Cities in the PUC’s Crosshairs

The Texas Public Utility Commission is the state agency that regulates private utility providers. Every so often, however, the Commission seeks to expand its authority to include cities.

For example, the Commission sought input on whether it could completely eliminate telecommunications franchise fees in 2009. Of course, it doesn’t have the statutory authority to do so. Since that time, only a handful of instances have required intervention to preserve municipal authority.

Fast-forward to this year, and it appears that a number of private utility providers, including telecommunications, water, and electric, are using the Commission to seek to chip away at municipal authority. The League has filed briefs in *five* proceedings in the last six months that seek to usurp municipal authority:

1. **Right-of-Way Fees:** Public Utilities Commission Docket No. 45280, Complaint of Extenet Network Sys., Inc. against the City of Houston for imposition of fees for use of public right-of-way. In this proceeding, a certificated telecommunications provider is asking the Commission to allow it to place wireless telecommunications equipment in a city’s rights-of-way by right and without paying compensation to the city. The brief in support of the City of Houston was filed on February 17, 2016.

2. **Water Rate Jurisdiction:** Appeal of Water and Sewer Rates Charged by the Town of Woodloch Nos. 12312 and 20141, PUC Docket No. 42862. In this proceeding, the Commission asserted jurisdiction over the *in-city* rates of a municipally owned water utility. The League filed comments in support of the City of Woodloch on April 25, 2016, and also filed reply comments on May 5, 2016.
3. **Certificates of Convenience and Necessity:** Application of the City of Cibolo for Single Certification in an Incorporated Area and to Decertify Portions of Green Valley SUD’s Sewer Certificate of Convenience and Necessity in Guadalupe County, PUC Docket No. 45702. In this proceeding, a special utility district argues that federal debt in connection with its sewer certificate of convenience and necessity is enough to prohibit a city from decertifying a portion of the city’s water CCN under state law. The League filed comments in support of the City of Cibolo on June 14, 2016.

4. **Municipal Subdivision Ordinance/Electric Undergrounding:** Appeal of CenterPoint Energy Houston Electric, LLC from an Ordinance of the City of League City, Texas and Application for Declaratory Relief, PUC Docket No. 45259. In this docket, CenterPoint Energy claims that a city may not, through its subdivision ordinance, require a developer to request undergrounded distribution lines pursuant to a city’s subdivision ordinance. The League filed a letter in support of League City on June 29, 2016.

5. **Municipal Zoning/PUC Jurisdiction:** Appeal of Brazos Electric Cooperative, Inc. and Denton County Electric Cooperative, Inc. D/B/A CoServ Electric from an Ordinance of The Colony, Texas, and, in the alternative, Application for a Declaratory Order, PUC Docket No. 45175. In this docket, electric cooperatives appeal a city’s denial of a specific use permit for an electric substation and claim that the Commission has jurisdiction to overturn the city’s zoning ordinance. The League filed comments in support of the City of The Colony on July 8, 2016.

Standing alone, each of the Commission proceedings above could have a serious impact on cities. Altogether, they could be devastating. League staff will continue to monitor and participate as necessary.

**Attorney General Opinion:**

**Cities Can’t Prohibit Licensed Carry in Executive Session**

On June 27, the attorney general issued Opinion No. KP-0098. The League contends that the opinion confuses the meaning of the term “open meeting” in a way that would mistakenly permit the carrying of handguns into executive sessions, even in cases where they are prohibited in the main meeting. The request for the opinion asked multiple questions concerning the requirements a city must follow when “posting notice about the carrying of handguns at open and closed meetings of a city council.”

Legislation passed in 2015 prohibits licensed carry “in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to [the Open Meetings Act] and the entity provided notice…”

Sections 30.06 and 30.07 of the Penal Code provide the language to be used in a notice to prohibit entry with a concealed handgun and entry with a handgun that is carried openly. The
request was meant to clarify where the signs should be posted. That clarification was sought because Section 30.06 states that the concealed carry prohibition sign should be “displayed in a conspicuous manner clearly visible to the public.” Section 30.07, for some inexplicable reason, has additional language stating that the open carry prohibition sign should be “displayed in a conspicuous manner clearly visible to the public at each entrance to the property.”

The confusion came from the fact that a city can’t generally prohibit open carry in city facilities, so it wouldn’t make sense to post that sign “at each entrance to the property.” Most attorneys had simply advised that a city wanting to prohibit carry in the meeting room do so by temporarily posting the signs at the entrance to the room when a meeting is taking place. The opinion essentially agreed, but it also included an analysis related to “closed meetings.”

The 2015 legislation prohibiting licensed carry “in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting” was added to clarify that only meetings of bodies governed by the Open Meetings Act are off limits, and only then if a city posts signage. The phrase “open meeting” in that statute clearly means one that is subject to the Open Meetings Act. However, the attorney general office reads it literally to not include a “closed meeting (i.e., an executive session).” In other words, the opinion concludes that a city can’t prohibit a person from licensed carrying into an executive session.

Of course, only members of the governing body have an absolute right to be in an executive session anyway. And a city can prohibit its employees from carrying at all while at work. But it’s conceivable that the governing body could invite some other person to attend an executive session. If that’s the case, the attorney general says the city can’t prohibit that citizen from licensed carrying in that meeting.

On July 5, the League submitted a letter requesting that the attorney general’s office reconsider the portion of the opinion related to executive sessions.

**Lawsuit: Licensed Carry in Court Buildings**

In the wake of two confusing attorney general opinions related to licensed handgun carry, court facilities, and signage, some local governments called foul. The issue is whether the entire building that houses a court, or only the actual courtroom and court offices, is off-limits to licensed carriers. Waller County, located northwest of Houston, has filed a lawsuit to find out the answer.

Terry Holcomb is the leader of the group known as Open Carry Texas, and spends much of his time complaining about governmental entities posting licensed carry signage in what he alleges is the wrong place or with the wrong wording. He sent a written complaint to Waller County officials claiming that – based on a recently-issued attorney general opinion – they can’t prohibit licensed carry in the entire courthouse building. He also claims that the attorney general’s office, under its investigatory authority over signage, can seek civil penalties against the county if it refuses to remove its signs. (Another recently-issued attorney general opinion incorrectly asserts investigatory authority that is not authorized by law.)
The county filed a lawsuit against Mr. Holcomb seeking a declaratory judgment from a district court that: (1) the entire courthouse is off-limits to licensed carriers; and (2) the attorney general’s office doesn’t have as much enforcement authority as it claims. The ultimate answer from that court case should provide guidance to cities that house municipal courtrooms and court offices in multi-use city facilities.