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ATTORNEYS AT LAW

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THE LONE STAR CURRENT

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PREVIEW OF THE REGULAR SESSION OF THE 89TH LEGISLATURE

by Ty H. Embrey

With the November 2024 General Election behind us and the turn of the calendar to 2025, the Texas Legislature started its Regular Session on January 14. In accordance with the Texas Constitution, the Legislature will meet for 140 days and will adjourn the Regular Session on Monday, June 2. There are many significant issues facing the Legislature as it attempts to tackle the rapid population and business growth Texas is experiencing.

Legislative Leadership

The make-up of the Texas Legislature did not change significantly after a general election with only a few surprises. Republicans picked up 1 seat in the Texas Senate with Adam Hinojosa defeating incumbent Morgan LaMantia in a state senate seat anchored in South Texas. This election result produces a 20 to 11 Republican majority in the Texas Senate. For the Texas House of Representatives, Republicans picked up 2 seats in South Texas with victories by Don McLaughlin and Denise Villalobos so Republicans will hold an 88-62 majority in the Texas House.

While Governor Abbott and Lieutenant Governor Patrick remain in their respective positions, the Texas House of Representatives held an election for the position of Speaker of the Texas House on the first day of the Regular Session. The only individuals who can vote for the Speaker of the Texas House are the 150 State Representatives who make up the Texas House. The Texas House elected State Representative Dustin Burrows of Lubbock on the 2nd ballot. After no Speaker candidates received the required 76 votes during the 1st ballot, Speaker Burrows received 85 votes in comparison to the 55 votes received by State Representative David Cook of Mansfield. Both Speaker Burrows and State Representative Cook are Republicans. The Speaker during the previous 88th Regular Session, Dade Phelan of Beaumont, announced in December he was not running for re-election as Speaker which led to the Texas House electing a new Speaker. One of the major issues in the Speaker race is the traditional practice of Speakers appointing members from both political parties to serve as chairpersons of House committees.

Legislative Priorities

The statewide office holders have expressed their interest in addressing multiple important issues facing Texas and its citizens. Governor Abbott and Republican leadership have already stated they plan to work with the Texas Legislature on legislation related to school choice, border security, and water supply challenges. The Legislature will also continue to work on legislation to make the electric grid as reliable as possible to confront the increased energy demands and unpredictable and adverse weather events facing Texas. Over the legislative interim period, both House and Senate Committees have a substantial amount of testimony from private companies and the leadership of the Public Utility Commission ("PUC") and ERCOT regarding the current status of the electric grid in Texas and how Texas can plan for the growth that is projected. There are ongoing discussions on the financial investment needed by the State of Texas to help the reliability of the Texas electric grid and the possible re-design of the Texas electric market.

Another main focus of legislators this Regular Session will be on the make-up of the state's budget and how to address the budget surplus that is anticipated.

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

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

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FIRM NEWS

Marc Cayabyab has joined the Firm's Employment Practice Group. Marc's practice consists of advising employers on employment law issues, including navigating compliance with state and federal employment laws, conducting workplace investigations, training management on effective practices, and representing employers in administrative hearings and in state and federal courts. Marc's career has mostly focused on serving as employment counsel for several state agencies such as the Texas Commission on Environmental Quality and Texas Health and Human Services Commission, and Texas non-profit organizations, with additional litigation experience as insurance defense counsel for several large commercial carriers. Marc has a demonstrated record of successfully guiding managers and leaders at the highest levels of state entities and organizations through difficult and complex employment issues with detailed knowledge and tailored advice. Marc received his doctor of jurisprudence from University of Houston Law Center and his bachelor's from the University of Texas.

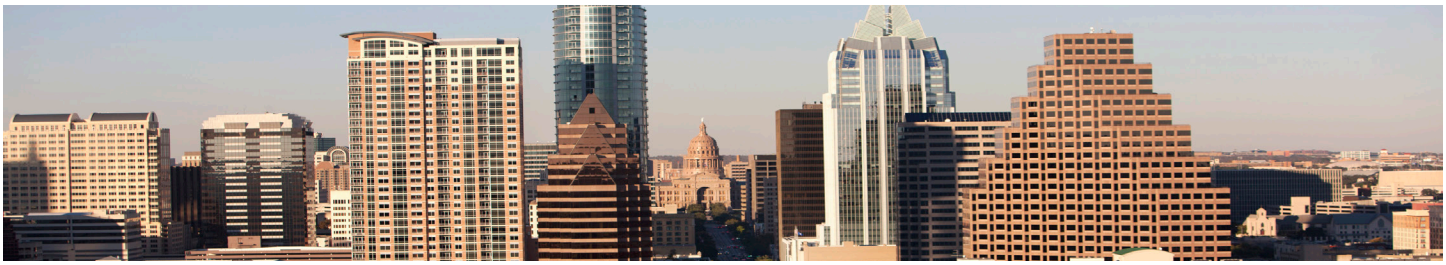
Lauren Thomson will be discussing "Water Reuse Permitting" at the 26th Annual Changing Face of Water Law Conference on February 20 in San Antonio.

Mary Martha Murphy will be giving a "Case Law Update" at the Texas Water Association Annual Conference on March 6 in Austin.

Jamie Mauldin and Toni Rask will be presenting "Requirements Regarding Public Notices" at the Texas Rural Water Association's Rural Water Con 2025 on March 27 in Austin.

Lloyd Gosselink is proud to support the Travis County Women Lawyers' Association Pathfinders Luncheon for another incredible year! Lloyd Gosselink attorneys, including principal Gabrielle C. Smith who is currently serving as the President of TCWLA, attended the luncheon, an inspiring event celebrating the trailblazing women in our legal community who pave the way for others through their courage, leadership, and dedication. Congratulations to this year's outstanding honorees for their remarkable achievements and impact—they truly embody the spirit of this luncheon and the mission of TCWLA. Thanks to TCWLA for hosting and for fostering a legacy of excellence and opportunity for women in law!

MUNICIPAL CORNER



The Attorney General addresses an individual's service in dual-public offices and the common-law doctrine of incompatibility. Tex. Att'y Gen. Op. KP-0474 (2024).

The Nueces County Attorney requested an opinion from the Texas Attorney General to determine whether an individual could simultaneously serve on the boards of the Nueces County Hospital District and the Corpus Christi Regional Transit Authority. This opinion examines the common-law doctrine of incompatibility, which prohibits service in multiple public offices in cases of self-appointment, self-employment, and conflicting loyalties.

The common-law doctrine of incompatibility prohibits dual public service in cases of self-appointment and self-employment. The self-appointment aspect of the doctrine disqualifies all public officials from holding offices in which they hold the power to appoint themselves to the office they hold. The self-employment aspect of the doctrine prohibits a person from holding both an office and employment in a job that the office supervises.

With regard to the circumstance involving the Nueces County Hospital District and the Corpus Christi Regional Transit Authority, the Attorney General determined that incompatibility due to self-appointment or self-employment are not at issue, as neither board appoints members to the other, and there were no indications of employment relationships.

The common-law doctrine of incompatibility also prohibits conflicting loyalties. The opinion focused on the conflicting-loyalties aspect, which applies when both positions are public offices that have overlapping jurisdiction. The opinion confirms that members of both boards are considered public officers. The Attorney General noted that overlapping geographical jurisdiction increases the potential for conflicting loyalties and cited certain examples of situations when the doctrine of incompatibility could be implicated, such as taxation powers, eminent domain powers, and overlapping functions. The Attorney General analyzed the powers and duties held by both boards and concluded that a court would likely find that the overlapping functions, contract authority, and eminent domain powers in overlapping territory prohibit an individual from simultaneously serving on both boards due to conflicting loyalties incompatibility, even if the overlapping taxation authority does not create an insurmountable conflict and the threat posed from conflicting loyalties is merely hypothetical.

The Attorney General examines boilerplate public notices concerning executive session and closed meetings with attorneys. Tex. Att'y Gen. Op. KP-0475 (2024).

The Hood County Attorney requested an opinion from the Texas Attorney General to determine the sufficiency of certain public notices used by governmental bodies with regard to the Texas Open Meetings Act ("TOMA"). In particular, the Attorney General examined whether certain boiler-plate language evidencing the possibility that the governmental body may enter closed, executive session satisfied the requirements of TOMA. The Attorney General also advised whether governmental bodies could consult with an attorney in a closed, executive session about retaining the attorney to perform professional legal services.

With regard to notices raising the possibility of a closed, executive session, the Attorney General determined that boilerplate language in a notice that a closed meeting may commence is insufficient under TOMA to alert the general public of the subject to be considered at the meeting. The Attorney General noted TOMA's broad purpose of enabling public access knowledge of government decision-making, and stated that providing notice that an executive session may occur does not relieve the governmental body of its duty to include in its notice all subjects that will be addressed at the meeting.

In the case at hand, the Hood County Hospital District (the "District") went into executive session with an attorney at a public meeting to discuss, among other items, the implementation of a voter-approved tax rate election and the possibility of that attorney's firm representing the District. Neither of these topics were listed as agenda items in the District's public notice of the meeting. The District's notice included the following boilerplate language: the "District reserves the right to adjourn into Executive session at any time during the course of this meeting to discuss any of the matters listed", along with a list of various potential statutory exceptions to TOMA's openness requirement. The Attorney General believed a court would find that this notice failed to satisfy the requirements of TOMA since the notice contained no agenda item referencing a discussion of a tax rate election or retaining a law firm in relation to that matter. While governmental bodies have the right to enter into a closed executive session, notices lacking any language that could alert the public of the actions that might take place in that executive session likely would violate TOMA.

The Attorney General also analyzed whether governmental bodies could discuss hiring an attorney to perform professional legal services in a closed meeting and determined that a court would likely find that such discussion in a closed meeting would not violate TOMA. While TOMA broadly prohibits governmental bodies from engaging in private meetings, there is an exception for confidential communications that would fall under attorney-client privilege. The Attorney General acknowledged that attorney-client privilege extends where a client, or potential client, consults with an attorney with a view to obtaining professional legal services. Thus, the Attorney General concluded, it's likely a court would find TOMA authorizes a governmental body to go into closed, executive session for the purpose of consulting with an attorney about potentially retaining the attorney's services, with the caveat that any discussion must be strictly limited to such subject and may not extend to other unrelated legal matters.

Jake Steen is an Associate in the Firm's Water, Districts, and Litigation Practice Groups. If you would like additional information or have questions related to these or other matters, please contact Jake at 512.322.5811 or jsteen@lglawfirm.com.

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In addition to its general funds and the Economic Stabilization Fund ("Rainy Day Fund"), Comptroller Glenn Hegar has estimated Texas will have approximately a $20 billion budget surplus generated from several sources, including the oil and gas production taxes collected by the State of Texas. State leaders have stated the budget surplus should continue to be used to lower property taxes for the citizens in Texas who own property.

Environmental Issues

Over the legislative interim period, committees in both the Texas House of Representatives and Texas Senate held committee hearings to discuss water, wastewater, environmental, and utility issues. These committees include the Senate Committee on Water, Agriculture, and Rural Affairs and the Senate Committee on Natural Resources and Economic Development as well as the House Committee on Natural Resources and the House Committee on Environmental Regulation. While the interim committee process was shorter in length than usual due to the special sessions the Texas Legislature held in 2024, each committee heard expert and public testimony on issues related to water utility infrastructure, water supply sources, groundwater management and protection, and state and regional flood planning, among other water and wastewater issues. During the Regular Session, we can expect the committees to continue these conversations and legislators to file legislation to address these issues.

The Chairman of the Senate Water, Agriculture and Rural Affairs Committee, Charles Perry of Lubbock, has expressed his desire for the Texas Legislature to pass legislation to address the water supply issues facing Texas. Chairman Perry is looking for the Texas Legislature to allocate multiple billions of dollars to help fund a substantial number of water supply projects, which could include the development of more water supplies from produced water, seawater desalination, and brackish groundwater sources.

Lloyd Gosselink at the Legislature

Over 2,000 bills have been filed since bill filing began on Tuesday, November 12th, setting up the framework for what promises to be an incredibly busy legislative session. As bills are filed, Lloyd Gosselink will continue to monitor and track all of the key pieces of legislation. During the Regular Session, Lloyd Gosselink will participate in the legislative process to ensure the interests of our clients are represented at the Texas Legislature.

Almost 180 years after the Texas Legislature first met in a Regular Session, the 2025 Regular Session for the Texas Legislature provides an opportunity for Texans across the state to participate in the lawmaking process. Lloyd Gosselink is proud to help Texans be a part of that process.

Ty Embrey is the Chair of the Firm's Governmental Relations Practice Group and a member of the Firm's Water, Districts, and Air and Waste Practice Groups. If you have any questions concerning Legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com.

AM I A FRIEND OF THE COURT?

by James Parker

Everyone wants to be a friend of the United States Supreme Court—in Latin, an "*amicus curiae*." Though amicus briefs to the Supreme Court used to be rare, today it is not unusual to see cases with more than 100 amicus briefs. And in its last term, the Supreme Court cited amicus briefs in more than half of its decisions.

But that trend has not necessarily filtered down to the lower federal courts or Texas state courts. And that's ironic, because those courts are arguably more in need of amicus briefing than is the Supreme Court. The Supreme Court has up to 53 law clerks, and it decides only about 60 cases each term. So, it has the time and staff to do all the research and analysis a case might need. In contrast, lower federal courts and state courts have smaller staffs and much larger dockets.

This is a phenomenon that has not escaped the notice of the judges. In various forums, justices on the Texas Supreme Court

have lamented the lack of amicus briefing that is filed in that court. We often think that judges probably have quite enough to read, thank you very much. But no—*they're actually asking for more.*

So hearing that instruction, perhaps you are now asking yourself: should I too be a friend of the court?

Who can be an amicus? So here's the thing: anybody can file an amicus brief. Typically, an amicus will favor one side or the other in a dispute. But some *amici* simply have an interest in an area of law and its development (for example, Prof. Ron Beal at Baylor School of Law is a serial amicus in administrative-law cases).

The effectiveness of an amicus has less to do with who the filer is than what the filer has to say.

What does an effective amicus have to say? The parties in a court of appeals or Texas Supreme Court case typically have capable counsel who have summarized the evidentiary record and analyzed the relevant legal authority. So, except in rare instances, it is not useful to the court for an amicus to make a party's primary legal arguments or delve into the record on appeal. Most of all, an amicus should not appear to be just a mechanism for a party to evade the word limits on its brief.

1. *Say something new:* While the parties will generally focus on the facts and law impacting the particular case and the parties they represent, an amicus can provide additional information and context. Importantly, an amicus is not limited to the evidentiary record developed in the trial court. An amicus brief can provide additional information from outside reference sources, including government agencies, industry publications, and scientific journals. Or an amicus brief can provide additional legal analysis as to the historical development of a legal rule, the rule followed in other jurisdictions, or unique assessment of a particular precedent (e.g., where the amicus was a party in a prior case cited as authority).
2. *Provide expertise:* An amicus that has unique industry knowledge or scientific expertise can be particularly helpful to a court. And because amicus briefs are generally viewed as being somewhat less formal than the parties' briefs, photos and diagrams are more common and can aid in the understanding of complex technical subjects.
3. *Explain the consequence of a decision:* The existence of an amicus can reveal that a decision will impact others beyond the parties to the particular lawsuit. And within its briefing, the amicus can identify the real-world consequences that judges without industry knowledge might not otherwise foresee.

When should an amicus brief be filed? In federal court, an amicus must obtain leave of court to file a brief or else have the consent of the parties. The request for leave of court along with the amicus brief itself must be filed no later than 7 days after the principal brief of the party supported by the amicus. See Fed. R. App. P. 29(6).

State court is more lenient. The Texas Rules of Appellate Procedure do not require an amicus to obtain leave of court, nor do they impose any deadline for filing an amicus brief. But as a practical matter, an amicus wants its brief to be filed at a time to maximize its impact. That necessarily depends on the stage of the appeal, but we would broadly advise that an amicus brief should be filed not long after the parties' briefs on the merits. At the very latest, the amicus would want to file its brief a month ahead of oral argument to allow the justices time to evaluate its points and add it into their oral-argument preparation.

What are the requirements for an amicus brief? In federal court, an amicus brief must comply with the rules governing a party's brief. *See* Fed. R. App. P. 29(4). In addition, the amicus brief must include certain disclosures, such as the identity of the amicus, its interest in the case, and its authority to file. *See id.*

State courts have similar rules requiring disclosure of the person or entity on whose behalf the brief is tendered and the fee paid for preparing the brief. *See* Tex. R. App. P. 11. As in federal court, the Texas Rules require an amicus brief to comply with the briefing rules for parties. *See id*. However, in practice we have noticed that the state courts are more lenient on the briefing requirements for *amici* than are the federal courts.

How does one file an amicus brief? To meet the formal requirements for an amicus brief and to maximize the effectiveness of the points raised by it, we would recommend that a potential amicus consult with an experienced appellate lawyer. The lawyers at Lloyd Gosselink have decades of experience in federal and state courts of appeals, and can help you decide whether an amicus brief would be appropriate in a given case.

James Parker is a Principal in the Firm's Litigation and Appellate Practice Groups. If you have any questions or would like additional information related to this article or other matters, please contact James at 512.322.5878 or jparker@lglawfirm.com.

A CRITICAL EVALUATION OF WATER AND WASTEWATER ENTITIES FOR THE COMMERCIAL AND RESIDENTIAL DEVELOPER

by David Klein and Lauren Binger

When a developer desires to provide retail water and/or wastewater service to a new development, there are multiple entity types which a developer can consider. Much the same way that choosing a corporate entity type (e.g. limited liability company, corporation, limited partnership, etc.) is a critical strategic decision for a business, the same is true for a developer choosing the type of utility to create to provide retail water and/or wastewater service to a development. The outcome of this decision has many implications including, but not limited to, tax, rate-making, and financing options.

Although providing retail water and/or wastewater service to a development involves many other steps including, establishing a Public Water System with the Texas Commission on Environmental Quality ("TCEQ"), determining where to obtain water (obtaining water rights vs. purchasing wholesale water), determining what facilities need to be constructed, hiring operators and staff, setting rates, and obtaining a Certificate of Convenience and Necessity, this article will solely focus on the step in the process of evaluating the pros and cons of each distinct type of utility and is intended to provide a non-exhaustive evaluation.

The term "utility" is associated with the business and billing aspects of providing retail water (and sewer) service—including the investment of public funds in infrastructure and real property, including easements and water rights. The Public Utility Commission of Texas ("PUC") generally has jurisdiction over utilities.

Retail Public Utilities

Municipal Utility Districts ("MUDs")

MUDs are conservation and reclamation districts created under the "Conservation Amendment" of the Texas Constitution (Art 16, Sec. 59) and are governed by Chapters 49 and 54 of the Texas Water Code ("TWC"). MUDs are intended to address the problem of modernizing older irrigation-type districts when suburban sprawl ramped up mid-20th century and are focused on providing water, wastewater and drainage services. MUDs are typically used by developers to finance the construction of water, wastewater, and drainage infrastructure through issuance of tax-exempt bonds on the open market or for purchase by the Texas Water Development Board. Creation of MUDs requires approval of the TCEQ or the Texas legislature. A MUD can be created by either (1) adoption of a district creation bill by the Texas Legislature or (2) by the TCEQ following a petition and consent process described in the TWC. For property located in a City's jurisdiction, to be included in a MUD, City consent is required prior to creation as part of the TCEQ process; however, there are certain limitations to the conditions a city may place on its consent. MUD powers include authority over water and sewer service, water and sewer rates, solid waste, irrigation, parks and recreation, drainage, street and security lighting, enforcement of deed restrictions, eminent domain, annexation, and authority to retain peace officers. Once a developer creates a MUD, the MUD would then be managed by an elected board. A MUD, as a governmental entity, is also subject to the Texas Open Meetings Act[1], Texas Public Information Act[2], and Texas Election Code[3].

Special Utility Districts ("SUDs")

SUDs are also conservation and reclamation districts created under the Conservation Amendment. A SUD is governed by a board of not less than five (5) and not more than eleven (11) directors. A SUD's powers include: (water) own, operate, maintain and improve, or extend inside and outside its boundaries any infrastructure that are helpful to supply water for municipal, domestic, power and commercial, and other beneficial purposes; (waste) collect, transport, process, dispose of, store, and control domestic, industrial, or communal wastes whether in fluid, solid, or composite state; (drainage) gather, conduct, divert, and control local storm water or other local harmful excesses of water in the district; irrigate land located within the district; alter land elevation in the district where it is needed; and (fire) provide fire-fighting services for the inhabitants. A SUD has no taxing authority, but does have rate-making authority. Like a MUD, a SUD has rate-making authority, which means that a board can set rates independently and absent approval from the PUC.

A SUD can be created by either (1) adoption of a district creation bill by the Texas Legislature or (2) by the TCEQ following a petition and consent process described in the TWC. Additionally, a WSC (defined herein) can be converted to a SUD by either the TCEQ or the Texas Legislature. Once a WSC has approval to convert to a SUD, a confirmation election is held. If the votes are canvassed and the election is successful, the SUD must submit evidence of the successful election to the TCEQ and PUC and the SUD is created. The PUC will update the SUD's records, Certificate of Convenience and Necessity certificate, database information, and mapping information to reflect the conversion of the WSC to the SUD. Once a developer creates a SUD, the SUD would then be managed by an elected board. A SUD, as a governmental entity, is also subject to the Texas Open Meetings Act[4], Texas Public Information Act[5], and Texas Election Code[6].

Water Control and Improvement Districts ("WCIDs")

A WCID is created under Article 3, Sec. 52, or the Conservation Amendment. A WCID is governed by a five (5) member board elected by voters of a district. A WCID may establish fees and charges, levy and collect *ad valorem* property taxes for maintenance and operating expenses,

and for debt service costs. Powers of a WCID include: the improvement of rivers, streams, creeks to prevent overflows, or to permit navigation or irrigation, the reclamation and irrigation of its lands, the reclamation, conservation, drainage, and development of its water and hydroelectric power, sewer service, provision of water for beneficial uses, annexation, and eminent domain. Additionally, a WCID is a governmental entity, and as such, is also subject to the Texas Open Meetings Act[7], Texas Public Information Act[8], and Texas Election Code[9].

Water Supply Corporations ("WSCs")
WSCs are non-profit water supply corporations organized under Ch. 67 of the TWC and Ch. 22 of the Texas Business Organizations Code. WSCs are not political subdivisions of the State, but are still subject to the Texas Open Meetings Act[10] and Texas Public Information Act[11] and are governed by a member-elected board. WSCs have the authority to construct, own, maintain, and expand infrastructure necessary or helpful to provide adequate water service, sewer service, flood control, or drainage for a political subdivision. WSCs also have authorities similar to public utilities including: granted rights of way along public roads and other rights of way without requirement for surety bond or security and WSC agents may enter land to inspect, survey, or perform tests to determine condition of property (locations of works, improvements, plants, facilities, etc.). Additionally, a WSC may contract with certain entities to issue bonds secured by a contract entered into under Local Gov't Code 552.014 – but interest rates are higher. Additionally, like a SUD, WSCs cannot levy *ad valorem* taxes and can set their own rates.

Private Utilities

Investor-Owned Utilities ("IOUs")
IOUs are created not by the Texas Legislature or the TCEQ, but through a corporate formation filing. An IOU then would apply to obtain a Certificate of Convenience and Necessity from the PUC and a Public Water System from the TCEQ. Prior to changing rates, an IOU must submit a rate application for review, approval, and/or modification by the PUC. The challenge for IOUs is to design rates that cover their regular expenses and that allow for the opportunity to earn a reasonable rate of return on their investment without undercharging or overcharging customers. The PUC has original jurisdiction over rates and service policies of IOUs outside the corporate limits of a city. Inside the corporate limits of a city, the city has original jurisdiction to set the IOU's rates, unless the city has surrendered its jurisdiction to the PUC. Additionally, if an IOU applies to a city to increase its retail rates charged to customers located inside a city's corporate limits, then the IOU can appeal the city's decision to the PUC. There are four different rate filing packages for IOUs in Texas. The utility's classification (Class A, B, C or D) determines which application form the utility must use to apply for a rate increase with the PUC. To determine the classification of an IOU, the number of retail water connections or taps is used. If the utility provides only retail sewer service, then the number of sewer connections or taps is used to determine the classification of the utility.

Additionally, an IOU is not a governmental entity, and as such, is not subject to the Texas Open Meetings Act, Texas Public Information Act, and Texas Election Code. An IOU also cannot levy *ad valorem* taxes.

Evaluating the type of water and wastewater utilities can be a difficult undertaking. When faced with this choice, a developer may look to specific priorities (independent rate-making, reimbursement, the power to levy taxes, etc.) in determining the appropriate utility system structure.

[1]TEX. GOV'T CODE § 551(3)(H).
[2]TEX. GOV'T CODE § 552.003(1)(A)(viii).
[3]TEX. ELECTION CODE § 1.005(13).
[4]TEX. GOV'T CODE § 551(3)(H).
[5]TEX. GOV'T CODE § 552.003(1)(A)(viii).
[6]TEX. ELECTION CODE § 1.005(13).
[7]TEX. GOV'T CODE § 551(3)(H).
[8]TEX. GOV'T CODE § 552.003(1)(A)(viii).
[9]TEX. ELECTION CODE § 1.005(13).
[10]TEX. GOV'T CODE § 551(3)(H).
[11]TEX. GOV'T CODE § 552.003(1)(A)(viii).

David Klein is a Principal in the Firm's Districts and Water Practice Groups. Lauren Binger is an Associate in the Firm's Districts and Water Practice Groups. If you have any questions regarding creating a water and/or wastewater utility or other matters, please contact David at 512.322.5818 or dklein@lglawfirm.com, or Lauren at 512.322.5807 or lbinger@lglawfirm.com.

PUC ADOPTS ANCILLARY SERVICES STUDY, MAINTAINS CONSERVATIVE OPERATIONS

by Rick Arnett

On December 19, 2024, the Public Utility Commission of Texas ("PUC" or "Commission") adopted its Ancillary Services ("AS") Study—a document controlling the Electric Reliability Council of Texas' ("ERCOT") AS acquisition policy for the upcoming two years. ERCOT acquires AS—generation capacity produced by certain eligible generators—in the "day ahead market." By "withholding" AS capacity from the "real time market," ERCOT reserves generation that may be necessary to address operational reliability events in the proceeding operating day. ERCOT, for example, deploys AS if a transmission line or powerplant failure leads to systemwide frequency concerns.

After Winter Storm Uri, the 87th Texas Legislature required the Commission to "evaluate whether [AS] will continue to meet the needs of the electricity market in the ERCOT power region." The Commission determined AS acquisition is sufficient—and made two other significant AS policy decisions detailed below.

ERCOT confirms—and maintains—recent "conservative operations"

During the AS Study process, ERCOT confirmed a recent shift in its operational posture. After Winter Storm Uri, ERCOT initiated "conservative operations" and, thus, acquired AS quantities necessary to avoid emergency "Watches." Before Winter Storm Uri, ERCOT acquired AS quantities necessary to avoid load shed, or blackout events. The Steering Committee of Cities and Texas Coalition for Affordable Power (collectively, "Cities") argued (1) ERCOT's conservative posture is unnecessary and inflates consumer costs, and (2) ERCOT's AS acquisition procedures are ambiguous and require supporting cost analysis.

First, compared to an Energy Emergency Alert (EEA) event—protocols implemented prior to a load shed event—a Watch is much less significant. Indeed, a Watch does not actually require ERCOT operational responses to address reliability concerns. Acquiring greater quantities necessary to avoid Watches, however, results in higher consumer costs. As such, ERCOT should only incur and pass to ratepayers AS costs necessary to avoid Watches. Second, ERCOT's AS objectives are ambiguous and, without supporting cost analysis, may subject consumers to unnecessary costs. Cities therefore urged ERCOT to produce cost analysis related to competing AS acquisition objectives. Otherwise, neither the Commission nor ERCOT stakeholders can compare and ultimately select the most efficient AS acquisition policy.

The Commissioners directed ERCOT to continue conservative operations—until ERCOT produces cost analysis necessary to compare competing operating postures. ERCOT will now develop cost analysis related to various operating postures before 2027, when the Commission will update the AS Study. In 2027, cost analysis may compel ERCOT to adjust its operating posture to a less conservative, more consumer-friendly, approach.

PUC broadens the scope of AS objectives

The Commissioners directed ERCOT to develop the Dispatchable Reliability Reserve Service (DRRS)—ERCOT's most recent AS—in a manner that both promotes operational reliability and resource adequacy initiatives. As set forth above, ERCOT generally acquires AS for near-term operational reliability initiatives. Resource adequacy initiatives, in contrast, are long-term reliability goals that seek to incentivize additional dispatchable generation such as natural gas facilities.

Cities argued that resource adequacy initiatives are outside the scope of AS policy and could possibly inflate DRRS costs. Nonetheless, in large part due to ongoing resource adequacy concerns, the Commissioners directed ERCOT to develop DRRS in a manner that preserves "optionality"—i.e., the ability to deploy DRRS for operational reliability and resource adequacy. ERCOT stakeholders, including Cities, will now determine to what extent DRRS should serve as a resource adequacy initiative.

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

ASK SARAH

Dear Sarah,

I received FMLA documents from one of my employees, and I think they filled the documents in themselves! As in, I think they changed the information the doctor provided! What can I do?

Signed,
— NOT A Doctor

Dear NOT A Doctor,

You might be surprised to learn that this does not come up infrequently for me and the lawyers on my team. There are a whole host of issues that can arise in connection with the completion of FMLA documentation, not the least of which are questions regarding the content of the medical certification, which is generally completed by the employee's medical provider.

For example, the information provided on the medical certification may be either **incomplete** or **insufficient**. **Incomplete** means that some required information is missing or left blank, such as certain fields, sections, signatures, dates, or other essential components.

Insufficient means that, although information was provided, it is vague, ambiguous, or non-responsive. For example, the document may be filled out but does not have enough detail to confirm that the employee's condition qualifies under FMLA, the descriptions or medical facts provided are unclear or do not connect the condition to the leave requested, or the document raises questions about the need for the leave or the duration of the leave. Some examples we see include a medical provider writing "intermittent leave needed" without explaining the frequency or duration, or the medical facts provided are too general, such as writing "employee has a medical condition" without any further information.

In either instance, you should notify the employee in writing that the certification is incomplete or insufficient, as appropriate, specify exactly what information is missing, and give them at least seven days to provide the information. If the employee does not provide the requested information, your organization may directly contact the employee's health care provider to obtain the required information, but whoever

does the contacting must be either a health care provider, a human resource professional, a leave administrator, or a management official. Because of privacy concerns, the rules forbid the employee's direct supervisor from contacting the employee's health care provider.

Now, what if the information in the medical certification is complete and sufficient, but you don't believe that a doctor actually filled it out? In some instances, it might be most appropriate to just ask the employee about it. Many of the issues that make it to my desk can be solved with a phone call. Otherwise, under FMLA regulations, you can directly inquire with the employee's medical provider about the authenticity of information provided, even without the knowledge or consent of the employee. Again, only certain employer representatives may contact the medical provider, and before you do so, you should first work with the employee to cure any deficiencies on the face of the document.

If the medical provider confirms that the documentation was falsified, this is a disciplinary issue to address with your employee. And, of course, you are not obligated to certify FMLA leave based on false information.

My team and I regularly work through FMLA forms that are either insufficient or incomplete. Thankfully, it is far rarer that someone intentionally falsifies information, which constitutes serious misconduct. Remember, give your folks the benefit of the doubt, communicate openly and honestly with them, and give them an opportunity to correct their FMLA forms when warranted – this can be a complicated process for those who are familiar with it, and even more so for those who are unfamiliar. Reach out to us any time if there is something we can help you with in respect to this process.

"Ask Sarah" *is prepared by Sarah Glaser, Chair of the Firm's Employment Law Practice Group. If you would like additional information or have questions related to this article or other employment matters, please contact Sarah at 512.322.5881 or sglaser@lglawfirm.com.*

IN THE COURTS

Water Cases

Herrera v. Mata, No. 23-0457, 68 Tex. Sup. Ct. J. 121, 2024 Tex. LEXIS 1079 (Dec. 6, 2024).

The Texas Supreme Court ("Court") remanded several homeowners' claims against Hidalgo County Irrigation District No. 1 ("District") officials for the District's effort to collect charges over twenty years old. The District is a special purpose irrigation district created under the authority of the Texas Constitution to deliver untreated water for irrigation and to provide for the drainage of lands.

In 2019, the District, as part of an initiative to find and collect delinquent amounts owed to it, sent ten homeowners a statement reflecting "delinquent taxes" owed for the years 1983-1998. While the amount owed by the homeowners varied between $237 and $255, the statements imposed additional charges for interest and attorney's fees, bringing the total per homeowner between $1,139 and $1,211. Upon receiving these statements, the homeowners requested the charges be removed based on Texas Tax Code ("Tax Code") 33.05(c), which states that if no pending litigation concerning a delinquent tax exists, the collector "shall cancel and remove from the delinquent tax roll…a tax on real property that has been delinquent for more than 20 years." The District refused and cited to its authority as an irrigation district under Texas Water Code ("Water Code") § 58.509 to levy charges and assessments which "shall constitute a lien against the land" and to which "[n]o law providing limitation against actions for debt shall apply."

On August 18, 2020, the homeowners sued the District and several District officials in their official capacity, asserting that the District acted *ultra vires* in seeking to collect taxes in violation of the Tax Code and seeking a refund of payments homeowners had made pursuant to the "delinquent tax" statements, as well as declaratory and injunctive relief. Though irrigation districts, as political subdivisions of the state, are normally immune from lawsuits for money damages, such immunity does not apply if a complaint successfully alleges that district officials acted "*ultra vires,*" that is, without legal authority. Despite the homeowners' argument that they successfully pled an *ultra vires* claim by showing the District failed to remove the charges in compliance with Tax Code § 33.05(c), the trial court found in favor of District officials, who responded that the charges were "assessments" under the Water Code rather than taxes subject to § 33.05(c) and as such, the trial court did not have jurisdiction to hear the homeowners' claim. The trial court's finding was appealed to the 13th Court of Appeals, which also found that the trial court lacked jurisdiction over the Tax Code claim, and the homeowners then petitioned the Court for review.

The Court found that when a challenge to jurisdiction rests solely on what is alleged in the pleadings, such pleadings are construed in favor of the plaintiff and must "affirmatively negate" jurisdiction for a plea challenging jurisdiction to be successful. Thus, when viewed in favor of the homeowners, the homeowners alleged sufficient facts to allow a court to hear the *ultra vires* claim by showing that (1) they received "delinquent tax statements" from the District; (2) the statements were sent more than twenty years after the amounts were due; (3) there is no pending tax litigation against any of them; and (4) the District failed to cancel and remove the charges. The District claimed these facts were negated elsewhere in the pleadings, pointing to concessions by the homeowners that the District does have authority to levy assessments under the Water Code, the failure of the homeowners to formally request a refund if the charges were taxes, the fact that the District never listed the disputed charges as delinquent on the property appraisal rolls or on the public lists of delinquent taxes, and a post-hoc clarification letter sent by the District stating that the charges were not taxes. However, the Court found that none of these factors determined the character of the disputed charges as definitively "tax" or "assessment" given the unusual circumstances of the charges; and therefore, the homeowners alleged facts showing that the charges were taxes subject to the Tax Code's limitations period and that a court has jurisdiction to hear the Tax Code *ultra vires* claim. The Court remanded the case to the trial court for proceedings consistent with this opinion.

Harris Cty. Water Control v. 308 Furman, Ltd., No. 01-23-00177-CV, 2024 Tex. App. LEXIS 9062 (Tex. App.—Houston [1st Dist.] Dec. 31, 2024, no pet. h.).

A Texas Commission on Environmental Quality ("TCEQ") Order had a preclusive effect on Harris County Water Control and Improvement District No. 89's ("District") ability to relitigate its obligation to reimburse a developer in district court. The District is a municipal utility district operating pursuant to Chapters 49 and 54 of the Texas Water Code, and it provides water, wastewater treatment, drainage, and related services to residents within its boundaries.

In December 2002, the District entered into a reimbursement agreement with 308 Furman, Ltd. ("Furman"), under which the District agreed to reimburse Furman, the developer of certain property, for the eligible portion of construction costs assumed in constructing water supply lines, storm sewers, drainage facilities, and other infrastructure required to serve the property. The District agreed to pay up to the maximum of all sums advanced to or on behalf of the District to the extent permitted by TCEQ rules, including interest. Furman agreed to maintain and provide an accounting of such costs, and in return, the District agreed to make all reasonable efforts to file and obtain approval from the TCEQ to issue bonds to fund reimbursements to Furman. However, in 2017, a dispute arose as to whether certain costs were reimbursable based on the District's exclusion from a bond application the costs to reimburse Furman for a pump station, money advanced to the District, payment of interest, and detention pond maintenance expenses. Furman appealed the District's decision refusing to reimburse these costs to the TCEQ, who eventually issued an Order finding in favor of Furman on all issues except the interest.

When the District failed to provide any reimbursement to Furman despite the TCEQ Order, Furman brought a breach-of-contract claim in district court based on the reimbursement agreement. Furman asserted that the TCEQ Order required a finding in Furman's favor, because TCEQ, a court of competent jurisdiction, had rendered a prior final judgement on the merits involving the same claims and the same parties, satisfying a legal doctrine known as *res judicata*. The District argued that *res judicata* did not bar it from contesting the breach-of-contract claim because the TCEQ does not have authority to decide a contract dispute. Further, the TCEQ statutes and regulations consider certain public interest factors that are not at issue in a contract claim, making the two claims distinguishable. The trial court granted summary judgment in Furman's favor and entered a judgment awarding Furman the reimbursement costs in damages plus pre- and post-judgment interest.

On appeal, the 1st Court of Appeals ("Court") found that though the TCEQ cannot award breach-of-contract damages, the TCEQ Order may still have a preclusive effect as to the issues the TCEQ did have authority to adjudicate. The elements of a breach-of-contract claim are: (1) the existence of a valid contract, (2) the party suing to enforce the contract performed or tendered performance, (3) the other party failed to comply, and (4) the suing party was damaged because of the breach. Because the District did not challenge the validity of the reimbursement agreement, the Court only looked to whether the TCEQ Order addressed the last three issues. As to these issues, the Court found that the TCEQ had to find that Furman performed to find the costs reimbursable, and the TCEQ found that the District erred in deciding to exclude the costs from its bond application, thus effectively finding that the District failed to comply with the reimbursement agreement. Finally, the Court found that the TCEQ Order is ultimately a finding that Furman was "aggrieved" by the actions of the District. For these reasons, the Court held that the trial court did not err in granting summary judgment in favor of Furman on the breach-of-contract claim based on *res judicata*.

Litigation Cases

City of Buffalo et al. v. Moliere, No. 23-0933.

A recent Supreme Court decision determined that the City Council of a Type A general law city had the authority to fire a police officer. Gregory Moliere ("Moliere") was fired from his position as a police officer for the City of Buffalo, Texas ("Buffalo"). A Buffalo Police Department policy prohibits high speed chases while a civilian is riding in the patrol vehicle. Moliere did just that—and it resulted in damage to his patrol vehicle. Two weeks later, the Buffalo City Council met in a closed session to discuss Moliere's incident, and then voted to terminate Moliere's employment in open session. Moliere sued the City, the Mayor, and members of the City Council in their official and individual capacities,

seeking a declaration that the City acted without authority and a judgment compelling his reinstatement as a police officer. Moliere argued that only the police chief was authorized to terminate his employment. Moliere also alleged that the Council's action "deprived his limited due process" under the City's policies and procedures.

After the trial court granted the City and Mayor's combined plea to the jurisdiction and motion for summary judgment and dismissed the claims against the City Council members, Moliere appealed. The Court of Appeals held that because there was no City ordinance permitting the Council to fire police officers, there was a fact issue as to whether the City had the power to fire Moliere. The City appealed to the Supreme Court.

On appeal, the Supreme Court found that the City Council did have authority to fire Moliere. Buffalo, as a general-law municipality, is a "political subdivision[] created by the State and, as such, possesses [only] those powers and privileges that the State expressly conference upon [it]" and those powers are typically granted through the Local Government Code.

The Supreme Court found that Local Government Code Section 341.001 applied, which states that "[t]he governing body of a Type A general-law municipality may establish and regulate a municipal police force. . . ." Therefore, Section 341.001(a) undeniably establishes the City Council's authority, as Buffalo's governing authority, to regulate the City's police force, which includes terminating a police officer for violating official policy or demonstrating a performance-related deficiency. The Supreme Court wholly disagreed with Moliere's argument that only the police chief has authority to terminate his employment because it would "vitiate the City Council's express authority to 'regulate' the police force. . . ." Instead, the "express legislative grant of authority confers implied powers reasonably necessary to carry out the conduct expressly authorized" which could reasonably imply the right to terminate a police officer

As such, the Supreme Court reversed the Court of Appeal's judgment and reinstated the trial court's judgment dismissing Moliere's claims against all defendants. The Court of Appeals did not reach Moliere's separate complaint of a due process claim, and therefore the Supreme Court remanded the case to the Court of Appeals with respect to the pending due-process claim.

425 Soledad, Ltd. et al, v. CRVI Riverwalk Hospitality, LLC, No. 23-0344.

Even if an easement is not recorded, subsequent purchasers may be on inquiry notice, or possess actual notice, if a reasonable inquiry of the documents would reveal the easement. In this case, the Supreme Court determined what constitutes actual notice of an unrecorded easement to subsequent property purchasers.

The properties at issue are an office building, a parking garage, and a hotel in San Antonio. The office building and hotel are connected to the parking garage via tunnels. In 2005, 425 Soledad Ltd. ("425 Soledad") purchased the office building. At that time, 425 Soledad and the owner of the parking garage entered into a parking agreement which permitted 425 Soledad to use up to 150 parking spots in the parking garage. The parking agreement stated that it would "run with the land and inure to the benefit of, and be binding on, [the parties] and their respective successors and assigns in title." The parking agreement was not recorded in the county property records.

In 2006, HEI San Antonio Hotel, LP ("HEI") purchased the parking garage and hotel. HEI financed the purchase with Merrill Lynch with a loan including two notes, A and B. Merrill Lynch knew of the parking agreement, as it had 425 Soledad attest that the agreement was "in full force and effect."

In 2008, Cypress Real Estate Advisors ("Cypress") purchased the B-Note from Merrill Lynch through its special-purpose entity, CRVI Crowne Plaza ("CRVI Crowne"). CRVI Crowne confirmed its duty to inquire into the loan documents, which included the closing documents for the Merrill Lynch loan with HEI with appendices that listed the parking agreement. However, the Cypress employee conducting the due diligence did not ask for a copy of the parking agreement from Merrill Lynch or HEI.

In 2010, Cypress anticipated that HEI would default on its loan and considered acquiring the parking garage and hotel. An appraisal of the parking garage and hotel referred to the parking agreement, however the Cypress employee—the same employee who conducted the previous due diligence—later testified he did not read beyond the appraisal's first page and was thus unaware of the information.

Cypress then placed the parking garage and hotel into a receivership in a state court action. Cypress also created another entity, CRVI Riverwalk Hospitality ("CRVI Riverwalk"), to purchase the properties from the receiver. Similar to when CRVI Crowne purchased the note, CRVI Riverwalk assumed a duty of inquiry for the property purchase. Another Cypress employee conducted the due diligence and noticed monthly parking revenue that he understood to be from monthly parking arrangements. Yet, he did not ask to see any parking agreements. Although Cypress had several appraisals for the properties, the Cypress employee "cherry picked" which documents to review and did not review the appraisals. When due-diligence period ended, CRVI Riverwalk purchased the parking garage and hotel.

Later, an office building unit holder requested parking spaces and CRVI Riverwalk refused. 425 Soledad sued and sought a declaratory judgment that the parking agreement is an enforceable instrument that runs with ownership of the garage. CRVI Riverwalk argued that the agreement was not an enforceable easement and that it was a *bona-fide* purchaser who took without notice of the agreement.

The trial court found that the parking agreement created an enforceable easement appurtenant, and that CRVI Riverwalk was not a *bona-fide* purchaser. The Court of Appeals agreed there was an easement, but found CRVI Riverwalk was a *bona-fide* purchaser.

The Supreme Court agreed there was an enforceable easement and, along with the trial court, found that CRVI Riverwalk could not use the affirmative defense of being a *bona-fide* purchaser.

CRVI Riverwalk argued first that CRVI Crowne should be treated as a *bona-fide* purchaser and that protection should also shelter CRVI Riverwalk. The Supreme Court disagreed because CRVI Crowne had actual knowledge of the parking agreement, meaning it could have discovered the parking agreement through a "reasonably diligent inquiry and exercise of the means of information at hand." While a recorded easement provides constructive notice, there was ample opportunity for CRVI Crowne to discover the parking agreement. For example, the closing documents from Merrill Lynch referred to the parking agreement, HEI possessed a copy of the parking agreement, and the tunnel easement referred to the parking garage as being owned by Merrill Lynch. Pursuant to CRVI Crowne's duty to inquire, the parking agreement would have been revealed through a reasonable inquiry.

Therefore, CRVI Riverwalk's argument that it also should be a *bona-fide* purchaser in its own right failed. The Supreme Court found that CRVI Riverwalk had access to the same information as CRVI Crowne and was on inquiry notice. Further, CRVI Riverwalk had several appraisals describing the parking agreement, which it ignored. The Supreme Court stated that "[w]hen a duty to inquire exists, negligent ignorance has the same effect in law as actual knowledge."

Having established that the unrecorded parking agreement was an enforceable easement, and that CRVI Riverwalk was not a *bona-fide* purchaser, the Supreme Court ruled in favor of 425 Soledad.

Purchasers of properties should take their duty to inquire seriously and request copies of every agreement listed or referred to in the documents provided by existing owners or loan servicers. Furthermore, if agreements are discovered after purchase, and to avoid long and protracted litigation, they should reasonably consider whether the existence of the agreement was overlooked during due diligence before refusing to honor the agreement as a *bona-fide* purchaser. Simply stating that the agreement at issue was not provided by the prior owner will not satisfy the requirements for being a *bona-fide* purchaser.

Nelson v. Eubanks, No. 15-24-00037-CV, 2024 Tex. App. LEXIS 8227 (Tex. App.—Houston [1st Dist.] Nov. 26, 2024, no pet. h.).

A defect in an election contest citation does not create a jurisdictional defect. In November 2023, Texas voters approved 13 amendments to the Texas Constitution. Shortly thereafter, three *pro-se* voters filed an election contest challenging the use of allegedly illegal electronic voting machines.

The Secretary of State filed a plea to the jurisdiction, arguing in part that the voters' contest failed because the citation served on the Secretary's office was defective, and therefore the case was jurisdictionally defective. The Secretary argued that she never received proper citation because the citation included an incorrect answer deadline. The citation erroneously stated the general civil answer deadline rather than the election contest deadline. Texas Rule of Civil Procedure 99 provides the general civil action answer deadline, which is the Monday next after the expiration of 20 days after the date of service. *See* Tex. R. Civ. P. 99(b). However, Election Code Section 233.007(a)(2) provides a shortened deadline for state-wide elections—20 days after the date of service. Tex. Elec. Code § 233.007(a)(2), (b).

The Court of Appeals found this to be a harmless error and not an error that created a jurisdictional defect. In fact, the voters filed and served their election contest timely, or before the election was canvassed, and therefore it was jurisdictionally sound. *See* Tex. Elec. Code § 233.014(b). The Court of Appeals also noted that that the Secretary was actually served with the citation, knew of the citation defect, and responded before the statutory deadline.

The Secretary argued that the defect was jurisdictional because "strict compliance with the rules is required" otherwise "service is invalid." The Court of Appeals disagreed as that rule applies to default judgments, not service of citation generally. Instead, defects in citations must be challenged by motions to quash and the "only relief is additional time to answer rather than dismissal of the cause."

The Court of Appeals further acknowledged that while "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity," citation is not a prerequisite to suit but a part of the statute addressing when the Secretary must answer. Tex. Gov't Code § 311.034; Tex. Elec. Code § 233.007. It is the district clerk's duty to prepare, sign, and issue citation, not the filing parties. Therefore it was the district clerk who issued the defective citation based on a form that required the voters to specify the type of service requested, but not the date for its return. The filing parties in this case, the voters, met their only prerequisite of suit by filing and serving the Secretary before the final election canvass was completed.

The Court of Appeals ultimately found that while providing an answer deadline is mandatory, it is not jurisdictional. Therefore, the voters' defective citation is not an incurable error.

Following the most recent elections, government officials should be aware that citations for election contests may provide the incorrect answer deadline and they should follow the 20-day deadline provided by Election Code Section 233.007 for statewide elections. Further, any deadline inaccuracies do not provide jurisdictional errors and should only be challenged by motions to quash rather than pleas to the jurisdiction.

Air and Waste Cases

Texas Attorney General ("AG") Sues PFAS Manufacturers 3M and DuPont for Falsely Advertising Safety of Products.

On December 11, 2024, the AG filed a petition at the Johnson County District Court, arguing that 3M and DuPont ("Defendants")

mispresented and omitted facts surrounding the safety of many of their brand names such as Teflon, Stainmaster, and Scotchgard, which contain the "forever chemicals" PFAS. This claim was brought under the Texas Deceptive Trade Practices-Consumer Protection Act and asserts that the Defendants knew of the danger of PFAS yet marketed them as safe for consumer use, ultimately misrepresenting their environmental and biological risks. This lawsuit has not been set for hearing.

Supreme Court Allows Emission Rules to Stand While Litigation Continues.

On April 25, 2024, EPA promulgated a rule reducing allowable emissions of carbon dioxide by power plants and other industrial facilities that impact downwind states, which provided the first legal limits on carbon dioxide. After promulgation, several states, energy companies, and other industry groups challenged the rule and requested it be put on hold while the federal appeal moves forward for a final determination on the rule's legality. The petitioners argue that the rule is not achievable with current technology, which could force closures and other negative impacts, and that the rule violates the major questions doctrine – the idea that an agency must be given explicit authority to make decisions that have significant economic and political impact. In October 2024, the Supreme Court ordered that the rule stay in place while litigation continues, finding that the rule provides significant environmental benefits. *Edison Elec. Inst. et al. v. EPA et al*, 604 U.S. No. 24A116 (2024).

"In the Courts" *is prepared by Samantha Tweet in the Firm's Districts Practice Group; Sydney Sadler in the Firm's Litigation Practice Group; and Mattie Neira in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Samantha at 512.322.5894 or stweet@lglawfirm.com, or Sydney at 512.322.5856 or ssadler@lglawfirm.com, or Mattie at 512.322.5804 or mneira@lglawfirm.com.*

AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

EPA Reworks Its 1,4-Dioxane Evaluation. In November 2024, EPA released a supplement to its 2020 risk evaluation for 1,4-dioxane. In the 2020 determination, EPA scientists concluded that 1,4-dioxane posed an unreasonable risk to workers who work with the solvent as part of their jobs. However, the supplement determines that the 2025 risk evaluation did not evaluate risks from general population exposures in drinking water or air or the full range of exposure that could result when 1,4-dioxane is produced as a byproduct. Now, EPA has determined that the chemical may also pose a risk to the general public.

The 1,4-dioxane risk evaluation was completed under the Toxic Substances Control Act ("TSCA") and is now being evaluated for separate inclusion in Safe Drinking Water Act ("SDWA") rules which could take years to promulgate. Regulators are confident that 1,4-dioxane's inclusion in TSCA rules will have a positive impact on the chemical being released beyond the "fence line," but EPA would still like to explore the chemical's inclusion in SDWA regulations. The SDWA, EPA acknowledges, has a higher burden to show that a chemical should be regulated in public water systems.

EPA Announces Studies Targeting Oil & Gas, Waste Treatment Sector for Effluent Limit Guidelines ("ELGs") Update. On December 16, 2024, EPA announced studies targeting two sectors for potential revisions to ELGs: oil and gas and centralized waste treatment ("CWT") facilities. EPA believes that technology-based approach should be taken to determine whether the industries should be subject to new ELGs with regard to per- and polyfluoroalkyl substances ("PFAS").

In the oil and gas sector, EPA deems the study necessary to determine whether the wide range of proprietary chemicals used in exploration, drilling and production includes regulated PFAS. Wastewater is a byproduct from these activities and is therefore subject to ELGs as the treated wastewater is then discharged to surface waters for use in agriculture or wildlife propagation.

CWT facilities are privately owned wastewater facilities that receive and treat industrial wastewater. EPA determined that based on the presence of PFAS in CWTs, the agency wants to better understand the sources of PFAS and other pollutants in CWT facilities.

Oil and gas ELGs were last revised in 2016 and CWT ELGs were last amended in 2003.

EPA Finalizes 404 Rule Ahead of Presidential Transition. Section 404 of the Clean Water Act ("CWA") prohibits discharging dredged or fill material into

U.S. waters without a permit. While the U.S. Army Corps of Engineers typically oversees this program, CWA Section 404(g) allows states and Tribes to manage it, including permitting, compliance, enforcement, and mitigation. The EPA approves and supervises state and Tribal programs. Currently, Michigan, New Jersey, and Florida administer approved Section 404 programs.

The new rule aims to streamline the ability for the states and Tribes to administer 404 programs. Proponents of the new rule hope that states and Tribes assuming the role of dredge and fill regulator can reduce duplicative programs and permitting requirements. Additionally, within the rule, EPA has identified waters within the scope of assumption therefore clarifying to states and Tribes which waters they would be able to regulate.

The new 404(g) rule went into effect on January 25, 2025.

EPA Releases Draft Risk Assessment ("RA") for PFAS-related Contamination of Biosolids. On January 14, 2025, EPA, in its final days under Biden-appointed administrator Michael Regan, released its long-awaited draft risk assessment ("RA") for newly regulated PFOA and PFOS-chemicals in sewage sludge when used as fertilizer for land application (also known as "biosolids"). EPA found that in some areas of land where biosolids have been applied, PFAS levels exceed safety thresholds (1 part per trillion) by orders of magnitude. However, the risk assessment included assertions that the general food supply is not at risk, but that certain populations may be at higher risk based on levels of exposure. For continued disposal of biosolids, the draft RA targets increased controls on wastewater treatment for PFOA and PFOS (even though such wastewater facilities are passive receivers, and not typically the generators of such chemicals) and implementing focused industrial pretreatment of wastewater, especially in industries which have a high incident of use or occurrence of PFAS-related chemicals such as PFAS manufacturers, electro- and chrome-platers, and landfills. Lloyd Gosselink and utilities across the state will be interested to see how the new EPA addresses PFAS broadly, but also in the context of biosolids. Given the change in administration, it is possible that there is no action, or delayed action arising out of the RA.

EPA Adds Certain PFAS to the Toxics Release Inventory ("TRI"). In October 2024, EPA proposed a rule to add 16 individually listed and 15 categories of PFAS representing over 100 individual PFAS to TRI, which requires certain manufacturing and industrial facilities to track and report releases of certain chemicals that may cause a threat to human health and the environment into the environment. Reporting Year 2024 now includes 196 reportable PFAS. This comes shortly after EPA designated PFAS as chemicals of special concern, effectively removing the *de minimis* exemption and requiring any level of PFAS be reported on more specific reporting forms.

Texas Commission on Environmental Quality ("TCEQ")

Chairman Jon Niermann Resigns; Gov. Greg Abbott Names Brooke Paup as Chair of TCEQ. On January 8, 2025, Texas Governor Greg Abbott appointed Brooke Paup as Chairwoman of TCEQ. Previously, Chairwoman Paup served on the Texas Water Development Board ("TWDB") from 2018 until her appointment to the Commission. She has served in various positions in the Texas government for over 19 years. Paup holds a juris doctor from Texas Tech School of Law.

Former Chair of the Commission, Jon Niermann, stepped down as of December 31, 2024, after serving with the Commission since 2015.

TCEQ Executive Director ("ED") Finds the Counties of Bowie, Dallas, Harris, and Tarrant to be Nonattainment Zones under new PM2.5 Standards. On February 7, 2024, EPA finalized a revised primary annual National Ambient Air Quality Standards ("NAAQS") for fine particulate matter (PM2.5), lowering the standard from 12.0 to 9.0 micrograms per cubic meter. The rule further required states to submit their nonattainment county designations by February 7, 2025. The TCEQ ED has determined that, under the new standards, the counties of Bowie, Dallas, Harris, and Tarrant fall under nonattainment, with all other counties being classified as either attainment or unclassifiable. The Commissioners continued the matter from the December 18, 2024 Agenda and will now deliberate on the designations at the January 2025 Agenda. Once approved, the Commission must next send its determinations to the governor for final approval and transmittal to EPA. We can expect the designations to be finalized in mid-2025.

Texas Water Development Board ("TWDB")

L'Oreal Stepney, P.E. Named Chairwoman of TWDB. On January 8, 2025, Texas Governor Greg Abbott elevated current TWDB board member L'Oreal Stepney to the Chair of the TWDB. Stepney has served on the board since January 2023. Prior to joining TWDB, Stepney served as deputy director for TCEQ. She holds a Master of Science in civil engineering from the University of Texas.

TWDB is the Texas agency responsible for water resource management and research, assisting with regional water supply and flood planning, and administering loan and grant programs for water infrastructure projects.

TWDB Funding Cycle Open Now for Water Projects. TWDB is currently accepting applications for the State Water Implementation Fund of Texas ("SWIFT") funding and project submissions for both the Clean Water State Revolving Fund ("CWSRF") and the Drinking Water State Revolving Fund ("DWSRF").

The SWIFT program assists rural water and sewer providers in procuring affordable financial assistance for critical infrastructure projects so long as those projects are recommended water management projects named in the 2022 State Water Plan. Applications are due by 5:00pm on February 3, 2025.

The CWSRF financial assistance programs help communities by providing cost-effective funding for wastewater infrastructure projects whereas the DWSRF does the same, but for drinking water and public water systems. The Funds provide below-market interest rates and principal forgiveness for qualified communities. Submissions for both the CWSRF and DWSRF are due by 5:00pm on March 7, 2025.

TWDB is also accepting project information forms ("PIF") for its CWSRF and DWSRF Emerging Contaminants ("EC") and Lead Service Line Replacement ("LSLR") projects. To be eligible for an EC project the proposal must reduce exposure to PFAS and other emerging contaminants through drinking water or by addressing discharges through wastewater. A PIF for funding under the LSLR program must relate to identification, design, planning and/or replacement of lead service lines in a system otherwise eligible for DWSRF. PIFs for EC and LSLR eligible projects are due by 5:00pm on April 4, 2025.

Public Utility Commission of Texas ("PUC")

Commissioners Glotfelty and Cobos Leave the PUC. Within a two-week span, two PUC Commissioners, Commissioner Jimmy Glotfelty and Commissioner Lori Cobos, announced their resignations from the PUC, effective December 31, 2024.

Commissioner Glotfelty assumed his role at the PUC in August 2021. During his time with the PUC, Glotfelty spearheaded several regulatory initiatives. He helped establish the Aggregated Distributed Energy Resources Task Force, a committee focused on distribution energy resources, including rooftop solar and residential batteries. Glotfelty also led the Texas Advanced Nuclear Reactor Working Group.

Commissioner Cobos assumed her role at the PUC in June 2021 – one of three Commissioners appointed by Governor Abbott in response to Winter Storm Uri. During her time at the PUC, Cobos led efforts to incentivize, and ultimately develop, transmission in the Rio Grande Valley and Permian Basin regions. Prior to her time with the PUC, Cobos served as the head of the Office of Public Utility Counsel representing residential and small commercial consumers in utility matters.

Governor Abbott now has two PUC Commissioner vacancies to fill. In the meantime, the PUC is down to three Commissioners – Chairman Thomas Gleeson, Commissioner Kathleen Jackson, and Commissioner Courtney Hjaltman.

TNMP and AEP System Resiliency Plan Update. As previously reported, Texas-New Mexico Power Company ("TNMP") filed its Resiliency Plan on August 28, 2024. TNMP's Resiliency Plan requests $751.1 million over the next three years. During the contested case, intervening parties and PUC Staff identified several proposed projects and investments that were ineligible for Resiliency Plan recovery or were not the most beneficial to ratepayers at this time. TNMP, intervening parties and PUC Staff ultimately came to an agreement that includes a $57.1 million reduction to TNMP's proposed Resiliency Plan, and implementation of metrics that will allow intervening parties and PUC Staff to accurately monitor the implementation of TNMP's Resiliency Plan. This settlement results in a Resiliency Plan that is estimated to cost $649 million over three years and, depending on the recovery period, would increase monthly residential bills by $11.54 per month. The PUC has not approved the settlement and will be considering the settlement at an upcoming Open Meeting. The settlement agreement can be found in Docket No. 56954.

AEP Texas Inc. ("AEP") filed its Resiliency Plan on September 25, 2024. AEP is the fifth transmission and distribution utility to file a system resiliency plan with the PUC. In its proposed Resiliency Plan, AEP estimates that it will spend $352.1 million over the next three years on five measures that AEP believes will mitigate the resiliency events and related risks identified to affect its system. As proposed, this would impact residential bills by an increase of $1.45 per month. The PUC opened a contested case under PUC Docket No. 57057. Intervening parties, PUC Staff, and AEP have reached a settlement in principle.

CenterPoint Withdraws its Appeal in the Electric Rate Case. CenterPoint Energy Houston Electric, LLC ("CEHE") filed a rate case with the PUC in March 2024, seeking a $60 million increase to base rates. After Hurricane Beryl made landfall in July, CEHE sought to withdraw its pending rate case. Intervenors in the proceeding opposed the withdrawal, arguing that a utility cannot unilaterally withdraw an application it was required to file and pointing to intervenor testimony filed in the docket supporting a rate decrease.

The State Office of Administrative Hearings Administrative Law Judge denied CEHE's withdrawal and CEHE appealed that decision to the PUC. The appeal had been under the PUC's consideration for three months when CEHE withdrew its appeal on November 8, 2024. At the PUC's open meeting on November 14, 2024, Commissioners instructed parties to work diligently to continue discussions. More information about this case is available on the PUC's Interchange under Docket No. 56211.

Permian Basin Reliability Plan Update. On July 25, 2024, ERCOT filed its Permian Basin Reliability Plan ("Plan") Study with the PUC. The PUC ordered the study as required by Public Utility Regulatory Act ("PURA") § 39.167, which implements House Bill 5066 from the 88th Texas Legislature. The Plan itself is meant to compensate for the forecasted load in the Permian Basin, which is one of the most prolific oil and gas basins in the United States. Transmission and Distribution Service Providers anticipate approximately 24 gigawatts (GW) of load in the region by 2030, as well as another 3 GW of oil-and-gas-related load by 2038, for a total projected demand of 27 GW.

The PUC approved the Plan on October 7, 2024, and established deadlines for ERCOT and Staff. Shortly thereafter, ERCOT filed a report ("ERCOT's Report") identifying certain transmission service providers ("TSP") to own, construct, and operate

certain projects associated with the Plan. Staff then filed a memorandum ("Staff's Memo") on the procedure for the PUC to make a final determination of, identify, and approve the applicable TSPs responsible for each of the projects. It recommended that the procedures for agreed projects be different than those for projects disputed amongst the TSPs. The Commissioners subsequently approved the procedures laid out in Staff's Memo.

Pursuant to Staff's Memo, the applicable TSPs filed responses to ERCOT's Report indicating whether the TSP disputed ERCOT's identification of responsibility for the common local projects and import paths. On December 4, 2024, ERCOT filed a joint report regarding the status of agreement on responsibility for ownership, construction, and operation of transmission facilities associated with the common local projects and import paths in ERCOT's Report.

Thereafter, Staff filed a petition ("Staff's Petition") asking for the PUC's determination of TSP rights to own, construct, and operate all projects identified in ERCOT's joint report for which no dispute was filed or for which the applicable TSPs have made a joint report indicating that their dispute has been resolved. This petition can be found in Docket No. 57441.

TSPs must submit in that same docket evidence supporting their rights to own, construct, and operate these undisputed projects by February 14, 2025. If a dispute regarding the rights related to a project identified in Staff's Petition arises during the adjudication of Docket No. 57441, the presiding officer may sever that dispute into a separate docket. TSPs, including the Lower Colorado River Authority Transmission Services Corporation and Lone Star Transmission, LLC, are still currently disputing projects identified in ERCOT's Report. Those petitions can be found in Docket Nos. 57384 and 57422, respectively.

Wind Energy Transmission Texas, LLC Rate Case. On December 3, 2024, Wind Energy Transmission Texas, LLC ("WETT") filed an application for authority to change rates and tariffs. WETT's most recent comprehensive rate case was filed on May 28, 2015. Since that rate case, WETT has placed $340.6 million of transmission investment in service. WETT now seeks approval of a requested revenue requirement of $136,602,978, which is a $15.9 million, or 13.2%, increase over its existing revenues. WETT is also asking for a return on equity of 10.5%, cost of debt of 4.33%, and capital structure of 55% debt and 45% equity, for an overall rate of return of 7.11%.

The Steering Committee of Cities Served by Oncor, along with the Texas Industrial Energy Consumers and Office of Public Utility Counsel, are among the parties that have intervened in this proceeding. You may refer to Docket No. 57299 for any filings related to this matter.

PUC Rulemaking Update. PUC Staff filed the current 2024 rulemaking calendar in Docket No. 56060. Status updates on the Commission's outstanding rulemakings are below:

- Project No. 53404 – Power Restoration Facilities and Energy Storage Resources for Reliability; Proposal for Publication issued June 8, 2024; additional comments filed on August 2, 2024; Commission Staff filed a proposed rule for adoption and discussion at PUC December 19, 2024 Open Meeting
- Project No. 54224 – Cost Recovery for Service to Distributed Energy Resources ("DERs"); PUC Staff filed questions for stakeholders to respond in September and reply to responses in October
- Project No. 54233 – Technical Requirements and Interconnection Processes for DERs; Commissioner Glotfelty filed memorandum on August 28, 2024
- Project No. 55718 – Reliability Plan for the Permian Basin Under PURA § 39.167; PUC Staff filed recommendations; Commissioners Cobos and Hjaltman filed a memorandum on September 25, 2024; PUC Commissioners approved the Plan on October 7, 2024
- Project No. 55000 – Performance Credit Mechanism (PCM); Comments filed on June 20, 2024; PUC Staff filed recommendations on December 13, 2024

Other rulemaking projects awaiting next steps:

- Project No. 52059 – Review of PUC's Filing Requirements
- Project No. 56199 – Review of Distribution Cost Recovery Factor
- Project No. 55249 – Regional Transmission Reliability Plans
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 53981 – Review of Wholesale Water and Sewer Rate Appeal
- Docket TBD – Water Financial Assurance

Railroad Commission of Texas ("RRC")

Christi Craddick Won Reelection. RRC Chair Christi Craddick won reelection for her third term at the RRC. Craddick has served the agency since 2012. The elected officials who sit on the three-member commission serve six-year terms and run in staggered elections. As such, one commissioner is up for reelection every two years.

During her campaign, Craddick's top issue was the growth of the Texas oil and gas industry during her tenure. She also criticized federal regulations intended to reduce emissions and fight climate change as regulations that would damage the fossil fuel industry.

In winning her reelection, Craddick wrote on the website X, "I am humbled and profoundly thankful to Texas voters for again electing me to the Railroad Commission, one of the most important pillars of Texas' ongoing economic success and America's national security."

Texas Gas Service ("TGS") Central-Gulf Service Area Rate Case Settlement. On June 3, 2024, TGS filed a rate application with the RRC and original jurisdiction cities seeking to raise rates in its Central-Gulf Service Area. TGS, RRC Staff, and city intervenors reached a settlement last fall and the RRC approved the settlement on November 19.

The approved settlement reduced TGS' requested increase by $6.5 million, lowered the requested residential customer charges, and resulted in a 9.7% Return on Equity (compared to TGS' requested 10.25%). This rate change took effect for bills rendered on or after November 27, 2024.

Atmos West Texas Rate Case. On October 25, 2024, Atmos Energy Corp., West Texas Division (Atmos West Texas) filed a rate application with RRC and cities retaining original jurisdiction. Atmos West Texas requests approval of an increase in its revenues of $26.9 million (an increase of $72.27% excluding gas costs). In addition, Atmos West Texas seeks approval of multiple new and revised rate riders, incorporation of its Triangle System into its system-wide cost of service for its West Texas Division, implementation of new depreciation rates, and a prudence determination on its capital investments. Intervening parties and RRC Staff have begun reviewing Atmos West Texas' application.

Energy Conservation Programs. Investor-owned gas utilities are now offering their residential and commercial customers an Energy Conservation Program ("ECP") Portfolio comprised of appliance rebate offerings and energy conservation initiatives. Texas Gas Service was the first gas utility to file an ECP Portfolio Application following the approval of 16 Tex. Admin. Code § 7.480. TGS' ECP Portfolio expands on the offerings in the company's Energy Efficiency Program, and the company proposed an annual budget for its ECP Portfolio of $2,586,152. TGS initially meant for its ECP Portfolio application to apply to each of its service areas. However, it amended its application to limit the request for approval of an ECP Portfolio to only its Central-Gulf Service Area. TGS' amended application can be found in Case No. 00018221.

Since TGS initially filed its ECP Portfolio Application on August 19, 2024, CenterPoint Energy Texas Gas and Texas Gas Service, on behalf of its West-North Service Area, have filed ECP Portfolio Applications. Those applications can be found in Case Nos. 00018173 and 00019028, respectively.

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