

UTILITY UPDATE
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This paper provides municipality-centric updates on three utility sectors – water, energy, and telecommunications.

WATER

PUC Jurisdiction over Wholesale Water and Sewer Rates

SB 997 clarifies the procedure for PUC review of wholesale and retail water and sewer contractual rates. The bill amends Texas Water Code to provide that the PUC must determine that the amount charged under the contract harms the public interest before it can hold a hearing on just and reasonable rates. The bill provides that such a determination is deemed to be a final order for the purposes of appeal and provides other procedural clarifications.

Municipalities considering appealing wholesale water or sewer rates to the PUC should note that the PUC must first make a finding that the appealed rates harm the public interest before proceeding to set new rates. And a public interest finding by the PUC is now immediately appealable to court, which likely will slow down the rate review process. Furthermore, if the PUC were to find the rates in question harmed the public interest, the PUC would be obligated to give the parties 60 days to amend the contract prior to holding a rate-setting hearing.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB997#>

Restricting PUC Jurisdiction over In-City Water Rates

Customers living outside the city limits of the Town of Woodloch appealed water rates charged by the Town utility. In 2017, the PUC decided that the appeal triggered PUC jurisdiction over rates charged both to customers outside the city limits and to customers within the city limits, and that once jurisdiction is triggered, the PUC gains jurisdiction over every rate charged by the utility as opposed to gaining jurisdiction only over the specific rate that was appealed. The PUC's decision concerned many cities and water providers, who believed that the PUC's decision was a departure from jurisdictional precedent.

HB 3689 explicitly narrows the PUC's jurisdiction, amending Texas Water Code § 13.043(j) to clarify that the PUC's jurisdiction over water and sewer rates is limited to the rate that was actually appealed and that the PUC has no jurisdiction under Sections 13.042(f) and 13.043(j) of the Texas Water Code over rates charged by a municipally-owned utility to customers within the municipality.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB3689>

Restrictions on City Jurisdiction over ETJ Design/Construction Standards

HB 3476 modifies Texas Water Code § 13.245 to limit a municipality's ability to require water and sewer service facilities to meet the municipality's design and construction requirements outside of its boundaries. Previously, municipalities could condition their consent to a PUC's grant

of a certificate of public convenience and necessity to a retail public utility operating in the municipalities extraterritorial jurisdiction with the requirement the utility meet the city's requirements. This condition of consent is no longer permitted. Instead, this bill mandates that the PUC must require that the water or sewer utility operating outside the municipality's boundaries meet the TCEQ's design and construction standards.

This code provision only impacts municipalities with a population of at least 500,000. The goal of the bill is to enable expedited PUC authorization for utilities to build and operate in the neighborhoods expanding outside of large Texas cities. Cities may want to observe whether any issues in reliability or performance arise when new water and sewer lines of differing design are connected to the municipality's existing system.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB3476>

Reclaimed Wastewater

SB 905 requires the TCEQ to create a guidance document to help entities understand the process for a project to reclaim municipal wastewater for a public water system or raw water supply.

A municipality that decides to implement a water reclamation project will be able to obtain guidance from the regulatory guidance manual the TCEQ will develop and promulgate. For those cities in drier parts of Texas, the guidance document is expected to streamline the development of reclaimed water projects in order to improve availability of drinking water.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB905>

Sale of City Water or Sewer Systems

HB 3717 exempts municipalities from the requirement to hold a vote prior to the sale of their water or sewer system if the municipality lacks the financial resources and technical expertise required to resolve a notice of violation issued by the TCEQ. By eliminating the requirement to hold an election prior to a sale, municipalities can expedite the sale of their water or sewer systems to entities capable of restoring the water or sewer system to safe and efficient operational levels.

If a city receives a Notice of Violation from the TCEQ for their water or sewer system and is not capable of restoring the system itself, the city government need only make an official finding to that effect prior to selling the system, rather than arranging an election and asking the voters for approval to sell.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB3717#>

Regional Water Planning

HB 1905 eliminates regional water planning duties that are now considered superfluous with the implementation of the State Water Implementation Fund for Texas (SWIFT) program. The bill repeals restrictions on the Texas Water Development Board's (TWDB) discretion to finance water projects based on the regional water planning organization's failure to prioritize projects or

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conduct financing surveys. Accordingly, these water planning activities are no longer a required step to obtain state financing.

To the extent municipal and municipal utility representatives participate in regional water planning activities, they now have fewer requirements outside of the SWIFT program for the purposes of obtaining state financing for water projects.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB1905>

ENERGY

Energy-Source Favoritism

HB 17 prohibits any regulatory authority or political subdivision, including cities, from adopting any rule, order or ordinance that establishes a preference for one utility service over the other based on the type or source of energy the utility service would deliver to the customer. This restriction applies to utility connection, permitting, construction, and installation rules.

This bill is targeted at national movements to restrict use of natural gas. In 2019, the City of Berkeley, California passed an ordinance banning the installation of natural gas hookups in new construction. In July 2021, in *California Restaurants Association v. City of Berkeley*, a district court dismissed the Association's claim that the ordinance was preempted by the federal Energy Policy and Conservation Act. The Association plans to appeal the decision. The ordinance and related lawsuit have prompted significant debate across the country, including in Texas. Supporters of HB 17 have said that it will not prohibit a city's ability to offer rebates for installation of energy-efficient appliances, energy storage, or renewable/clean energy. However, critics of the bill have said that it is too broad and could have a chilling effect on energy efficiency programs. Thus, municipalities may need to carefully scrutinize any existing or new energy efficiency or green programs to ensure the programs don't violate this provision.

<https://capitol.texas.gov/tlodocs/87R/analysis/html/HB00017E.htm>

Securitization of Winter Storm Uri Utility Costs

HB 1510 enables electric utilities to recover system restoration costs, including weatherization and storm-hardening costs, incurred during extreme weather events or disasters with secured financing. The bill creates a new non-profit special purpose public corporation overseen by the PUC to issue bonds and borrow money as authorized by a PUC financing order to help electric utilities recover costs. This bill applies only to utilities outside of the ERCOT power region and requires that financial benefits or savings obtained from securitization are reflected in customer rates.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB1510#>

HB 1520 enables the RRC and Texas Public Finance Authority to issue bonds to help repay the suppliers of natural gas and gas utilities and to ease the burden on customers as natural gas utilities recover costs associated with providing services during Winter Storm Uri. During the winter storm, many gas utilities incurred significant spikes in the cost of gas supply, which is a pass-through cost to residential customers. The goal of this bill is to use the secured financing to extend the time period in which the utilities recoup the extraordinary storm-associated costs from customers and in doing so reduce the monthly bill charged to retail customers. The deadlines for utilities to apply to the Railroad Commission to participate in the securitization process is July 30, 2021.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB1520#>

House Bill 4492 provides for the establishment of a debt financing mechanism that enables ERCOT to finance up to \$2.1 billion that was uplifted to municipally owned utilities, electric cooperatives, and retail electric providers due to energy consumption during Winter Storm Uri for

reliability deployment price adder charges and ancillary services costs in excess of the system-wide offer cap set by the PUC. The bill requires the entities that receive offsets to specific uplift charges to adjust customer invoices to reflect the offsets for any charges that were or would otherwise be passed through to customers under the terms of service with the entity and provides for the repayment of the charges that are financed by ERCOT through the assessment of uplift charges over a period not to exceed 30 years.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB4492#>

City attorneys should be aware of these developments, as securitization of costs will likely result in additional line-items on utility bills and could be the source of calls from concerned/confused citizens.

Disclosure of Chilled Water Service Rates and Related Information

HB 3615 requires municipally owned utilities that operate chilling systems to disclose in response to a public information request certain information relating to rate setting for their chilled water service. Critics of the bill contended that requiring municipally owned utilities to release rate-related information could put the utilities at a competitive disadvantage in the market for chilled water services. However, supporters of the bill contended that the current market isn't truly competitive.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB3615>

Response to Winter Storm Uri

SB 3 contains a variety of provisions intended to help prepare for and avoid future disasters similar to Storm Uri. Some of the key areas SB 3 addresses that impact municipalities are discussed below. Municipal utilities should consider getting an early start on creating emergency preparedness plans and identifying critical infrastructure and clients in their service network.

a) Supply Chain Mapping Committee: Establishes the Texas Electricity Supply Chain Security and Mapping Committee with primary responsibilities of mapping Texas' electricity supply chain and identifying critical infrastructure, best practices for extreme weather events, and priority service needs. The committee is obligated to report its findings to the state government.

b) Critical Natural Gas Facilities: Requires the RRC and PUC to designate certain natural gas facilities and providers as critical customers or suppliers during energy emergencies. The PUC has established Project No. 51888 for any proposed rulemaking related to this subject.

c) Weatherization and Emergency Preparedness for Certain Facilities: Obligates the RRC to require weatherization measures of gas supply chain facilities designated as critical and part of the Texas Electricity Supply Chain. The bill also obligates the PUC to require electric utilities, transmission and distribution utilities, and power generation utilities within the ERCOT region to implement weatherization measures to meet PUC adopted reliability standards. The rule authorizes various administrative penalties to be enforced by the PUC and RRC for failure to correct compliance issues within a reasonable time. The PUC and RRC are also required to review emergency operations plans of the above facilities under their respective purviews and compile a

weather emergency preparedness report to be sent to the state government every two years. On July 19, 2021, the PUC released a discussion draft rule with questions for comment in Project No. 51840, with a proposed rule expected to be published in August or September.

d) Texas Disaster Reliability Council: Establishes the Texas Energy Disaster Reliability Council to help energy and electric industries within the state coordinate and communicate to meet human needs and support critical infrastructure. The bill grants the council authority to request disaster-related information from public utilities and gas providers. It also obligates the council to produce a report on the reliability and stability of the electricity supply chain in Texas and provide recommendations for improvement.

e) TDEM Disaster Preparedness: Requires the Texas Division of Emergency Management (TDEM) to develop lists of suggestions actions and other education materials to help state agencies and the public prepare for winter storms of varying severity.

f) Power Outage Alert System: Requires the Texas Department of Public Safety (DPS) to work with the PUC, Texas Department of Transportation (TxDOT), the Officer of the Governor, and the Texas Division of Emergency Management (TDEM) to develop an alert system which can be activated when power resources are at risk of failing to meet demand.

g) Landfill-Electricity Generation Connections: Authorizes landfill operators with methane to electric power generation equipment to sell that electricity to other providers without being considered a utility themselves.

f) Load Management Rules: Requires the PUC to adopt a system to allocate load shedding among various utilities across the state and conduct simulated load shedding exercises.

g) Customer Awareness: Amends the Texas Utilities Code to require electric utilities to disclose information about load shedding procedures and critical customer procedures to retail providers and their customers.

h) Wholesale Index Electricity Pricing: Requires disclosures, opt-outs, and price caps for residential and small commercial customers of wholesale indexed products. The PUC has issued a strawman rule and request for comments in Project No. 51830.

i) Water Utilities: Existing Water Code provisions require utilities in large counties to maintain minimum water pressure at 35 psi during emergencies. This new law extends a similar requirement to utilities in all other counties, requiring retail water utilities to ensure that their emergency operation of their water system during an extended power outage maintain a minimum water pressure of 20 psi or another level approved by TCEQ as soon as safe and practicable following a natural disaster. The utilities are also required to submit an emergency preparedness plan to TCEQ for approval, with the plan intended to demonstrate that utilities can meet the minimum psi requirements. To assist municipalities, TCEQ is required to create an emergency preparedness plan template and to provide other technical assistance, and is also authorized to inspect for compliance. The bill also prohibits retail water utilities from imposing late fees or discontinuing service for nonpayment of bills during an extreme weather emergency.

j) Energy Plan Advisory Committee: Establishes a State Energy Plan Advisory Committee to provide recommendations for removing economic barriers, provide recommendations for improving reliability, stability, and affordability of electric service, and evaluate the electricity market structure.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB3>

Solar Panels

The Legislature previously restricted the ability of a homeowner's association (HOA) to limit deployment of residential solar panels. Concerns have been raised that some cities have adopted ordinances that go beyond those Legislative restrictions that apply to HOAs. As such, SB 398 prohibits municipalities from restricting residential and small commercial property owners from installing solar energy devices (e.g. solar panels) except to the extent an HOA can currently prohibit solar panel installation. Additional exceptions authorize limiting solar panel installation where PUC rules, interconnection agreements, and grid operator protocols require such limits for quality, safety, and reliability of the electricity distribution system.

The bill also introduces new disclosure requirements for sellers and lessors of solar energy devices. The sellers and lessors must disclose, in writing, costs, fees, rates, warranties, identities of the seller and installer, and operational and financial performance representations.

The bill also requires utilities to provide grid interconnection to retail customers' distributed generation facilities in non-competitive areas within ERCOT if those retail customers are part of the food supply chain – think grocery stores – subject to certain size limitations and other exceptions. The bill amends the Utilities Code to obligate municipally owned utilities to purchase power from, and supply power to, the food supply customer in certain service disruption or emergency situations.

If a municipality has existing solar panel restrictions, it should check if the restriction is authorized under Texas Property Code sections 202.010(d)(1)-(7) or the other exceptions to SB 398's limitation. Municipal utilities should anticipate interconnection requests for distributed generation facilities associated with grocers and other food supply chain participants.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB398>

TELECOMMUNICATIONS

Telecommunications Services in Rural Areas

HB 2667 was intended to help the PUC address funding shortages for various Texas Universal Service Fund (TUSF) programs, which subsidize the provision of basic local telecommunications service in high cost rural areas, among other things. The bill would have applied the monthly TUSF surcharge to customers of Voice over Internet Protocol (VoIP) service providers. The bill was vetoed by Governor Abbott over concerns that the bill would create a new fee. There is also ongoing litigation in the Third Court of Appeals between various recipients of the TUSF and the PUC, related to the ongoing funding shortages.

The lack of required funding for TUSF may have a direct impact on the provision of basic local telecommunications services in rural telephone exchanges.

Next-Gen 9-1-1

HB 2911 amends the Health and Safety Code to enable the statewide deployment of next generation 9-1-1 (NG 9-1-1) services by September 1, 2025. The bill creates the NG 9-1-1 service fund for use in areas served by emergency communication districts, the Commission on State Emergency Communications or home rule cities operating their own 9-1-1 systems, using any available federal funds. The Legislature will designate the money to be used for the creation of the NG 9-1-1 service fund from available federal sources (such as a portion of the money allocated to Texas pursuant to the American Rescue Plan Act) in an upcoming special session in the fall.

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB2911#>

Expediting Broadband Deployment (Small Cell 5G Nodes)

Wireless and wireline providers contended that excessive fees and regulations have slowed 5G deployment. In 2017 the Texas legislature passed SB 1004, which capped right-of-way rental fees at \$250 per small cell node. Continuing this trend, in 2019 the Texas legislature passed SB 1152, which reduced cable/phone companies fees to the lesser of its stable cable franchise fees or telephone access line fees.

A coalition of Texas cities filed a lawsuit against the State of Texas, arguing that SB 1004 amounted to an unconstitutional grant of public money under the Texas Constitution. The petition was amended to include similar complaints against SB 1152. After a February 2020 hearing, the court denied the cities' motion for a preliminary injunction. Given the Federal Communication Commission (FCC) order discussed below, the current disposition of this lawsuit is unclear as some of the Texas rules at issue have likely been preempted by the FCC order.

In 2019, FCC rules regarding 5G small cell node deployment became effective. The FCC order preempts local Right-of-Way (ROW) access and use of government property access fees unless they are based on reasonable costs and are non-discriminatory. The order provides for a presumptively lawful ROW access fee of \$270 per node per year. The order also reduced the local government review time for small cell node applications to 60 or 90 days (this was shorter than existing Texas law) and limited the use of local aesthetic requirements.

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A coalition of cities filed several lawsuits against the FCC's order. On August 12, 2020 the Ninth Circuit rejected cities' constitutional challenges to the FCC rules (though the court did remove some of the aesthetic requirement limitations imposed by the FCC). On June 28, 2021, the US Supreme Court denied the cities' petition for certiorari, thus upholding the Ninth Circuit's decision and affirming the FCC order limiting the discretion available to municipalities regarding 5G small cell permitting decisions.