and burst into flames.

Ultimately, the RCT cited three pipeline safety violations. Atmos paid the fine in August 2018 without admitting it violated any rules. However, the RCT rejected Atmos' plan to correct two of the three violations and gave the company an extension until May 2019 to comply.

One interesting footnote to this matter is that an investigation by the *Dallas Morning News* revealed that Atmos Mid-Tex has been cited for violations by the RCT more than 2,000 times in the last decade, but has paid less than $250,000 for such fines. Further, the investigation found that in the same time span, Atmos has made profits of $2.8 billion. CenterPoint Energy, the only other gas distributor that rivals Atmos Mid-Tex in size, had slightly more than 400 citations in the same period.

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