Control Number: 39800

Item Number: 22

Addendum StartPage: 0

**DOCKET NO. 39800**

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| **COMPLAINT OF JASPER COUNTY AGAINST SOUTHWESTERN BELL TELEPHONE LP, d/b/a AT&T TEXAS** | **§** | **PUBLIC UTILITY COMMISSION OF TEXAS** |

# JASPER COUNTY'S APPEAL OF ORDER NO. 4 (DISMISSING COMPLAINT)

## TABLE OF CONTENTS





27

**DOCKET NO. 39800**

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|---|---|---|
| **COMPLAINT OF JASPER COUNTY AGAINST SOUTHWESTERN BELL TELEPHONE LP, d/b/a AT&T TEXAS** | § | **PUBLIC UTILITY COMMISSION OF TEXAS** |

**JASPER COUNTY'S APPEAL OF ORDER NO. 4 (DISMISSING COMPLAINT**

NOW COMES, Jasper County and, pursuant to P.U.C. Proc. R. §22.123, files this appeal of Order No. 4 of the Commission's ALJ in this matter and would show as follows:

This complaint No. 39800, and its predecessor Complaint No. 39219 have been mired in procedural wrangling, not against AT&T, but against Commission Staff and the Commission ALJs. The Commission ALJs' reasons for dismissing the instant complaint as well as its predecessor were for "failure to state a claim for which relief can be granted". Both embodiments of the complaint absolutely stated the claim sufficiently to have been acceptable in any forum, including the state and federal court systems from which the Commission borrowed the very language of the rule. However, the Commission ALJs have misinterpreted and misapplied the concept, effectively "moving the goal posts", thereby resulting in increased cost of the proceedings, unnecessary delays, inconsistent results, and has fostered contentiousness between the parties.

What it means to "state a claim for which relief can be granted" and whether or not Jasper "stated a claim for which relief can be granted" are issues to be addressed by a SOAH ALJ or the Commissioners themselves.[1] As Jasper explains in detail below, the order of the Commission ALJ must be reversed and this complaint must be referred to SOAH for further development and a hearing on the merits of the case.

## Points of Error

1. The Commission ALJ erred by improperly requiring Complainant to specify and specifically quantify its claim for general damages in its initial pleading.

2. The Commission ALJ erred by improperly requiring Complainant to preemptively address and

1 See *Texas Health and Human Services Comm'n v. Community Health Choice, Inc.*, attached hereto as Exhibit No 1.

disprove an as-of-yet unstated counterclaim by AT&T of an offset of overdue interest pursuant to Tex. Gov. Code Ann. Sec. 2251 (Prompt Payment Act).

3. The Commission ALJ erred by issuing an order dismissing the complaint under 22.181(a)(1)(g) for failure to state a claim for which relief can be granted.

4. The Commission ALJ erred by exceeding her authority and entering an order affecting the substantive rights of the Complainant (dismissing the complaint with prejudice) in a contested case.

5. The Commission ALJ erred by failing to refer or allowing to be referred a contested case to the State Office of Administrative Hearings as required by Tex. Gov. Code Ann. Sec. 2003.021 and .049, PURA Sec. 14.052-.053, P.U.C. Subst. R. §22.207.

## Discussion

**1. The Commission ALJ erred by improperly requiring Complainant to specify and specifically quantify its claim for general damages in its initial pleading.**

The Commission ALJ in the instant complaint imposed upon the Complainant an impossible burden reminiscent of the "*prima facie* case" burden fiasco the Commission ALJ in dockets 36361, 36362, and 36363 placed on those complainants. The ALJ in those complaints and others, at the behest of Commission staff, improperly required the complainants to establish *prima facie* evidence of their claims in their initial pleadings or risk dismissal of their complaint.[2] In the instant complaint, the Commission ALJ, again at the bidding of Commission Staff, first ordered Complainant to amend its complaint and "At a minimum, on or before January 15, 2012, Complainant shall provide the information described in Commission Staff's recommendation."[3]

Commission Staff's Response to Order No. 1, referenced by the Commission ALJ in its Order No. 2, emphasized the following points:

> "It is Staff's position that in this docket Complainant has sufficiently pled, for purposes of initiating a formal complaint, the legal basis for its complaint. However, Complainant has not pled sufficient facts to provide AT&T with fair notice of the time period, charges,

2 *See generally*, P.U.C. Docket No. 36361, 36362, and 36363, Commission Staff's Responses to Orders No. 4 (March 19, 2009); P.U.C. Docket No. 36361, 36362, and 36363, Orders No. 5 (May 12, 2009).

3 Order No. 2, at 3 (December 5, 2011).

payments, or accounts that are the subject of this complaint."[4]

Staff's position on the issue of the sufficiency of Complainant's pleading is simply wrong; and the reliance by the Commission ALJ on Staff's statements was misplaced. Tex. R. Civ. P. Rule 47 requires that an original pleading include "a short statement of the cause of action sufficient to give fair notice of the claim involved," but it does not require that the plaintiff set out in his pleadings the evidence upon which he relies.[5] The purpose of the fair notice requirement is to provide the opposing party with sufficient information to enable him to prepare a defense.[6] The test of whether the requisite fair notice has been given has been described as **whether an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the nature and basic issues of the controversy and the testimony probably relevant**.[7] [Emphasis added]. Staff's own statement acknowledges that the Complainant met this burden and nothing more should have been required.

Stated another way, the test is not whether it it might cause the defendant some discomfort to answer the complaint, but whether the defendant is capable of answering; and AT&T's own answers in the predecessor Complaint No. 39219 admit AT&T is capable of answering the complaint, but that it might cost $19,000 in overtime wages for AT&T personnel to gather the information. AT&T has demonstrated through its objections that it is able to answer, it just complains that it is too burdensome to answer and that is unfair.[8]

Despite the fact that the Complainant had sufficiently pleaded its case, Complainant complied with the Commission ALJ's Order No. 2 and filed its amended complaint in which complainant specifically addressed the time period involved in the claimed overcharges, the specific accounts on

4 Commission Staff's Response to Order No. 1, at 5 (October 27, 2011).

5 See *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988).

6 *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988) (citing *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)).

7 *State Fidelity Mortgage Company v. Varner*, 740 S.W.2d 477, 479 (Tex.App.-Houston [1st Dist.] 1987, writ denied).

8 PUC Docket No. 39219, response to RFI 2-3 (April 5, 2011) states: "*Subject to and without waiving its objections to Jasper County's Second RFI (March 28, 2011), to determine how long and how much a review of this magnitude would entail, a service representative pulled and reviewed telephone bills, for one account, for a 12 month period. This activity was timed at approximately 25 minutes, which multiplied by 75 accounts, multiplied by 16 years worth of bills, equates to 30,000 minutes, or 500 hours.*" While Jasper disputes this hyper inflated estimate, this response demonstrates that AT&T understands the accounts in question, the time at issue, and the path to answering Jasper's complaint in full. The ALJ's assertion that Jasper has not given fair notice to AT&T is clearly without basis, given AT&T's response to RFI 2-3. See also the Affidavit of Nancy Galloway (attached to AT&T Texas' Motion for Protection from Discovery), PUC Docket No. 39219, March 14, 2011, at 6. AT&T's claims regarding potential expenses are themselves facts in dispute and are issues for the SOAH ALJ to consider.

which the claims were made, and provided concrete examples of actual Late Payment Charges imposed by AT&T and paid by the Complainant. Complainant could not provide a full accounting of AT&T's overcharges nor the dates and amounts of each of Complainant's payments since much of that information is in the sole possession of AT&T.

The ALJ found in Order No. 3, "The amended complaint addresses Order No. 2 in part in that Complainant identifies the time period believed to be at issue, 1994 through approximately 2008, the specific account numbers affected, and provided examples of bills reflecting LPCs. The amount of Complainant's payments or information regarding Jasper's accounting of the payments is not addressed in the amended complaint."[9] While not proper requisites for an initial pleading, Complainant complied and filed a response.

Complainant filed a 28 page Response to Order No. 3 which included an affidavit of Mark Wilder in which Mr. Wilder painstakingly analyzed the limited number of bills currently available and gave an accounting of the payments due and paid and demonstrated that none of Complainant's payments on which AT&T actually imposed LPCs were overdue as defined by the PPA. Thus Complainant's Response to Order No. 3 addressed the only remaining issue identified by the Commission ALJ in Order No. 3: "The amount of Complainant's payments or information regarding Jasper's accounting of the payments..."[10]

It would appear that Commission Staff (and thus the Commission ALJ) would only allow the complaint to proceed if Complainant could identify and quantify each and every instance in which AT&T imposed and collected a prohibited Late Payment Charge and provide an absolute total amount of general damages sought in the complaint. Such an accounting is not required in any forum, not even state or federal court.

The general rule is that if a [complainant] alleges sufficient facts to state a cause of action from which the [commission] can determine the proper measure of damages, the [complainant] is not required to allege the measure of damages sought.[11] Actual damages are classified as either direct (general damages) or consequential (special damages).[12] The distinction is important because general

9 Order No. 3, at 1 (January 6, 2012).

10 Order No. 3, at 1 (January 6, 2012).

11 *Bowen v. Robinson*, 227 S.W.3d 86, 95 (Tex.App. - Houston [1st Dist.] 2006, pet. Denied); *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 834 (Tex.App. - Amarillo 1993, writ denied).

12 *Arthur Anderson & Co. v. Perry Equip. Corp.* 945 S.W.2nd 812, 816 (Texas 1997).

damages do not need to be specifically pleaded, but special damages must be pleaded.[13] General damages are damages that naturally and necessarily flow from a wrongful act and would normally compensate for the loss, damage, or injury that is presumed to have been foreseen or contemplated by the party as a consequence of its wrongful act.[14] General damages are those that are so usual an accompaniment of the kind of breach or wrongdoing alleged in the complaint that the mere allegation of the wrong gives sufficient notice.[15] The Plaintiff does not have to specifically plead general damages.[16]

The Commission ALJ erred by improperly requiring Complainant to specify and specifically quantify its claim for general damages in its initial pleading, and the orders requiring such an accounting and dismissing the complaint must be overturned.

**2. The Commission ALJ erred by improperly requiring Complainant to preemptively address and disprove an as-of-yet unstated counterclaim by AT&T of an offset of overdue interest pursuant to Tex. Gov. Code Ann. Sec. 2251 (Prompt Payment Act).**

Commission staff stated in its Response to Order No. 1:

> "Staff further notes that the PPA provides that a political subdivision shall compute interest imposed on the political subdivision pursuant to the PPA at the time a payment is made on the principal. Complainant has not presented this calculation or provided any specific facts supporting the claim of overpayment."[17]

[citations omitted]. It is clear that the Commission ALJ accepted staff's statement as if it were authority on the topic, failing to recognize that staff is merely a party to the proceeding and not the final arbiter.

Staff's view on this topic is misguided, as was reliance on Staff's statement by the Commission ALJ. There is no requirement in statute, rule, or precedent for such issues to be preemptively addressed in an initial pleading. Staff's is free to recommend these issues to the Commission as issues to be addressed by the SOAH ALJ upon referral and through the Commission's Preliminary Order as it did in City of Pharr, P.U.C. Docket No. 39660. However, the Commission ALJ erred in relying upon the statements of Commission Staff as grounds for dismissal of the complaint, and the Commission ALJ's order must be overturned.

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13 TRCP 56.

14 *Arthur Anderson & Co. v. Perry Equip. Corp.* 945 S.W.2nd 812, 816 (Texas 1997).

15 Tex. R. Civ. P. 56; *Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (citing 2 McDonald, Texas Civil Practice 124, § 6.17.1 (1970)).

16 *Green v. Allied Interests, Inc.* 936 S.W.2d 205, 208 (Tex.App. - Austin 1998, pet. denied).

17 Commission Staff's Response to Order No. 1, at 6 (October 27, 2011).

**3. The Commission ALJ erred by issuing an order dismissing the complaint under 22.181(a)(1)(g) for failure to state a claim for which relief can be granted.**

Complainant's initial pleading alleges that AT&T improperly charged Late Payment Charges to Complainant's accounts that are prohibited under the Prompt Payment Act.[18] Complainant alleged and demonstrated that it actually paid the improperly charged LPCs on at least nine (9) of its phone bills.[19] Complainant has established as a matter of law that it is entitled to relief for at least those charges reflected on the nine bills. Thus, Complainant has stated a claim for which relief can be granted. AT&T admits it exempted Jasper from LPCs as a result of Jasper's complaint. As such, it is undeniable that Jasper was subjected to LPCs prior to that exemption. Notwithstanding the fact that AT&T must allege and prove that Jasper owes overdue interest under the PPA, Jasper has shown that for the few bills used to show LPCs were charged, Jasper paid early under the terms of the PPA. Moreover, as demonstrated above, general damages need not be specifically pleaded and Complainant is also entitled to any and all other improperly charged LPCs that are identified though discovery and at the hearing on the merits.

Notably, this is not the first occasion for the Commission to consider the precise issues made the subject of the instant complaint. In PUC Docket No. 34332, the Commission rejected AT&T's identical argument to the instant issue that before the complaint states a claim for which relief can be granted (by giving fair notice), HCHD must give an accounting of the payments and show that no overdue interest was owed under the PPA. Likewise the SOAH ALJ completely dismissed AT&T's argument at the Hearing on the Merits. The SOAH ALJ asked AT&T if it could show any overdue interest owed under the PPA to which they replied they could not. That was the end of that. HCHD did not specify and identify each and every LPC AT&T charged HCHD until well after the complaint was refereed to SOAH. In the more recent PUC Docket 39660, the Commission issued its order of referral without requiring Pharr to give any accounting of payments made and/or show that no overdue interest was due. As it turned out in that complaint (and as it will also turn out in this complaint), AT&T's Direct Testimony in Docket No. 39660 testified that Pharr was sometimes late under the PPA, but that any interest was so nominal that it was not pursuing the matter.[20] In the instant complaint the ALJ's demand and subsequent order dismissing the complaint is inconsistent with the two prior cases addressing substantially identical issues.

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18 Jasper County's Complaint and Motion for Referral to SOAH, at 4 (September 28, 2011).

19 Jasper County's Response to Order No. 2 and First Amended Complaint, at 3 (December 8, 2011).

20 See PUC Docket No. 39660, Direct Testimony of Nancy Galloway, March 2, 2012, at 7 (lines 9-12). See also Rebuttal Testimony of Nancy Galloway, April 16, 2012, at 2 (lines 13-20).

The Commission ALJ now reads the rules to require that Jasper must identify each and every LPC ever charged by AT&T and allege its general damages specifically. The ALJ also believes Commission rules require Jasper to show it paid each and every payment timely under the PPA, despite the fact that AT&T has not alleged Jasper was every late. As argued above, this is inconsistent with law and prior Commission precedent. The general allegation of LPCs coupled with the demonstrated imposition of LPCs by AT&T and paid by Jasper constitutes a claim for which relief can be granted and gives fair notice to AT&T.

The Commission ALJ erred by issuing an order dismissing the complaint under 22.181(a)(1)(g) for failure to state a claim for which relief can be granted, and the Order dismissing the complaint must be overturned.

**4. The Commission ALJ erred by exceeding her authority and entering an order affecting the substantive rights of the Complainant (dismissing the complaint with prejudice) in a contested case.**

The State Office of Administrative Hearings was created in 1991 to serve as an independent forum to conduct adjudicative hearings for the various agencies of executive branch of state government, to wit:

> **Tex. Gov. Code Ann. Sec. 2003.021. OFFICE. (a)** The State Office of Administrative Hearings is a state agency created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government. The purpose of the office is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that the office is authorized to conduct.

[Emphasis added] And, the Utility Division was established pursuant to the Public Utility Regulatory Act to conduct contested case hearings for the Commission, to wit:

> **PURA Sec. 14.053. POWERS AND DUTIES OF STATE OFFICE OF ADMINISTRATIVE HEARINGS.**
> (a) The utility division of the State Office of Administrative Hearings shall conduct each hearing in a contested case that is not conducted by one or more commissioners.
> (b) The commission may delegate to the utility division of the State Office of Administrative Hearings the authority to make a final decision and to issue findings of fact, conclusions of law, and other necessary orders in a proceeding in which there is not a contested issue of fact or law.
> (c) The commission by rule shall define the procedures by which it delegates final decision-making authority under Subsection (b).
> (d) For review purposes an administrative law judge's final decision under Subsection (b)

has the same effect as a final decision of the commission unless a commissioner requests formal review of the decision.
(V.A.C.S. Art. 1446c-0, Sec. 1.101(e).)

[Emphasis added]

**Tex. Gov. Code Ann. Sec. 2003.049. UTILITY DIVISION.**
(a) The office shall establish a utility division to perform the contested case hearings for the Public Utility Commission of Texas as prescribed by the Public Utility Regulatory Act of 1995 and other applicable law.
(b) The utility division shall conduct hearings relating to contested cases before the commission, other than a hearing conducted by one or more commissioners. The commission by rule may delegate the responsibility to hear any other matter before the commission if consistent with the duties and responsibilities of the division.
(c) Only an administrative law judge in the utility division may conduct a hearing on behalf of the commission. An administrative law judge in the utility division may conduct hearings for other state agencies as time allows. The office may transfer an administrative law judge into the division on a temporary or permanent basis and may contract with qualified individuals to serve as temporary administrative law judges as necessary.

[Emphasis added] In addition, Commission rules are clear as to who has the authority to conduct a hearing, preside over a proceeding, or determine the legal rights, duties, or privileges of a party, in a docketed contested case before the Commission, such as the instant complaint, to wit:

**Proc. R. §22.2. (1) Administrative law judge** — The person designated to preside over a hearing.

**Proc. R. §22.2. (23) Hearing** — Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

**Proc. R. §22.2. (19) Docket** — A proceeding handled as a contested case under APA.

**Proc. R. §22.2. (16) Contested case** — A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

**Proc. R. §22.2. (35) Proceeding** — Any hearing, investigation, inquiry or other fact-finding or decision-making procedure, including the denial of relief or the dismissal of a complaint, conducted by the commission or the utility division of SOAH.

[Emphasis added] In addition, Commission rules provide:

**Proc. R. §22.207 Referral to State Office of Administrative Hearings.**

> The utility division of the State of Office of Administrative Hearings shall conduct hearings related to contested cases before the commission, other than a hearing conducted by one or more commissioners. At the time SOAH receives jurisdiction of a proceeding, the commission shall provide to the administrative law judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide to the administrative law judge at any time additional issues or areas that must be addressed. The commission shall send a request for setting or hearing, or request for assignment of administrative law judge to SOAH in sufficient time to allow resolution of the proceeding prior to the expiration of any jurisdictional deadline. In order to give the commission sufficient time to consider a proposal for decision, the commission may specify the length of time prior to the expiration of a jurisdictional deadline by which the administrative law judge shall issue a proposal for decision.

[Emphasis added] It is unclear under what authority the Commission ALJ even exists[21], much less summarily ruled on the merits of the instant complaint by dismissing the complaint *with prejudice*. Even if the Commission ALJ is empowered with some delegated authority of the Commission, which does not appear to be the case, Commission rules do not permit the Commission ALJ to summarily dismiss a complaint with prejudice:

> **§22.181. Dismissal of a Proceeding.**
> (a) **Motions for dismissal.**
> (1) Upon the motion of the presiding officer or the motion of any party, the presiding officer may recommend that the commission dismiss, with or without prejudice, any proceeding without an evidentiary hearing, for any of the following reasons:
> (A) lack of jurisdiction;
> (B) moot questions or obsolete petitions;
> (C) res judicata;
> (D) collateral estoppel;
> (E) unnecessary duplication of proceedings;
> (F) failure to prosecute;
> (G) failure to state a claim for which relief can be granted; or
> (H) other good cause shown.
> (2) The party that initiated the proceeding shall have 20 days from the date of receipt to respond to a motion to dismiss. If a hearing on the motion to dismiss is held, that hearing shall be confined to the issues raised by the motion to dismiss.
> (3) If the presiding officer determines that the proceeding should be dismissed, the presiding officer may prepare a Proposal for Decision to that effect, or issue

21 Effective September 1, 1995, the State Legislature created the Utility Division of SOAH by adding Texas Government Code 2003.047 (now 2003.049), and by substantially modifying PURA. Specifically, PURA was modified to remove the authority of the Commission to employ Administrative Law Judges, and transferring those duties to SOAH. Some of these changes can be seen in the "introduced" version of the bill (attached hereto as Exhibit 2). Taken in its entirety, it becomes clear that the State Legislature abolished Commission Administrative Law Judges and transferred all powers previously delegated to Commission Administrative Law Judges to SOAH Administrative Law Judges in its Utility Division. There appears to be no present statutory authority for the creation or existence of a Commission Administrative Law Judge.

an order dismissing the proceeding. The commission shall consider the Proposal for Decision as soon as is practicable.

(4) An order dismissing a proceeding under paragraph (3) of this subsection may be appealed pursuant to §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission).

The Commission ALJ erred by exceeding her authority and entering an order affecting the substantive rights of the Complainant (dismissing the complaint with prejudice) in a contested case, and the order dismissing the complaint must be overturned

**5. The Commission ALJ erred by failing to refer or allowing to be referred a contested case to the State Office of Administrative Hearings as required by Tex. Gov. Code Ann. Sec. 2003.021, PURA Sec. 14.052-.053, P.U.C. Subst. R. §22.207.**

As demonstrated above, Jasper County's claims constitute a Contested Case and are therefore entitled to a hearing on the merits before a SOAH ALJ. Moreover, the question of whether or not Jasper stated a claim for which relief can be granted and how Sec. 2251.027 affects this complaint are all issues to be addressed by the SOAH ALJ as they affect the legal rights, duties, or privileges of a party to a Contested Case.

The Third Court of Appeals addressed this very issue in *Hawkins v. Community Health Choice, Inc.*[22] in which the Department of Health and Human Services ("HHSC") refused to refer a Contested Case to SOAH because HHSC claimed the complainant had failed to meet a condition precedent (jurisdictional prerequisite) for referral to SOAH. While the court agreed there were prerequisites, whether those prerequisites were satisfied was a question of fact that must be presented to SOAH. The court opined that the ONLY condition precedent to referral to SOAH was a request for referral from the complaining party.

For complaints before this Commission, there are but two condition for referral: it must be a Contested Case, and there must be a request for referral; both of which conditions were met in the original petition. In fact, in the instant complaint there have been five requests for referral, four by the Complainant and one by Commission Staff, who stated: "In light of the Commission's comments during the October 13, 2011 open meeting and the parties' arguments implying a lack of cooperation during the informal complaint process that preceded this formal complaint, Staff respectfully requests that this complaint be referred to the State Office of Administrative Hearings (SOAH) so that a SOAH

22 *Hawkins v. Community Health Choice, Inc.*, 127 S.W.2d 322 (Tex. App.—Austin 2004, no pet.) attached hereto as Exhibit 1.

ALJ may consider ordering referral of the case for alternative dispute resolution."[23]

If there is a concern as to whether or not Jasper has stated a claim for which relief can be granted, then the Preliminary Order should identify that issue as the first issue to be addressed by the SOAH ALJ. However, any ruling on the merits of a complaint by a Commission ALJ is in error and must be reversed so that the complaint can be properly referred to SOAH as required under Texas Government Code, PURA, and P.U.C. Procedural Rules.

## Conclusion

As shown above, the Order No. 4 of the Commission ALJ dismissing the Complaint of Jasper County against AT&T Texas was in error and must be reversed and the complaint must be referred to SOAH for further development and a Hearing on the Merits. Jasper County prays the Commission will reverse Order No. 3 and refer the case to SOAH.

Respectfully Submitted,

Mark A. Wilder
Southwestern Tariff Analyst (Authorized Representative for Jasper County)
2514 Tangley Street
Houston, TX 77005
713-522-7568 phone
713-522-0145 fax

**CERTIFICATE OF SERVICE**

I, Mark Wilder, Authorized Agent for Jasper County, certify that a copy of this document was served on all parties of record in this proceeding on May 11, 2012 in the following manner: FedEx to the Public Utility Commission and via facsimile to all other parties of record.

May 11, 2012

23 COMMISSION STAFF'S RESPONSE TO ORDER NO.1, at 5 (October 27, 2011).

Exhibit 1

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-03-00283-CV**

**Albert Hawkins, Commissioner of Health and Human Services, and The Texas Health and Human Services Commission, Appellants**

**v.**

**Community Health Choice, Inc., Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT**
**NO. GN300106, HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING**

## OPINION

This is an appeal from the issuance of a writ of mandamus compelling appellant, Albert Hawkins, the Commissioner of the Texas Health and Human Services (ACommissioner@), to refer a contested issue to the State Office of Administrative Hearings (ASOAH@). Appellee, Community Health Choice, Inc. (ACommunity@), was under contract with appellant, the Texas Department of Human Services (ADepartment@). A dispute arose between the parties, and after several months of unsuccessful negotiations, appellee notified the Department of its intent to sue for breach. Once notified, the Department was required by statute to refer the dispute to SOAH. It refused to do so based on appellee=s failure to give it timely notice. Appellee sued and requested the trial court to issue a writ of mandamus directing the Commissioner

to refer the suit to SOAH. The trial court granted appellee=s summary judgment and issued the writ to the Commissioner. Appellants have appealed. We will affirm the trial court=s summary judgment.

## PROCEDURAL AND FACTUAL BACKGROUND

Appellee was under contract with the Department to provide managed care to Medicaid enrollees under the state=s managed care program, State of Texas Access Reform (ASTAR@). *See* 1 Tex. Admin. Code ' 353.2(13) (2003). On June 5, 2002, appellee sent a letter to the Department demanding reimbursement for the money it paid on claims of a child it believed did not meet STAR=s eligibility requirements. The Department responded on June 18, 2002, and denied appellee=s claims for reimbursement. On October 3, 2002, appellee wrote another letter threatening suit if reimbursement were not received by October 11, 2002 and asked the Department to refer the dispute to SOAH pursuant to chapter 2260 of the government code[1] if the Department refused to make payment. Three weeks later, on October 24, the Department responded and stated that it would not refer the matter to SOAH because appellee had failed to Aprovide written notice to HHSC [Health and Human Services Commission] of a claim for breach of contract>not later than the 180th day after the date of the event giving rise to the claim.=@ Appellee responded on October 29, 2002, suggesting that if appellee=s notice were untimely, then the Department could raise that issue at the SOAH hearing. In letters dated November 18 and December 16,

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[1] Tex. Gov=t Code Ann. ' ' 2260.001-.108 (West 2000 & Supp. 2003).

2002, the Department concluded that appellee=s failure to provide timely notice deprived SOAH of jurisdiction over the dispute.[2] It said:

> [I]t is the Commission=s position that [Community] did not comply with the requirements of Texas Government Code, chapter 2260, e.g., [Community] did not timely provide notice of a claim for breach of contract to HHSC. Since [Community] did not comply with the statutory prerequisites, SOAH does not have jurisdiction over this dispute under Chapter 2260.

On January 10, 2003, appellee filed suit asking for a writ of mandamus to compel the Commissioner and the Department to submit the matter to SOAH for a contested case hearing. Arguing the failure to provide timely pre-suit notice deprived the court of jurisdiction, appellants filed a plea to the jurisdiction. On April 17, 2003, the trial court denied the appellants= plea to the jurisdiction and granted appellee=s writ of mandamus compelling appellants to refer the dispute to SOAH for resolution pursuant to the provisions of chapter 2260 of the government code.

Appellants raise two points of error on appeal. First, appellee=s failure to provide the Department with timely, pre-suit notice deprived the trial court of jurisdiction. Second, the trial court erred

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[2] To the extent that appellants attempt to argue that SOAH did not have jurisdiction to consider the disputed issue of fact, the argument has not been briefed. As we discuss below, the issue is not whether SOAH had jurisdiction but whether the Department had a clear legal duty to refer the dispute to SOAH upon request. *See* Tex. Gov=t Code Ann. ' 2260.102 (West 2000).

as a matter of law in issuing the writ of mandamus. Because we find that appellants had a clear legal duty to refer the issue to SOAH, we will affirm the issuance of the writ of mandamus.

**Chapter 2260 of the government code**

Appellants argue that the notice provision in section 2260.051 of the Government Code is a jurisdictional prerequisite to the waiver of sovereign immunity under section 107 of the civil practice and remedies code. *See* Tex. Gov=t Code Ann. ' 2260.005 (West Supp. 2003); Tex. Civ. Prac. & Rem. Code Ann. ' ' 107.001-.005 (West 1997). Whether the trial court properly denied appellants= plea to the jurisdiction is a question of law we examine *de novo. Texas Dep=t. of Health v. Doe*, 994 S.W.2d 890, 892 (Tex. App.CAustin 1999, pet. dism=d by agr.).

Before a party may sue the state for breach of contract, it must comply with the provisions of chapter 2260 of the government code. Tex. Gov=t Code Ann. ' 2260.005; Tex. Civ. Prac. & Rem. Code Ann. ' ' 107.001-.005 (permission to sue state). Section 2260.051 provides that before suing the state for breach of contract, the party must Aprovide written notice . . . not later than the 180th day after the date of the event giving rise to the claim.@ Tex. Gov=t Code Ann. ' 2260.051 (West 2000). The notice must specify: A(1) the nature of the alleged breach; (2) the amount the contractor seeks as damages; and (3) the legal theory of recovery.@ *Id.* The state must assert its counterclaims in writing to the contractor within ninety days of receipt of the notice. *Id.* Once notice is given, the Achief administrative officer@ of the agency sued or Aanother officer,@ as designated in the contract, must examine the claim and negotiate with the contractor to resolve the dispute. *Id.* ' 2260.052 (West 2000). The negotiations must begin no later than the sixtieth day after A(1) the date of termination of the contract; (2) the completion date in the original

contract; or (3) the date the claim is received,@ whichever is latest. *Id.* If negotiations do not resolve the dispute within 270 days after the date the claim is filed with the state agency or if the party is dissatisfied with the outcome of the negotiations, the party may file a request for a contested case hearing with SOAH. *Id.* ' ' 2260.055, .102 (West 2000). Upon receipt of the request for a contested-case hearing, the agency Ashall@ refer the dispute to SOAH. *Id.* ' 2260.102.

Appellants cite *General Services Commission v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex. 2001), and *State v. Kreider*, 44 S.W.3d 258, 264 (Tex. App.CFort Worth 2001, pet. denied), for the proposition that the failure to give proper notice under chapter 2260 deprives a party of its right to sue the state for breach of contract. *See* Tex. Gov=t Code Ann. ' 2260.051. The supreme court in *Little-Tex* said that Athere is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature.... Compliance with Chapter 2260, therefore, is a necessary step before a party can petition to sue the State.@ 39 S.W.3d at 597. In *Kreider*, the court held that failure to give timely notice under the Texas Tort Claims Act prevented suit against the state. 44 S.W.3d at 264. While we agree that proper notice is a prerequisite to suit under chapter 2260, the issue here is whether appellee has in fact complied with the notice provisions of chapter 2260. This is a disputed question of fact that should be presented to SOAH. Appellants would have us read *Little-Tex* to mean that the referring agency has the exclusive authority to decide whether and to what extent an adverse party is in compliance with chapter 2260. In addition to the various notice provisions of chapter 2260 (*see* Tex. Gov=t Code Ann. ' ' 2260.051 (timeliness of initial claim), .052 (negotiations), .055 (incomplete resolution), and .056 (unsatisfactory resolution)), chapter 2260 contains other procedural and substantive prerequisites to suit.

*See* Tex. Gov=t Code Ann. ' ' 2260.004 (required contract provision), .051(c) (substantive sufficiency of the notice), .052 (required negotiation), .053 (partial resolution of claim), .054 (payment of claim), .102 (substantive sufficiency of request for hearing). Were the agency charged with making the referral the ultimate finder of fact, then conceivably no issues of fact would make it past the agency determination. Such a reading would essentially eliminate the need for a referral to SOAH altogether and frustrate the legislature=s intent to provide an alternate procedure of resolving contractual disputes with government agencies.

In *Flores v. Employees Retirement System*, we commented on SOAH=s role as a neutral fact-finder. 74 S.W.3d 532, 540 (Tex. App.CAustin 2002, pet. denied). Before the creation of SOAH, hearing examiners were employed by and accountable only to the litigant-agency. *See id.* We observed that A[g]iven that the resolution of disputed adjudicative facts requires weighing the evidence and making credibility determinations, a neutral decision-maker is crucial to a fair adjudicatory hearing.@ *Id.*; s*ee also* Tex. Gov=t Code Ann. ' 2003.021 (West Supp. 2003) (SOAH was Acreated to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government.@). SOAH is empowered to determine Aadjudicative facts,@ those that answer Awho, what, when, where and how@ and are Aroughly the kind of facts that go to a jury in a jury case.@ *Flores*, 74 S.W.3d at 539. Surely, fairness factors are at play in this case. Were the state agency the sole fact-finder, then possibly every breach of contract claim against the state would rise or fall based on that agency=s potentially self-interested interpretation of the prerequisites of chapter 2260 and its assessment of compliance with those prerequisites by the party bringing the claims. Such a proposition could not be considered the Afair adjudicatory hearing@

by a Aneutral decision-maker@ as contemplated in *Flores*. We hold that appellants are not the agency charged with deciding disputed questions of fact under chapter 2260; consequently, appellants= first point of error is overruled.

**Writ of mandamus**

Appellants also argue that the trial court erred in issuing the writ of mandamus because the agency did not have a clear legal duty to refer the case to SOAH since appellee failed to provide timely notice. A writ of mandamus is proper to compel a public official to perform a ministerial act. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). AAn act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.@ *Id.* In addition to a clear legal duty to perform a nondiscretionary act, there must have been a demand for performance and a subsequent refusal. *Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979). Appellee moved for summary judgment on the grounds appellants had a clear legal duty to refer the dispute to SOAH. The trial court granted the motion without specifying the grounds. When the trial court does not specify the basis for its summary judgment, the appealing party must show it is error to base it on any ground asserted in the motion. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). We must affirm the summary judgment if any one of the movant=s theories has merit. *Id.* Because we find that appellee was clearly entitled to the performance of the respondent=s duty, we affirm the summary judgment.

The essential elements for the issuance of a writ of mandamus were met. Appellants had a clear legal duty to refer the dispute over the timeliness of appellee=s notice to SOAH. Section 2260.102 states that:

(a) If a contractor is not satisfied with the results of negotiation with a unit of state government under Section 2260.052, the contractor may file a request for a hearing with the unit of state government.

. . . .

(c) On receipt of a request under Subsection (a), the unit of state government shall refer the claim to the State Office of Administrative Hearings for a contested case hearing under Chapter 2001, Government Code, as to the issues raised by the request.

As indicated above, a referral to SOAH was non-discretionary; demand was made for the referral and appellee=s demand was refused.

Appellants also argue that the appellee=s failure to give timely notice barred the use of mandamus as a remedy. *See Oney v. Ammerman*, 458 S.W.2d 54, 54-55 (Tex. 1970); *Boone v. McGee*, 280 S.W. 295, 297 (Tex. Civ. App.CAustin 1926, no writ). In *Oney*, the supreme court held that mandamus was improper where candidates for elected office failed to file affidavits and statements of their intention to run for office by the state deadline. *See* 458 S.W.2d at 54-55. In *Boone*, this Court quoted *Texas Mexican Railway Co. v. Jarvis*, 15 S. W. 1089 (Tex. 1891), for the proposition that Amandamus will not issue to enforce a right which is contingent or incomplete by reason of condition precedent which is still to be performed by the petitioner or relator, or which is contingent upon the further act of a third person or tribunal.@ *See id.*

Appellants= cases are inapplicable because in those cases it was clear that one party failed to comply with a condition precedent. Again, we do not know whether appellee failed to give timely notice and deciding that issue depends on the resolution of a fact issue. SOAH has the power to find facts and make conclusions of law. Tex. Gov=t Code Ann. ' 2001.141 (West 1995). The condition precedent to

appellants= clear legal duty to perform was receipt of appellee=s request. *Id.* ' 2260.102. Once the request was made, appellants were compelled to act in compliance with the statute; therefore, we overrule appellants= second point of error.

## CONCLUSION

Chapter 2260 was enacted to provide a limited waiver of sovereign immunity when the state has allegedly breached a contract. Upon notification, the state must refer the contractual dispute to SOAH. We hold that a question regarding whether a party has in fact complied with the pre-suit notice requirements of chapter 2260 is a question of fact that, like the issues underlying the breach-of-contract claim, must be referred to SOAH. We affirm the trial court=s summary judgment.

David Puryear, Justice

Before Chief Justice Law, Justices Kidd and Puryear

Affirmed

Filed: January 23, 2004

(a) The commission shall employ an executive director, a general counsel, and such officers[~~, administrative law judges, hearing examiners, investigators, lawyers, engineers, economists, consultants, statisticians, accountants, administrative assistants, inspectors, clerical staff,~~] and other employees as it deems necessary to carry out the provisions of this Act. All employees receive such compensation as is fixed by the legislature. The commission shall develop and implement policies that clearly define the respective responsibilities of the commission and the staff of the commission.

(b) The executive director is responsible for the day-to-day operations of the commission and shall coordinate the activities of commission employees [~~commission shall employ the following:~~

[~~(1) an executive director;~~

[~~(2) a director of hearings who has wide experience in utility regulation and rate determination;~~

[~~(3) a chief engineer who is a registered engineer and an expert in public utility engineering and rate matters;~~

[~~(4) a chief accountant who is a certified public accountant, experienced in public utility accounting;~~

[~~(5) a director of research who is experienced in the conduct of analyses of industry, economics, energy, fuel, and other related matters that the commission may want to undertake;~~

[~~(6) a director of consumer affairs and public information;~~

[~~(7) a director of utility evaluation;~~

[~~(8) a director of energy conservation; and~~

[~~(9) a general counsel.~~

[~~(c) The commission shall employ administrative law judges to preside at hearings of major importance before the commission. An administrative law judge must be a licensed attorney with not less than five years' general experience or three years' experience in utility regulatory law. The administrative law judge shall perform his duties independently from the commission~~].