



Control Number: 42860



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APPLICATION OF DOUGLAS § PUBLIC UTILITY COMMISSION  
UTILITY COMPANY TO CHANGE §  
WATER AND SEWER RATE/TARIFF § OF TEXAS  
IN HARRIS COUNTY, TEXAS §

ORDER REMANDING PROCEEDING TO  
COMMISSION ADMINISTRATIVE LAW JUDGE

In this order the Commission remands this proceeding to a Commission administrative law judge (ALJ) with instruction to develop an evidentiary record, so that the Commission may consider a proposal for decision that has been issued by a State Office of Administrative Hearings (SOAH) ALJ. The Commission also directs the Commission ALJ to order Douglas Utility Company to begin making refunds, on an interim basis, based on a 24-month period.

I. Background

On March 12, 2013, Douglas filed an application with the Texas Commission on Environmental Quality (TCEQ) to modify its water and sewer rates. On the same day, Douglas began charging customers its proposed rates.<sup>1</sup>

On July 29, 2014, Douglas, the executive director of the TCEQ, the Office of Public Interest Counsel (OPIC), Fountainview Homeowners Association (Fountainview), and Rainbow Housing Assistance Corporation/Equality Community Housing Corporation participated in mediation at SOAH and entered into a settlement agreement regarding new water and sewer service rates.<sup>2</sup> The settlement signatories also agreed that Douglas had double-billed its customers the fees charged by the city of Houston under the city's groundwater reduction plan. Thereafter, on August 12, 2014, Douglas revised its billings to no longer double-bill the city fee. The issue of refunds for the over-collected fees was carried along in this case to be resolved in the final order.<sup>3</sup>

<sup>1</sup> Proposal for Decision (PFD) at 8, Proposed Finding of Fact No. 1 (Mar. 29, 2016).

<sup>2</sup> *Id.* at Proposed Finding of Fact No. 5.

<sup>3</sup> *Id.* at Proposed Finding of Fact No. 6.

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On July 30, 2014, the executive director of the TCEQ filed the mediated settlement document and moved to dismiss the proceeding from SOAH and remand the proceeding for processing. However, on July 31, 2014, Douglas filed a response opposing the TCEQ's executive director's motion. Douglas asserted it was withdrawing from the mediated settlement because Douglas had determined that the agreed rates would result in a negative cash flow. Douglas also stated it could not provide continuous and adequate service if it cannot pay its bills.<sup>4</sup> In reply to Douglas's response, the executive director of the TCEQ, Equality, and Fountainview made filings arguing Douglas was bound by the terms of the mediated settlement document, and remand for processing would be proper. On August 20, 2014, in SOAH Order No. 3, the SOAH ALJ effectively denied the executive director's motion to dismiss and remand, explaining that the applicable TCEQ rule contemplates remands of cases in which "no fact or issues remain controverted" and in this case facts or issues remain in controversy.<sup>5</sup> In SOAH Order No. 6, the SOAH ALJ denied Equality's motion for reconsideration of SOAH Order No. 3.<sup>6</sup>

Douglas continued to bill customers its proposed rates.<sup>7</sup>

On September 1, 2014, jurisdiction over the economic regulation of water and sewer utilities, including jurisdiction over this pending rate-change proceeding, was transferred from TCEQ to the Commission.

On September 2, 2014, Equality filed an appeal of SOAH Order No. 3. Upon consideration of this appeal, the Commission determined that it was appropriate for SOAH to hold a limited hearing to determine whether or not the settlement agreement contained rates that would result in inadequate revenue, in violation of TWC § 13.183(a).<sup>8</sup> Before that hearing, on August 10, 2015, Douglas ceased charging its proposed rates and reverted back to its prior, TCEQ-approved rates.<sup>9</sup> On September 2, 2015, Douglas withdrew its application to change rates.<sup>10</sup>

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<sup>4</sup> *Id.* at Proposed Finding of Fact No. 8; Douglas's Response to the Executive Director's Motion to Dismiss and Remand at 1 (July 31, 2014).

<sup>5</sup> SOAH Order No. 3 at 1-2, quoting 30 Texas Administrative Code (TAC) § 80.101.

<sup>6</sup> SOAH Order No. 6 (Sep. 16, 2014).

<sup>7</sup> PFD at 1.

<sup>8</sup> Order on Appeal of SOAH Order No. 3 (Oct. 29, 2014).

<sup>9</sup> PFD at 9, Finding of Fact No. 13.

<sup>10</sup> Douglas's Notice of Withdrawal of Application (Sep. 2, 2015).

In SOAH Order No. 14, the SOAH ALJ set a procedural schedule for determining what surcharges and refunds were due to Douglas's customers. The SOAH ALJ ordered Douglas to calculate the difference between charges made under Douglas's proposed rates and charges that would have been made under Douglas's, prior TCEQ-approved rates; account for the over-billing of the city of Houston fees; and include monthly, compound interest at the Commission-approved interest rate for overbilling.<sup>11</sup> Commission Staff and Douglas participated in discovery to determine these amounts.

The sole remaining issues in controversy are the appropriate periods of time over which Douglas should make the refunds and surcharges. The parties agreed to waive a hearing on this issue and made oral arguments during a telephonic prehearing conference on January 22, 2016. On February 19, 2016, Douglas, Commission Staff, and Equality each separately filed proposed orders.

On March 3, 2016, Douglas filed an exhibit calculating the refunds and surcharges owed its customers. Douglas stated this exhibit had been agreed-upon by all the parties.<sup>12</sup> On March 14, 2016, Commission Staff filed a revised calculation of the refund and surcharge amounts, stating all parties were in agreement with Commission Staff's revisions.<sup>13</sup> Neither Douglas's nor Commission Staff's exhibits were styled as settlement agreements or stipulated facts, signed by all joining parties, nor entered as evidence.

On March 29, 2016, the SOAH ALJ issued a proposal for decision recommending that that the Commission order Douglas to pay refunds over a 12-month period and collect surcharges over a 24-month period.

On April 13, 2016, Douglas filed exceptions to the proposal for decision, arguing in part that the PFD was not based on record evidence, in violation of Texas Administrative Procedure Act (APA) § 2001.141(c). Commission Staff and Equality filed timely replies to Douglas's exceptions to the PFD.

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<sup>11</sup> SOAH Order No. 14 at 2 (Sep. 22, 2015).

<sup>12</sup> Douglas's Exhibit A at 1 (Mar. 3, 2016).

<sup>13</sup> Commission Staff's Amended Exhibit A at 1 (Mar. 14, 2016).

## II. An Evidentiary Record is Required.

APA § 2001.141(c) requires that the findings of fact in an administrative agency's final decision or order must be based on evidence or matters that are officially noticed.<sup>14</sup> In addition, stipulated facts may not be admitted as evidence unless the facts are reduced to writing and signed by the stipulating parties or, upon leave of the presiding officer, dictated into the record.<sup>15</sup> However, in this proceeding there does not appear to be any admitted testimony, matters that are officially noticed, or any properly-stipulated facts admitted into the evidentiary record. No written SOAH orders admitted evidence; no transcripts were filed indicating party motions for admission of evidence were granted; and the Commission did not receive any admitted evidence upon return of the case from SOAH. Further, it is unclear whether the Commission Staff's revised calculation of the refund and surcharge amounts currently satisfies the requirements to be admissible into the evidentiary record as a written stipulation of facts.<sup>16</sup> Consequently, there is no evidence in this matter upon which the Commission may adopt findings of fact.

Therefore, in order to satisfy APA § 2001.141(c), and 16 TAC § 22.228 if necessary, the Commission remands this proceeding to a Commission ALJ with instruction to require the parties to develop an evidentiary record. After evidence has been admitted into the record, the Commission will consider the proposal for decision issued by the SOAH ALJ.

## III. Interim Refunds are Appropriate.

Douglas began charging its customers its proposed rates, including a double-billing of the city of Houston fee on March 12, 2013, more than three years ago. Further, customers who are entitled to a refund may have to wait even longer to be made whole because no party is advocating for a one-time, lump-sum refund. Therefore, in the interest of avoiding additional delay of refunds, and in order to incent the timely entry of evidence, the Commission directs the Commission ALJ

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<sup>14</sup> Texas Government Code, Administrative Procedure Act (APA) § 2001.141(c).

<sup>15</sup> 16 TAC § 22.228. "No stipulation of facts between the parties or their authorized representatives shall be admitted into evidence unless it has been reduced to writing and signed by the parties or their authorized representatives or, upon leave of the presiding officer, dictated into the record during a prehearing conference or hearing at which all parties to the agreement are present, have waived the right to be present, or have received reasonable notice that the settlement will be read into the record at that prehearing conference or hearing."

<sup>16</sup> *Id.*

to order Douglas Utility Company to begin making refunds, on an interim basis, based on a 24-month refund period.<sup>17</sup> The refunds collected on an interim basis shall be reconciled with the refund amount and refund period ultimately adopted by the Commission in a final order. In the final order, the Commission will also determine the appropriate start-date, amounts, and refund period for surcharges.

Signed at Austin, Texas the 31st day of May 2016.

**PUBLIC UTILITY COMMISSION OF TEXAS**



**DONNA L. NELSON, CHAIRMAN**



**KENNETH W. ANDERSON, JR., COMMISSIONER**



**BRANDY MARTY MARQUEZ, COMMISSIONER**

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<sup>17</sup> See Douglas's Notice of Withdrawal of Application at 2, in which Douglas originally proposed to make refunds over 24 months.