Case Law Update

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* The positions and opinions expressed are those of the presenter alone and should not necessarily be deemed to reflect those of the Attorney General of Texas nor the Office of the Attorney General.

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INTRODUCTION

This case law update is meant to provide a brief overview of important utility law cases from August 2017 through August 2018. It is not intended to be an in-depth review of all issues in each case, nor does it include all utility law decisions by courts during this period. In addition, this paper emphasizes Texas law decisions. The views and opinions included in this update are solely those of the author and do not express the official position of the Office of the Attorney General or any state agency represented by the Attorney General.

I. U.S. SUPREME COURT

Texas v. New Mexico, No. 141, orig. (U.S. Mar. 5, 2018), slip opinion

The U.S. Supreme Court considered whether the U.S. government may pursue claims under the Rio Grande Compact—a multi-state agreement which apportions the water of the Rio Grande Basin among Colorado, New Mexico, and Texas.

Facts

In 2013, Texas sued the upstream states of New Mexico and Colorado, alleging that by allowing downstream users in southern New Mexico to pump groundwater wells near the Rio Grande, New Mexico had failed to send its legal share of water downstream.

The U.S. government intervened in the proceedings citing parallel claims under the Rio Grande Compact and federal reclamation law. New Mexico moved to dismiss the U.S.'s complaint, and the Court referred the matter to a Special Master. The Special Master in the case recommended that the U.S.'s complaint be dismissed because the Rio Grande Compact does not grant the U.S. the power to enforce it. The U.S. argued that it may pursue its claims for violations under the Rio Grande Compact. The other states argued that the U.S. should be limited to pursuing claims only to the extent they arise under the 1906 treaty with Mexico.

Holding and Analysis

The U.S. Supreme Court held that the U.S. government may pursue its original claims asserting that New Mexico has violated the Rio Grande Compact.

The Court's role in compact cases is different from its role in ordinary litigation, namely the Court's role is to serve "'as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.'"[1] Under this authority, the Court has allowed the U.S. to participate in compact suits to defend federal interests that a normal litigant might not be permitted to pursue in ordinary litigation.[2]

The Court then outlined the specific reasons it considered for allowing the U.S. to pursue its claims. First, the Court explained that the Rio Grande Compact is inextricably intertwined with the Rio Grande Project, an infrastructure project in which the U.S. was involved. Second,

[1] *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 (2015) (slip op., at 6) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372-373 (1923)).

[2] *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981).

New Mexico conceded that the U.S. plays an "integral role" in the Compact's operation. Third, a breach of the Rio Grande Compact could jeopardize the U.S.'s ability to satisfy its treaty obligations. Fourth, the U.S. has asserted its claims in an existing action brought by Texas, seeking substantially the same relief and without Texas's objection.

The Court explicitly stated that whether the U.S. government could sue a state directly for violations of the Rio Grande Compact is still an open question.

Artis v. District of Columbia, 138 S. Ct. 594 (2018)

The U.S. Supreme Court considered whether tolling provision 28 U.S.C. § 1367(d) 1) suspends the limitations period for the state-law claims while the state-law claims are pending in federal court and for thirty days after the claims are dismissed from federal court ("stop-the-clock reading") or 2) does not suspend the limitations period but merely provides 30 days beyond the dismissal for the plaintiff to refile ("grace-period reading").

Facts

The federal supplemental jurisdiction statute, 28 U.S. § 1367, allows a litigant with a federal claim to bring it to federal court along with any related state claims that "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 also provides that the "period of limitations...shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

In this case, Stephanie C. Artis filed an employment discrimination suit in federal court in which she alleged one federal claim and three related state claims. When Artis filed in federal court, she had nearly two years remaining on the applicable statute of limitations for the state-law violations.

The federal court granted a motion for summary judgment dismissing Artis's federal claim and declined to exercise supplemental jurisdiction over her remaining three state law claims. Artis refiled her state-law claims fifty-nine days after the dismissal of her federal claim.

The state court granted a motion to dismiss, adopting a grace-period reading of § 1367(d) and holding that Artis's claims were time barred because they were filed twenty-nine days too late. The state court reasoned that Artis could have protected her state-law claims by pursuing them in state court while her federal case was pending. The state court of appeals affirmed. The Supreme Court granted certiorari.

Holding and Analysis

The U.S. Supreme Court, in a 5-4 decision, held that § 1367(d) assures not just a 30-day grace period to refile but instead preserves the balance of the limitations period remaining on the state-law claims when the federal suit was filed. The Court focused on the plain text of the statute and reasoned that "tolling" means stopping temporarily before later resuming.

Thus, § 1367(d) suspends a state limitations period until thirty days after dismissal of the federal suit.

Once Artis's federal case was dismissed, she had the thirty-day grace period plus the nearly two years left to assert her state-law claims in state court. Therefore, her claims, filed fifty-nine days after her dismissal, were timely.

Carpenter v. United States, 138 S. Ct. 2206 (2018)

The United States Supreme Court considered whether the government's acquisition of cell-site records constituted a search under the Fourth Amendment.

Facts

A man who was arrested for robbing a Radio Shack identified Timothy Carpenter as an accomplice who had assisted in various robberies over the preceding months. Based on that information, prosecutors obtained an order for Mr. Carpenter's cell phone location data for those months under the Stored Communications Act, which allows the government to compel disclosure of certain records when it offers specific and articulable facts showing that there are reasonable grounds to believe that the records are relevant and material to an ongoing criminal investigation.

Mr. Carpenter sought to suppress the data at his subsequent trial for robbery, arguing that the seizure of the records violated the Fourth Amendment because they were obtained without a warrant supported by probable cause.

Holding and Analysis

The court held that location information obtained from a wireless carrier constitutes a search under the Fourth Amendment.

Carpenter considered the intersection of the previously established doctrines that: (i) a person has an expectation of privacy in their physical location and movement,[3] and (ii) a person has no expectation of privacy in information voluntarily turned over to third parties.[4]

In its holding, the Court considered the historical difficulties law enforcement would have cataloguing a suspect's movements for months at a time, the pervasive use of cell phones, and the fact that there is no affirmative action on the part of the cell phone user in conveying their location information. The Court went on to explain that the standard used by the government to obtain the records under the Stored Communications Act was a "gigantic departure from the probable cause rule" because the Stored Communications Act only requires "reasonable grounds for believing that the records were relevant and material to an ongoing investigation," while probable cause "usually requires some quantum of individualized suspicion."[5]

The Court in *Carpenter* further clarified that while subpoenas and similar means of obtaining documents will be available in an "overwhelming majority of investigations," a warrant is necessary when the

[3] *United States v. Jones*, 565 U.S. 400 (2012).
[4] *Smith v. Maryland*, 442 U.S. 735 (1979).
[5] *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018).

suspect has a legitimate privacy interest in records held by a third party.[6]

II. U.S. COURTS OF APPEALS

Entergy Tex., Inc. v. Nelson, 889 F.3d 205 (5th Cir. 2018)

The Fifth Circuit Court of Appeals considered whether a 2015 FERC order regarding bandwidth payments conflicted with—and therefore, preempted—a 2007 Public Utility Commission of Texas (PUC) order. The court held that the orders did not conflict.

Facts

Entergy Operating Companies, a subsidiary of Entergy Corporation, consists of several electric companies that serve Texas, Arkansas, Louisiana, and Mississippi and are split along state lines. Entergy Gulf States, Inc. originally existed to serve markets in both Texas and Louisiana, but in 2008, the entity split into two companies: one company for Texas—ETI—and one company for Louisiana—Entergy Gulf States Louisiana (EGSL).

The Federal Energy Regulatory Commission (FERC) and the Public Utility Commission of Texas (PUCT) regulate energy production and sales. Because of preemption principles, FERC's orders trump PUCT's orders if the two commissions issue conflicting orders. Congress has charged FERC with ensuring that utility companies charge "reasonable rates" and maintain roughly equal production costs.

In 2005, about three years before Entergy Gulf States split into two entities, FERC determined that the Operating Companies' costs were not roughly equal. To equalize the costs, in 2007 FERC implemented a requirement that the Entergy entities participate in a "bandwidth remedy"—a process in which the entities with low costs make payments to the entities with high costs—to ensure that no operating company's production costs were 11 percent higher or 11 percent lower than the Entergy System average. Once these companies completed their bandwidth payments, FERC no longer had jurisdiction over the payments. Instead, each individual state—in efforts to ensure reasonable rates—determined the extent to which the state's payee entities pass the benefit onto their customers and the payor entities pass the costs onto their customers.

In 2007, the first year of the bandwidth remedy, FERC calculated the payments based on 2006 data. Louisiana and Texas both had authority to regulate Entergy Gulf States' bandwidth payment receipts because Entergy Gulf States had not yet split into two entities. Entergy Gulf States received a $120.1 million bandwidth payment. Louisiana and Texas disagreed over how to allocate the payment, but Entergy Gulf States split into separate, state-specific entities before either state could enforce their respective allocation decisions. Both states still had jurisdiction over the $120.1 million, however.

Entergy tried to remedy the problem by asking FERC to amend the system agreement and allow FERC—rather than Texas and Louisiana—to allocate the

[6] *Id.* at 2222.

$120.1 million. However, FERC refused, stating that it did not have jurisdiction over "issues related to the allocation of an individual utility's payments or receipts to retail customers."[7] Therefore, FERC stated that it did not have jurisdiction because PUCT and FERC disagreed on the allocation of Entergy Gulf States' total bandwidth amount, although they agreed on the total amount of receipts that Entergy Gulf States should receive.

During the years following the bandwidth remedy's introduction, various aspects of the bandwidth formula used in 2006 were litigated and ruled upon. This meant that the formula changed over the years, and some entities had to make additional payments. In 2014, FERC ordered Entergy to file a recalculation of the bandwidth payments from 2007 and 2014. FERC accepted Entergy's compliance filing, agreeing that it was reasonable for Entergy to recalculate the 2007 bandwidth filing in a way that allocates refunds and charges to ETI and EGSL—instead of Entergy Gulf States—because Entergy Gulf States no longer existed in 2014. However, appellant Texas Industrial Energy Consumers (TIEC) disagreed, arguing that the additional payment between ETI and EGSL should be treated as being made to Entergy Gulf States.

In 2015, FERC issued an order laying out the six Entergy operating companies and breaking down the 2007 bandwidth amounts each company had paid/received as well as the amounts each company had yet to pay/receive. The order stated that in 2007, ETI's total bandwidth receipt was $41.3 million, it had already received $30.4 million, and it had yet to receive $10.9 million on September 2014.

ETI argued that because FERC originally agreed that the 2007 payments should be split between ETI and EGSL, FERC's 2015 order retroactively reallocated $30.4 million of the $120.1 million to ETI. PUCT issued an order in 2007 that treated the $10.9 million as a new bandwidth payment rather than as compensation for the $18 million overpayment and asked ETI to follow ordinary pass-through procedures. This caused ETI to sue to enjoin enforcement of PUCT's order. The trial court found for ETI.

Holding and Analysis

The appeals court held that the 2015 FERC order—which accepted Entergy's 2007 compliance filing—did not reallocate the 2007 bandwidth payments. Therefore, the FERC order was consistent with the PUCT order and did not preempt it. Neither the 2015 FERC order nor Entergy's compliance filing said anything about reallocating the bandwidth payments, and neither FERC nor Entergy asked the other party for anything related to a retroactive reallocation. Instead, the order simply distributed true-up bandwidth payments to the operating companies that qualified to receive them.

The court pointed out that in 2007, FERC stated that its initial allocation decision was "subject to refund," which is consistent with the process that occurred: ETI received an initial payment ($30.4 million) followed by a "true-up"

[7] *Entergy Tex., Inc. v. Nelson*, 889 F.3d 205, 208 (5th Cir. 2018).

($10.9 million) a few years later. The court said because neither ETI nor EGSL received a 2007 bandwidth payment, FERC assigned each of those companies a hypothetical share of the $120.1 million to determine how much of the remaining "true-up" each company should receive. The appeals court agreed with PUCT and TIEC, stating that the PUCT and FERC orders were consistent, and reversed the trial court.

III. TEXAS SUPREME COURT

City of Richardson v. Oncor Elec. Delivery Co. LLC, 539 S.W.3d 252 (Tex. 2018)

The Texas Supreme Court considered an appeal of the City of Richardson (Richardson) from the Dallas Court of Appeals' reversal of Richardson's motion for summary judgment. The court analyzed the question of who is responsible for the expense of relocating electric utility facilities to accommodate the widening of a street or alley within a city's rights-of-way. The court found that cities have exclusive control over their public rights-of-way and have the authority to manage the terms of use of those rights-of-way.

Facts

In 2006, the Richardson City Council approved Ordinance No. 3359 (the "Franchise Contract Ordinance"), granting TXU Electric Delivery Company, predecessor to Oncor, a franchise to use Richardson's public rights-of-way for the transmission and distribution of electric power. TXU Electric Delivery Company accepted the Franchise Ordinance in writing, and the Franchise Ordinance, along with TXU's written acceptance, became the Franchise Contract.

The Franchise Contract included a right-of-way ordinance (ROW Ordinance) requiring the utility, upon written notice from Richardson, to remove or relocate "at its own expense" any facilities placed in public rights-of-way. From 2006 to 2010, when Richardson asked Oncor to accommodate changes to public rights-of-way, Oncor complied at its own expense.

In 2010, Richardson approved the widening of thirty-two public alleys, requiring the relocation of approximately 150 electric utility poles and facilities. Oncor refused to pay for this relocation.

During the dispute related to this relocation project, Oncor filed an unrelated case with the PUC seeking to change its rates, operations, and services. The parties in the unrelated case, Oncor and the Steering Committee of Cities Served by Oncor, eventually reached a settlement which was approved by the PUC. As part of the settlement, Richardson enacted an ordinance adopting Oncor's tariff as modified by the settlement. The adopted tariff included pro-forma language which specified that the entity requesting removal must pay for the removal or relocation of a utility's facilities.

When Richardson sued Oncor for breach of contract in district court, arguing that Oncor's refusal to pay relocation costs violated the Franchise Contract as well as common law principles and Texas statutory law requiring a utility to pay for relocations from a public right-of-way, Oncor filed its own breach of contract

counterclaim. Oncor argued that the tariff controls when there is a conflict between the tariff's terms and those in any other ordinance or agreement. Both parties filed motions for summary judgment, and the trial court granted Richardson's motion and denied Oncor's motion.

Oncor appealed, and the Dallas Court of Appeals reversed and rendered judgment in favor of Oncor. The court of appeals determined that the pro-form language of the tariff and the Franchise Contract were in conflict and that the tariff's provisions controlled.

Holding and Analysis

The Texas Supreme Court reversed the Dallas Court of Appeals and reinstated the trial court's judgment.

The court held that the tariff did not apply to the public right-of-way relocation costs, and that there is not conflict with the common law rule, statutory law governing relocations or the Franchise Contract.

The court explained that at common law and within Public Utility Regulation Act that utilities bear the costs of right-of-way relocation. The court then added that the Texas Legislature has granted broad authority to home-rule cities, like Richardson, and that such cities are only limited in their powers when expressly provided by statute. Further, the Utilities Code clarifies that an electric utility's right to use "a state highway, a county road, a municipal street or alley, or other public property in a municipality" is subject to the consent and direction of the city. Because there is no applicable statutory limitation on a home-rule city's jurisdiction over the rates, operations, and services of an electric utility in the municipality, the Court determined that Richardson was not prevented from requiring Oncor to pay for relocation expenses.

The court then overruled Oncor's argument that both PURA § 37.101(c) and the tariff are laws requiring Richardson to pay relocation costs and thus, control over the Franchise Contract or the ROW Ordinance. Instead, the court explained that absent a statute "with unmistakable clarity" limiting the power of a home-rule city, that Richardson retains exclusive control over its public rights-of-way.

Finally, the court considered whether the tariff controls over the Franchise Contract. Oncor argued that the Franchise Contract would be abrogated by the tariff to the extent that the two contracts conflict. The court disagreed and found that the language in the tariff was limited to situations in which Richardson would be an end-use, or retail, customer. The court ultimately determined that language in the tariff was insufficiently specific to express with "unmistakable clarity" an intent that Richardson pay for the right-of-way relocation costs at issue in the case.

***Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC,* 546 S.W.3d 133 (Tex. 2018)**

The Texas Supreme Court considered a contract dispute over electric service to oil wells and the question of whether the PUC has exclusive jurisdiction to resolve issues underlying a customer's claim that

a PUC-regulated entity breached its contractual obligations by failing to provide electric service.

Facts

Chaparral Energy LLC, an oil and gas company, contracted with Oncor Electric Delivery Co. to supply electricity to two wells in Texas and hired a third-party to construct electrical facilities from the wells to a tie-in point. Oncor was responsible for extending its own electrical infrastructure to that tie-in point.

Delays in obtaining two easements from landowners resulted in Chaparral having to power its oil wells with generators. Once the project was complete, Chaparral sued Oncor for breach of contract in district court. Chaparral sought recovery of the additional costs of the generators. The district court case went to a jury trial, and the jury entered a judgment in favor of Chaparral. Oncor appealed and the El Paso Court of Appeals affirmed the district court judgment. Oncor filed a petition for review which was granted.

Holding and Analysis

The Texas Supreme Court reversed and rendered. The court found that the Public Utility Regulatory Act (PURA) grants the PUC exclusive jurisdiction to resolve issues underlying a customer's claim that a PUC-regulated utility breached a contract by failing to timely provide electricity services.

The court discussed the issue of exclusive jurisdiction by explaining that PURA is a pervasive regulatory scheme and that the term "service" includes "any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties...." The court found that because Chaparral's breach of contract claim was based upon the provision of Oncor's "services" under PURA that the claim was ultimately within the exclusive jurisdiction of the PUC.

The court further held that Texas Utilities Code § 17.157 does not negate the expansive scope of exclusive original jurisdiction conferred on the PUC by Texas Utilities Code § 32.001. Because Chaparral's claim involved issues within the PUC's exclusive jurisdiction, Chaparral was required to exhaust its administrative remedies at the PUC before filing in district court.

The court then overruled Chaparral's argument that the "inadequate-remedy" exception applied to its exhaustion-of-remedies requirement. The court explained that the inadequate-remedy exception applies when a claimant cannot obtain an adequate remedy through the administrative process, and thus requiring the claimant to go through that process would cause the claimant irreparable harm.[8] The court held that the inadequate-remedy exception did not apply because Chaparral's claim could be resolved using the "hybrid claims-resolution process."

The court explained that the "hybrid-claims resolution process" requires a claimant to first address its claims at the

[8] *Hous. Fed'n of Teachers, Local 2415 v. Hous. Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987).

appropriate administrative agency before filing at district court. This two-step process allows an agency to apply its expertise to the issues that fall within the agency's exclusive jurisdiction before filing suit in district court to obtain the forms of relief that the agency cannot provide.

The court also held that Chaparral did not demonstrate that exhausting its administrative remedies would cause it to suffer irreparable harm.

Finally, the Texas Supreme Court addressed Chaparral's violation of constitutional rights to a jury trial and open courts. Chaparral argued that PURA's regulatory scheme abrogated its pre-1876 common-law breach-of-contract suit and that any review of a PUC ruling is limited to substantial-evidence review, which is a review "without a jury."

First, the Court held that because Chaparral's breach of contract claim involved Oncor's compliance with PURA and PUC rules, the breach of contract claim was not analogous to any action tried to a jury in 1876. Second, the Court explained that substantial-evidence review only applies to the issues that the PUC has determined. The court explained that the ultimate questions of the breach of contract and of damages remain would within the jury's province, and thus, Chaparral's access to the courts had not been denied.

***Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, No. 15-0155, 2018 WL 1770290 (Tex. 2018)**

The Texas Supreme Court considered an appeal of a trespass to try title action addressing competing claims to mineral-lease interests in two tracts of land in the Spraberry (Trend Area) field of the Permian Basin.

Facts

Between 2004 and 2007, Endeavor Energy Resources, L.P. and Endeavor Petroleum, L.L.C. (collectively, Endeavor) acquired mineral leases directly from the mineral-estate owners of two adjoining tracts that total approximately 960 acres in the Spraberry field. Endeavor completed four wells on the tracts; two wells are in the northern tract and two wells are in the southern tract. After completing the wells, Endeavor filed a certified proration plat with the Texas Railroad Commission for each of the four wells. Each of Endeavor's filed plats assigned approximately 81 acres to the well for proration purposes. The four wells began producing in commercial quantities. Thereafter, the primary terms of Endeavor's leases expired on February 9, 2008 and February 5, 2009.

Endeavor's leases include continuous development clauses. Under the clauses, the leases automatically terminate as to each proration unit without a well producing oil or gas in commercial quantities. However, the leases remain in full force and effect beyond the expiration of the primary term "as to all proration units" if Endeavor is "engaged in drilling or reworking operations" and so

long as Endeavor maintains a continuous drilling program. The leases also include retained-acreage clauses. The retained-acreage clauses specify that at the end of the leases' primary term or upon cessation of continuous development (whichever is later), the leases automatically terminate except for "those lands and depths located within a governmental proration unit assigned to a well producing oil or gas in paying quantities. . . with each such governmental proration unit to contain the number of acres required to comply with applicable [Railroad Commission] rules and regulations. . . for obtaining the maximum producing allowable for the particular well."

After the primary terms of Endeavor's leases expired, Discovery Operating, Inc., a different operator of oil and gas wells, acquired leases for portions of the two tracts where Endeavor had never drilled or developed and where the land was not included in the plats that Endeavor had filed with the Railroad Commission when designating the proration units for its four wells.

After execution of Discovery's lease, Discovery drilled four producing wells. Endeavor learned of Discovery's wells and objected to Discovery's assertion of any leasehold interest in the tracts.

Holding and Analysis

The Supreme Court of Texas affirmed the trial court's and the Eleventh Court of Appeals' holdings that Endeavor had not retained the mineral interests to the disputed portions of the tracts.

The Court noted that mineral leases are contracts and the law's strong public policy favoring freedom to contract compels the courts to respect and enforce agreed contractual terms. Courts review and construct contracts, including mineral leases, de novo. A court's objective in construing a contract is to ascertain the contracting parties' intent as expressed within the four corners of the contract.

The Court then explained that although mineral leases are contracts, they are subject to the state's police power to conserve and develop the state's natural resources. The Legislature delegated to the Railroad Commission authority to adopt rules to prevent waste and conserve natural resources. Under the authority, the Railroad Commission has adopted rules and regulations, including specific field rules that apply to the Spraberry field. Furthermore, contracting parties may define retained acreage based upon Railroad Commission proration units. But the inclusion of such regulatory principles may also cause confusion or disappointment when a contracting party does not fully understand the ramifications of including a regulatory term.

Construing the language in Endeavor's leases, the Court concluded that the retained-acreage clauses refer to Endeavor's assignments in its filings of proration units with the Railroad Commission. Although, under the Railroad Commission's applicable field rules, Endeavor could have included up to 160 acres in each proration unit, Endeavor did not do so. Endeavor assigned proration units of approximately 81 acres. Thus, only the approximately 81 acres per well was retained.

Additionally, the court construed the retained-acreage clauses as requiring Endeavor to include in each proration unit only the number of acres required to comply with Railroad Commission rules for obtaining the maximum producing allowable for a well; here, the acreage required is 80 acres.

The Court held that Endeavor retained exactly what it filed for: approximately 81 acres per well. At the end of the primary term, all unretained acreage reverted to the lessors who were then free to lease those mineral interests to Discovery.

The Court also contrasted forfeitures, which generally arise from failure to comply with a condition subsequent, with a special limitation in a mineral lease. A special limitation is not a forfeiture provision because it instead fixes a natural limit of an interest.

***XOG Operating LLC v. Chesapeake Expl. Ltd.*, No. 15-0935, 2018 WL 1770506 (Tex. 2018)**

The Texas Supreme Court considered retained-acreage provisions in oil-and-gas lease instruments.

Facts

XOG conveyed to Chesapeake its rights as a lessee under four oil-and-gas leases. The assignment's retained-acreage provision required that the assigned interest would revert to XOG after the expiration of the primary term: "assigned interest would revert to XOG after the primary term, 'save and except that portion of the leased acreage'...'included within the proration...unit' 'prescribed by field rules' or, 'absent...field rules,' 320 acres."

Chesapeake completed six wells during the primary term of the assignment. Five of the six wells were subject to the Railroad Commission's field rules. Railroad Commission field rules may affect how a proration unit is designated.

In this case, the relevant rule, Rule 2, provides: "The acreage assigned to the individual gas well for the purposes of allocating allowable gas production thereto shall be known as the prescribed proation unit...For allowable assignment purposes, the prescribed proration unit shall be a three hundred twenty (320) acre unit."

Chesapeake filed a Form P-15 for each well within the Railroad Commission, assigning a proration unit. Chesapeake contended that it had retained all the assigned acreage, but XOG contended that Chesapeake could hold only the acreage for which had designated proration units prior to the expiration of the drilling program.

XOG sued Chesapeake to construe the retained-acreage provision. The trial court found that none of the land at issue reverted to XOG under the retained-acreage provision. The court of appeals affirmed.

Holding and Analysis

The Court held that the retained-acreage clause was not limited to Chesapeake's designation but rather was controlled by the applicable field rules, which resulted in Chesapeake retaining more acreage than what it designated in the proration

plats that it filed with the Railroad Commission.

The Court explained that retained-acreage clauses are "contractual and vary widely because parties are free to contract in any way they choose not prohibited by law." Here, the Court held that the "prescribed proration unit" according to the Railroad Commission field rules was 320 acres for five of the wells. Additionally, the "deemed" proration unit for the remaining well was also 320 acres. Because the six proration units exceeded the assigned acreage, none of it reverted back to XOG.

The Court read the oil-and-gas leases to plainly incorporate the field rules' prescribed proration unit size into their assignment to govern the retained-acreage provision.

IV. TEXAS COURTS OF APPEALS

W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12, 537 S.W.3d 549 (Tex. App.—Austin Aug. 29, 2017, pet. filed)

The Austin Court of Appeals considered an appeal from a district court's denial of a plea to the jurisdiction asserting that the Appellant agency's immunity from suit was not waived under Texas Local Government Contract Claims Act.

Facts

In 2008, the Lower Colorado River Authority (LCRA) and the Travis County Municipal Utility District No. 12 (MUD 12) entered into a "Water Sale Contract" which set forth the terms and conditions by which MUD 12 would receive wholesale water from the LCRA. Among the terms and conditions of the Water Sale Contract, MUD 12 agreed to install, at its own expense, a master meter near the delivery point. The Water Sale Contract became effective upon the parties' execution of the document.

The parties entered into a second contract, the "Wholesale Water Services Agreement" (the Services Contract) in 2009. The Services Contract called for Mud 12's payment of a flat monthly charge, a volumetric rate (based on measurements obtained from the master meter), and a connection fee. The Services Contract would become effective only after the LCRA accepted the master meter installed by MUD 12. The LCRA later assigned the Services Contract to the West Travis County Public Utility Agency (the "Agency").

MUD 12 installed the master meter required by the Water Sale Contract. In a proposed letter agreement from the LCRA to MUD 12, the LCRA enclosed a letter accepting the completed master meter and the proposed Services Contract, executed by LCRA. MUD 12 indicated its acceptance of the Services Contract by signing the letter agreement and executing the Services Contract.

The parties conducted business under the terms of the Service Contract until a dispute arose concerning the rates that the Agency was charging. MUD 12 filed suit in district court alleging that the Agency breached the Services Contract by charging rates that were not authorized by the contract's terms. The Agency contended that the Service Contract did

not meet the requirements of the Texas Local Government Contract Claims Act because MUD 12's agreement to install and convey the master meter did not constitute the provision of a "service" to the Agency—rather, the Service Contract required the Agency to provide water treatment and delivery to MUD 12.

MUD 12 pleaded that the Agency's sovereign immunity was waived by the Texas Local Government Contract Claims Act (the "Act") because of MUD 12's agreement in the Services Contract to provide "services" to the Agency in the form of the installation and conveyance of the master meter. The Agency filed a plea to the jurisdiction, which the trial court denied after an evidentiary hearing. The Agency appealed the denial of its plea to the jurisdiction.

Holding and Analysis

The Third Court of Appeals reversed the district court's order denying the Agency's plea to the jurisdiction.

The court held that the contract was not subject to Texas Local Government Contract Claims Act, and thus the Agency's governmental immunity was not waived.

The Texas Local Government Contract Claims Act applies to a services contract when it is (1) a written contract (2) stating the essential terms of (3) an agreement for providing goods or services to a local governmental entity (4) that is properly executed on behalf of the local governmental entity.

The court overruled MUD 12's argument that the "benefits" received by the Agency from MUD 12's installed master meter qualified as "services" subject to the Act. The court reasoned that not every "benefit" received by a governmental entity operating within a contractual relationship with another party qualifies as a "service" under the Act. The court found that for a "benefit" to qualify as a "service" under the Act, "the governmental entity must have a *right* under the contract to receive services—even under a broad interpretation of that term—because otherwise the benefits incidentally accruing to it would be too "indirect" and "attenuated" to bring the contract under the Act."

The court determined that the Agency had no contractual right to *receive* any services from MUD 12. Instead, the installation and conveyance of the master meter was a condition precedent to the formation of the Service Contract.

The court further held that "the right to receive "services" must be expressly provided for in the written contract, *including* a statement of the "essential terms" for the provision of those services—as the Act unambiguously requires." Key components of these "essential terms" required by the Act include price and time of performance, both of which were absent in the Services Contract at issue. Because the Services Contract did not provide for the "essential terms" of an agreement by MUD 12 to provide services to the Agency, the court found that the Services Contract was not subject to the Texas Local Government Contract Claims Act.

***Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-16-00796-CV, 2017 WL 5078034 (Tex. App.—Austin Nov. 2, 2017, pet. filed)**

The Austin Court of Appeals considered whether an expedited release of a water utility CCN is permissible for a portion of a tract of land and whether 7 U.S.C. § 1926(b) preempts a Public Utility Commission of Texas (PUC) determination when service is not actually being provided to the property.

Facts

The City of Midlothian (the City) requested an expedited release under Texas Water Code § 13.254 for 97.3 acres of a 104 acre property from the certificated service area of the Mountain Peak Special Utility District (Mountain Peak). Mountain Peak had a sewer lift station and water line running on the 6.7 acres excluded from the petition. The Public Utility Commission granted the City's request. Mount Peak then appealed the Commission's decision in Texas district court, and later the Court of Appeals. Mountain Peak appealed the release on the grounds that: (i) the area was receiving water service from Mountain Peak, (ii) the City impermissibly excluded some of the property the City owned from its request for release, and (iii) that federal law preempted the PUC's decision.

Holding and Analysis

The Texas Court of Appeals upheld the PUC Order.

The Court held that the area was not receiving actual water service from Mountain Peak. When determining if a tract is receiving water service the Commission considers "whether the utility has facilities or lines committed to providing water to the particular tract."[9] While Mountain Peak had water lines on or near the property and had the system capacity to serve the property, the Court found that because none of these lines or facilities were "committed to or installed for the purpose of providing water to the" property, the PUC's determination that there was no actual water service was reasonable.[10]

The Court held that it was permissible for a petitioner to exclude a portion of a tract of land when seeking an expedited release. The Court relied heavily on the statute in its determination, reasoning that Texas Water Code § 13.254(a-5) only requires that the tract be at least 25 acres, be located within certain counties, and not be receiving actual water service. Nowhere does § 13.254(a-5) specify that an entire tract of land be included in a petition to release

The Court held that the federal law, specifically 7 U.S.C. § 1926(b), did not preempt the PUC's decision in this case. Section § 1926(b) provides protections for federally indebted associations

[9] *Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas*, 03-16-00796-CV, 2017 WL 5078034, at *5 (Tex. App.—Austin Nov. 2, 2017, pet. filed).

[10] *Id.* at 16.

against the encroachment from competing associations.[11] To invoke the protections of § 1926(b), the water utility must show:

(1) the utility is an "association" within the meaning of § 1926,

(2) the utility has a qualifying federal loan outstanding, and

(3) the utility provided or made service available to the disputed area.[12]

The Court held that Mountain Peak was not protected by 7 U.S.C. § 1926(b) because the ordinary meaning of "provide" is the "actual provision of service or physical capacity and readiness to provide service." The Court further reasoned that the Section 1926(b) is "defensive in nature, [and] intended to protect territory *already served* by a rural water association," and that Mountain Peak was not currently serving the property.[13]

***Elec. Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, No. 05-17-00872-CV, 2018 WL 1790082 (Tex. App.—Dallas Apr. 16, 2018, no pet.)**

The Dallas Court of Appeals considered whether the State's sovereign immunity extends to ERCOT when ERCOT is exercising the government's regulatory powers.

Facts

Panda Power Generation Infrastructure Fund, LLC and its affiliates (collectively, Panda) filed suit in Texas district court against the Electric Reliability Council of Texas, Inc. (ERCOT) alleging fraud, negligent misrepresentation and breach of fiduciary duty. The basis of Panda's claims rested on ERCOT's 2011 and 2012 capacity, demand, and reserves reports (CDRs), which Panda claimed contained false and misleading information.

In response to Panda's petition ERCOT contended that Panda's claims were barred because ERCOT enjoyed sovereign immunity when it was "exercising the government's regulatory powers." The district court denied ERCOT's plea regarding sovereign immunity and ERCOT brought the question to the Court of Appeals in a mandamus proceeding.

Holding and Analysis

While ERCOT is not a governmental unit for the purposes of interlocutory appeals, ERCOT, as a self-regulatory organization, is protected by sovereign immunity

[11] Specifically, 7 U.S.C. § 1926(b) provides "The service provided or made available through any [federally indebted] association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event."

[12] 2017 WL 5078034 at *7 (Tex. App. Nov. 2, 2017). (internal citations omitted).

[13] *Id.* at *8. (internal citations omitted).

when it is performing its statutorily delegated adjudicatory, regulatory and prosecutorial functions.

In reaching its determination the Court upheld the analysis of whether or not ERCOT is a governmental unit that was reached in *HWY 3 MHP, LLC v. Elec. Reliability Council of Texas*, 462 S.W.3d 204 (Tex. App.—Austin 2015, no pet.), but the Court reasoned that in determining whether or not an entity is immune "courts should rely not on [the] definition of governmental unit, but on the nature and purpose of sovereign immunity."[14]

The Court looked to federal cases regarding self-regulatory organizations such as the North American Electric Reliability Corporation and the New York Stock Exchange. These federal cases have long held that private organization authorized by Congress to promulgate and enforce rules are quasi-governmental authorities that are protected by absolute immunity when performing statutorily delegated adjudicatory, regulatory and prosecutorial functions.[15]

The Court reasoned that like the self-regulatory organization in the federal cases: "(1) ERCOT is a private corporation exercising power delegated to it by an administrative agency pursuant to legislation; (2) ERCOT's power includes rulemaking authority that is binding on market participants; and (3) ERCOT is subject to broad oversight by the PUC, which can decertify it."[16] Because of both the nature and purpose of sovereign immunity and because ERCOT is a self-regulatory organization operating with power delegated by the government, the Court held that ERCOT is entitled to sovereign immunity from private damage suits in connection with the discharge of its regulatory responsibilities.

***Tabrizi v. City of Austin*, No. 08-16-00209-CV, 2018 WL 1940556 (Tex. App.—El Paso Apr. 25, 2018, no pet.)**

The Court of Appeals in El Paso considered whether the City of Austin's municipal land use regulations applied to a particular piece of land, whether sovereign immunity applied, and whether city officials acted ultra vires in enforcing the land-use regulations. The court also considered whether street gutters qualified as utility service under the Austin City Code.

Facts

Two landowners, the Tabrizis, wanted to build a house on their 0.56-acre piece of land that was not in a subdivision and had not been platted. The City of Austin required the Tabrizis to first plat the land, which required them to file a subdivision application. The application did not comply with environmental restrictions because there was a seep on the lot, so the city rejected it. The Tabrizis argued that the Austin City Code Chapter

[14] *Elec. Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 05-17-00872-CV, 2018 WL 1790082, at *9 (Tex. App.—Dallas Apr. 16, 2018, no pet.) (internal citations omitted).

[15] *Weissman v. NASD*, 500 F.3d 1293, 1296 (11th Cir. 2007); *Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 114 (2d Cir. 2011); *DL Capital Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 95 (2d Cir. 2005).

[16] *Elec. Reliability*, 2018 WL 1790082 at *19.

25-4 exception to the platting requirement, which would have allowed the landowners to build the house without filing the subdivision application, applied. However, the appeals court disagreed because the lot did not meet the utility service provision of the exception. This provision required the property to be receiving utility services on January 1, 1995, "as authorized under the rules of a utility provider."

The Tabrizis sued the city, claiming that the city officials had acted ultra vires by applying environmental restrictions to their application. The lot abutted a street with curbs and gutters, so the Tabrizis claimed that the curb and gutter drainage facilities qualified the lot as receiving utility service for purposes of the provision. The Tabrizis also claimed that the Declaratory Judgment Act waived the city's sovereign immunity.

Holding and Analysis

The appeals court stated that street gutters did not qualify as utility service provided to a property. The court affirmed the trial court, holding that Austin's environmental regulations applied to the Tabrizis' land, the Declaratory Judgment Act did not waive Austin's sovereign immunity, and the city officials did not act ultra vires. The court used canons of statutory interpretation to analyze Austin City Code Chapter 25-4 and concluded that the chapter's environmental regulations did apply to the Tabrizis' land.

The court disagreed with the Tabrizis' argument that the curb and gutter drainage facilities constituted "utility service." The court looked at many different definitions of "utility service," and none of the definitions included street gutters. The court also pointed out that Austin charges landowners a "drainage utility fee" to help pay for street gutters, and the Tabrizis were not charged that fee. However, even if they were charged that fee, the fee alone does not prove that they received utility service for purposes of the exemption statute. A provision of the statute requires the property to be on an existing street, so if the drainage utility fee—which was assessed to properties that are on streets—proved that the land was receiving utility service for purposes of the exemption statute, then the utility service provision would be redundant.

Finally, the court stated that although the property was de facto subdivided because the city-approved subdivisions surrounded the property, the Tabrizis did not point out a city code provision that recognizes de facto subdivisions. Additionally, even if the property were already subdivided, the Tabrizis would have to file a platting application.

***Johnson Cty. Special Util. Dist. v. Pub. Util. Comm'n*, No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App.—Austin May 11, 2018, pet. filed)**

The Austin Court of Appeals considered whether a property, whose landowner was seeking decertification from the certificated service area of Johnson County Special Utility District (District), was "receiving water service" pursuant to Texas Water Code § 13.254(a-5).

Facts

The District sought review of a Public Utility Commission of Texas (PUC) order granting a landowner's petition for expedited release from the District's

certificated water service area. The district court found that substantial evidence supported the PUC's determination that the landowner was not "receiving water service" from the District and upheld the PUC's decision. The District appealed.

Holding and Analysis

The Austin Court of Appeals affirmed the district court's final judgment.

The court looked to the statutory definition of "service" in Texas Water Code § 13.002 and to the plain and common meaning of "receiving"—taking possession of, delivery of, or knowingly accepting. The court paraphrased its analysis in an earlier case, *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied) to explain that the question is not whether the District is providing water service to the decertified property but whether the decertified property is *receiving* water service from the District.

The court explained that PUC could have reasonably concluded from the evidence before it that the decertified property was not receiving water service from the District. The evidence of contracts and facilities provided by the District failed to show that the District had facilities dedicated to or reserved to serve or committed to the decertified property. Further, the District's delays in providing evidence of its services to the decertified property at the PUC could support the PUC's conclusion that the decertified property was not receiving service.

The Court also overruled the District's argument that its due process rights had been violated when it was denied an evidentiary hearing at the PUC. The Court held that a CCN is not a vested property right entitled to due process protections and therefore the District was not entitled to an evidentiary hearing.

***Tex. Indus. Energy Consumers v. Pub. Util. Comm'n,* No. 03-17-00490-CV, 2018 WL 3353225 (Tex. App.—Austin Jul. 10, 2018, no pet.)**

The Court of Appeals in Austin considered whether the Public Utility Commission (PUC) erred in finding that Southwestern Electric Power Company's (SWEPCO) acted prudently in its decision to complete the construction of a coal-fired power plant.

Facts

In 2007, SWEPCO asked the PUC to amend its certificate of convenience and necessity because it wanted to build a coal-fired power plant. The PUC conditionally granted SWEPCO's amendment application based on the plant's cost estimates at the time. In July 2012, SWEPCO asked the PUC for authority to increase its rates to pay for the plant, and the PUC referred SWEPCO to the State Office of Administrative Hearings.

The PUC said SWEPCO had a duty to evaluate, throughout the construction process, the prudence of constructing the plant. *Gulf States v. Public Util. Comm'n* sets forth the standard by which to measure whether SWEPCO fulfilled this duty. The *Gulf States* standard says that a utility can meet the burden of proving prudence—even through an analysis of

the decision after the fact—through "independent retrospective analyses." In efforts to meet this standard, SWEPCO employees testified about fluctuations in natural gas pricing, SWEPCO's strategy of "fuel diversity," SWEPCO's decision to preserve the capital it had invested, and SWEPCO's need for the plant.

The Administrative Law Judge (ALJ) determined that SWEPCO had not met its burden of showing that a reasonable utility manager would have found prudent SWEPCO's decision to complete construction. The ALJ said SWEPCO had failed to properly monitor the economic viability of the plant throughout the construction period and that a reasonable utility manager would have considered canceling the plant's construction. The PUC disagreed with the ALJ, stating that although SWEPCO had not fulfilled its duty, it had shown through employee testimony that its decision to complete the plant was prudent, meeting the *Gulf States* standard. The trial court held for the PUC.

Holding and Analysis

The appeals court reversed and remanded the trial court's decision, holding that the PUC improperly applied the *Gulf States* standard, so the trial court erred in affirming the PUC's determination. The court stated that because SWEPCO's only evidence of prudence was testimony from four of its employees, the evidence was not independent like the *Gulf States* standard requires. The appeals court pointed out that the testimony consisted solely of facts, not analysis, which further showed that SWEPCO failed to meet the "independent retrospective analyses" requirement. Therefore, the court held that this evidence did not demonstrate that a reasonable utility manager would have found the decision prudent, so it remanded the decision to the PUC.

V. CASES TO WATCH IN 2018

Virginia Uranium v. Warren (SCOTUS)

This is an appeal of a Fourth Circuit determination that the federal Atomic Energy Act does not preempt a Virginia law that on its face prohibits an activity within its jurisdiction (uranium mining), but has the alleged purpose and effect of regulating radiological activities that are exclusively regulated by the Nuclear Regulatory Commission (the milling of uranium and the management of the waste that results from uranium milling). The Supreme Court has granted *cert*.

City of Cibolo, Texas v. Green Valley Special Utility District (SCOTUS)

Under 7 U.S.C. § 1926(b), a rural utility association that holds a federal USDA loan for water or wastewater infrastructure enjoys protection from curtailment or limits on "[t]he service provided or made available" by the association during the term of the loan. The city is appealing a Fifth Circuit determination that 1) "[t]he service" protected under § 1926(b) is not limited to the service funded by the federal loan and 2) the association may satisfy the requirement that it show it is providing or making the service available by demonstrating that it has a legal duty under state law to provide service. In contrast, the Fourth,

Sixth, Eighth, and Tenth Circuits have held that the association must show that the service is being or can promptly be furnished. The Supreme Court has not decided yet whether to grant *cert*. and has requested briefing from the federal government.