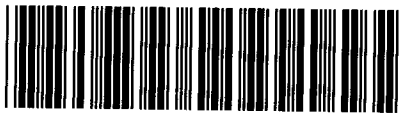

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SOAH DOCKET NO. 582-14-1052
TCEQ DOCKET NO. 2013-1735-UCR

APPLICATION OF DOUGLAS UTILITY COMPANY, TO CHANGE ITS WATER AND SEWER RATES IN HARRIS COUTNY TEXAS, CCN NOS. 11369 & 20527	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

BRIEF IN SUPPORT OF MOTION TO DISMISS AND REMAND

TO: THE HONORABLE ADMINISTRATIVE LAW JUDGE PENNY WILCOV:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality and files this Brief in Support of Motion to Dismiss and Remand the above-referenced case.

Factual Background

On June 6, 2014, Judge Wilcov issued an order referring the case to mediation. That order included the following directive: "The parties are ordered to appear at the mediation with a party representative (in addition to the attorney) who has full settlement authority for this matter." The instructions for mediation provided by the mediator included a directive requiring the parties to bring a person to the mediation with the authority to settle. On July 29, 2014, the parties participated in mediation and, after over nine hours of work, settled all matters of dispute in this cause.

In July 30, 2014, the ED filed a motion to dismiss the case and to remand the case to the Executive Director for processing in accordance with the mediated settlement agreement (a copy of which was attached to the motion). On July 31, 2014, Douglas Utility filed a document stating that even though it had signed a mediated settlement agreement, the utility, after further reflection, found it could not meet operating expenses under the settlement agreement and that it could not file a new application in order to cover the shortage. Therefore, the utility stated that it was withdrawing its consent. Douglas Utility sent a copy of the withdrawal of its consent to the mediator. On August 4, 2014, the mediator filed the mediation report stating that the case was settled, and did not mention the attempt to disassemble the mediated agreement on which the parties and the mediator had worked all day to forge. On August 4, 2014, Karl E. Wolff filed a letter with SOAH stating that it was his understanding that an agreement that came out of a mediation was binding and that it would create a hardship for him to have wasted that entire day and travel time only to have the mediation amount to naught based on the unilateral

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repudiation of the agreement by one party. On August 5, 2014, Equality Community Housing Corporation (aka Rainbow Housing Assistance Corporation) filed a response to Douglas's pleading that pointed out that a mediated settlement agreement cannot be unilaterally repudiated.

Summary of Argument

The case should be remanded to the ED for processing. The point of mediation is to settle a case, not to use it only for discovery and then to create more litigation by repudiating the signed mediation agreement. Alternative Dispute Resolution (ADR) tools are designed to decrease litigation, not to increase it by using ADR as a tactical tool. The law is well settled that a mediated settlement agreement cannot be unilaterally repudiated. The only question left open is whether a mediated settlement can lead directly to an order if a party attempts to repudiate unilaterally, or if the mediated settlement agreement has to be litigated as a contract after such repudiation. For the reasons stated below, the ED concludes that SOAH can and should issue an order based on the mediated settlement agreement.

Argument

I. IT IS SETTLED LAW THAT A MEDIATED AND SIGNED SETTLEMENT AGREEMENT IS BINDING

The Texas Civil Practices and Remedies Code states that: "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."[1] Unilateral repudiation of a contract is an anticipatory breach, and does not make the responsibilities of the contract disappear under the Civil Practices and Remedies Code as well as TCEQ/SOAH rules.[2]

There can be no question that the signed settlement agreement is binding; the only remaining question is how it should be enforced. As will be shown below, in this case the ALJ should dismiss the case and remand it to the agency.

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[1] Tex. Civ. Prac. & Rem. Code § 154.071

[2] The law laid out in section 154.071 also applies to administrative agencies. Specifically, the law provides as follows in the Texas Government Code: "Sec. 2009.051. DEVELOPMENT AND USE OF PROCEDURES. (a) Each governmental body may develop and use alternative dispute resolution procedures. Alternative dispute resolution procedures developed and used by a governmental body must be consistent with Chapter 154, Civil Practice and Remedies Code."

II. BECAUSE THE AGREEMENT WAS THE RESULT OF MEDIATED SETTLEMENT IN AN ADMINISTRATIVE HEARING AND BECAUSE THE UTILITY HAS ADMITTED THAT THE CONTRACT WAS SIGNED, THE COURT CAN CONSIDER THE CASE SETTLED AND REMAND THE CASE TO THE AGENCY.

It would appear obvious that the mediated settlement agreement should be honored because the purpose of mediation is to decrease litigation – it is not designed to be a way to get free discovery, prolong a case, and create new points to litigate regarding whether a party can breach its agreement and cause all the other parties and the mediator to waste time. While the fact that mediation is meant to limit litigation and get cases settled fairly and expeditiously would appear obvious, it also has been codified. In title 10 of the Texas Administrative Procedures Act, Alternative Dispute Resolution for use by Governmental Bodies, the policy is explicitly stated in the following words: "Sec. 2009.002. POLICY. It is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operations and programs."[3]

While the law is settled that a signed settlement agreement is a binding contract, there is a divergence of authority on how that contract is to be enforced. The advent of mediation procedures injected new policy considerations and has generated a different remedy than that used in private settlements.

Before the widespread use of ADR, the cases dealt with private, non-court ordered settlements. In *Burnaman v. Heaton*, the Texas Supreme Court laid out the law as it applies to private settlements.[4] In that personal injury case, the plaintiff entered a private settlement agreement and then wanted to repudiate it. The court held that the settlement agreement was enforceable as a contract, but that an agreed judgment could be entered only if the agreement was still in existence when the judgment was signed. Subsequent cases on private settlements followed this line of thought, adding the concept that the contract cause of action had to be pleaded and proved before the court could take action on the contract. In fact, these cases often included an additional contract action, a summary judgment proceeding, and then – finally – the judgment that the parties had agreed to originally.

With the rise of court-ordered mediated settlements, there were new ideas and law that differed from the old method of requiring the pleading and proof of a contract cause of action if the agreement was repudiated before the agreed judgment was entered. The Amarillo Court of Appeals decided that "a party who has reached a settlement agreement disposing of a dispute

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[3] Tex. Gov't Code § 2009.002

[4] *Burnaman v. Heaton*, 240 S.W.2d 288(Tex. 1951)

through alternative dispute resolution procedures may not unilaterally repudiate the agreement."[5] The court specifically stated that a mediated settlement agreement should not be treated the same way as a private settlement agreement. In footnote one on page 592 of the opinion the court wrote: "We are aware of cases in which it has been held that a valid consent judgment cannot be rendered unless consent exists at the time the court undertakes to make the agreement the judgment of the court....These cases are inapplicable to agreements reached pursuant to alternative dispute resolution procedures...."[6]

The *Ames* decision also included a discussion of the policy reasons behind its decision in the following words:

> If voluntary agreements reached through mediation were non-binding, many positive efforts to amicably settle differences would be for naught. If parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur. In order to effect the purposes of mediation and other alternative dispute resolution mechanisms, settlement agreements must be treated with the same dignity and respect accorded other contracts reached after arm's length transactions. Again, no party can be forced to settle the conflict outside of court, but if a voluntary agreement that disposes of the dispute is reached, the parties should be required to honor the agreement.[7]

There is another Court of Appeals case that refused to follow *Ames*, but it has insufficient reasoning underlying it to persuade that it should be followed instead of *Ames*.[8] The *Cary* court stated that the agreement had to still be in effect when the agreed judgment was signed – otherwise, it had to be enforced by a contract cause of action.[9] The court's reasoning was that to rule otherwise would be to turn mediation into binding arbitration.[10] This reasoning is unsound. Mediation would not become a binding arbitration, because, as the *Ames* court noted, no party can be compelled to sign a mediation agreement. When parties agree to mediate, they do not agree to sign a mediation agreement that would be imposed upon them by a mediator.

Finally, even if the Court believes that the only way to enforce the agreement is to plead and prove the elements of a contract, there is no need to do so in this case. Douglas Utility's response to the motion to dismiss and remand is a judicial admission that a binding settlement agreement was signed at the mediation. After stating that it entered the agreement, Douglas contends in general allegations that it is now dissatisfied with the agreement because it does not give the utility enough money and that it cannot file a new rate case fast enough to recover the lost money through a new proposed rate. These unilateral repudiations are not

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[5] *In the Matter of the Marriage of Ames*, 860 S.W.2d 590, 591 (Tex. App. –Amarillo 1993, no writ)
[6] *Id.* at 592 (Emphasis in original)
[7] *Id.*
[8] *Cary v. Cary*, 894 S.W.2d 111, (Tex App. Houston [1st Dist.] 1995, no writ)
[9] Id. at 112
[10] Id. at 113

allowed to annul contracts; they are anticipatory breaches of contracts. To admit a contract and then assert unavailable defenses to the contract only proves that the contract was entered and obviates the need to plead and prove the signatures and the contract.

Because the mediation occurred in the context of an administrative contested case hearing, there is at least one more policy reason that would support giving effect to the signed agreement that resulted from the mediation. The additional policy reason stems from the fact that the TCEQ does not have jurisdiction to determine the validity of contracts. The delay in time if the case should require an abatement until a contract case could be litigated would be unacceptable. Especially since Douglas has admitted the contract existed and is only announcing an anticipatory breach based on unavailable purported "defenses."

CONCLUSION AND PRAYER

It is settled law that a mediated and signed settlement agreement is enforceable and cannot be repudiated unilaterally. While the case law does diverge, the superior reasoning is that a mediated settlement agreement can form the basis of a final order without the necessity of filing and pursuing a perfunctory summary judgment on the contract. The whole purpose of alternative dispute resolution is to settle matters quickly and efficiently and cut down on excess litigation. To rule that an order cannot be issued would be to promote the exact opposite effect. It could lead to abatement of the case, the filing of a contract action in district court, waiting a year or so for the result of that case, the probable need for an interim rate, and SOAH reopening of the case in a year or so. To allow a party to destroy a mediated settlement after it was settled with a signed agreement would open the door to the tactical use of mediation in a fashion that would completely contradict the very reason for alternative dispute resolution.[11]

WHEREFORE, PREMISES CONSIDERED, the ED requests that the court enter an order including the following provisions:

The Court should take judicial notice of the signed settlement agreement;

The Court should note that Douglas Utility judicially admitted that it agreed to the rates in the settlement agreement and has interposed no articulable defense to the validity of the agreement; and

The Court should dismiss the case from SOAH's docket and remand the case to the ED for processing as a settled and uncontested matter.

[11] The ED understands that there may be unusual cases of fraud, mutual mistake, etc. that could undermine a signed agreement, but none of these unusual circumstances exist or have been alleged to exist in this case.

Respectfully submitted,

TEXAS COMMISSION ON
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CERTIFICATE OF SERVICE

I certify that on August 13, 2014, a copy of the foregoing document was sent by first class, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.

Brian D. MacLeod

Brian MacLeod
Staff Attorney

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TCEQ Docket No. 2013-1735-UCR
SOAH Docket No. 582-14-1052

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