Control Number: 42860

Item Number: 31

Addendum StartPage: 0

42860

RECEIVED

14 SEP -2 PM 1:51

PUBLIC UTILITY COMMISSION
FILING CLERK

SOAH DOCKET NO. 582-14-1052
PUC DOCKET NO. 42860
(former TCEQ DOCKET NO. 2013-1735-UCR)

APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARIFF IN HARRIS COUNTY, TEXAS	§ § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

EQUALITY COMMUNITY HOUSING CORPORATION'S APPEAL OF AN INTERIM ORDER OF THE ADMINISTRATIVE LAW JUDGE IN THE APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARRIFF MATTER

TO: THE HONORABLE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW Equality Community Housing Corporation (Equality) and files this its Appeal of An Interim Order of the Administrative Law Judge in the Application of Douglas Utility Company to Change Water and Sewer Rate/Tariff Matter in accordance with 16 TAC § 22.123. The referenced matter subject to this appeal was assigned State Office of Administrative Hearing (SOAH) Docket No. 582-14-1052 and Texas Commission on Environmental Quality (TCEQ) Docket No. 2013-1735-UCR. While this matter originated at the TCEQ, as of September 1, 2014, it has been transferred to the Public Utility Commission of Texas (PUC).[1]

The TCEQ transferred the case to SOAH for a contested case hearing. After going to SOAH, the Administrative Law Judge (ALJ), the Honorable Penny Wilkov, ordered that the parties participate in mediation in an effort to settle the case.[2] The mediation was successful and

[1] *See*, 16 TAC § 22.248(c)(1).

[2] *See*, Order No. 2, issued June 6, 2014.

31

1

the parties signed a settlement agreement (Settlement Agreement).[3] Subsequently, one of the parties, Douglas Utility Company (Douglas) attempted to withdrawal its consent to the Settlement Agreement.[4] In response to Douglas' response, the ALJ in Order No. 3 denied the TCEQ Executive Director's motion to dismiss and remand the case to TCEQ.[5]

Both the TCEQ ED and Equality, believing the ALJ's ruling in Order No. 3 was in error, filed motions for reconsideration. In addition to its motion for reconsideration, Equality alternatively asked the ALJ to summarily dispose of the case and alternatively requested that the ALJ submit this as a certified issue to the PUC. Equality hereby incorporates by reference and attaches a copy of its Motion for Reconsideration or First Alternative Motion for Summary Disposition or Second Alternative Request for the Administrative Law Judge to Submit Certified Issue to the Public Utility Commission of Texas (including all attachments and incorporations by reference)[6] and the TCEQ Executive Director's Motion for Reconsideration.[7]

An interim order can be appealed when it "immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing . . . ."[8] In this case, a contested case would not be required and would not proceed if the ALJ had granted the TCEQ ED's motion to dismiss and remand the case. Equality believes that policy, statutes, rules and case law show that the ALJ's Order No. 3 was in error. If the water and sewer utility rates are

---

[3] *Mediator's Report on Mediation*, Aug. 4, 2014; *ED's Motion to Dismiss and Remand*, July 30, 2014.

[4] *Douglas Utility Company's Response to the Executive Director's Motion to Dismiss and Remand,* July 31, 2014.

[5] *Order No 3 Regarding Motion to Dismiss and Remand and Requesting Dates for a Prehearing Conference,* Aug. 20, 2014.

[6] Sept. 2, 2014.

[7] Aug. 28, 2014.

[8] 16 TAC § 22.123(a)(1).

2

not immediately applied as agreed to by the parties Equality will be forced to pay increased utility rates that are prejudicial and discriminatory, spend additional time, incur additional legal fees, and use other resources to prepare for and participate in a contested case hearing that is not necessary, all to its substantial detriment.

As support for this appeal, Equality hereby attaches (Exhibit A) and incorporates its Motion for Reconsideration or First Alternative Motion for Summary Disposition or Second Alternative Request for the Administrative Law Judge to Submit Certified Issue to the Public Utility Commission of Texas (including all attachments and incorporations by reference).

REQUEST FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Equality Community Hosing Corporation respectfully requests that the Public Utility Commission grant Equality's appeal and determine that the Settlement Agreement is valid and binding and order that the ALJ revoke Order No. 3, dismiss the case before SOAH, and remand to the PUC. Equality Community Housing Corporation additionally requests any other relief to which it may be entitled.

Respectfully submitted,

MCGINNIS LOCHRIDGE
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 495-6000
Fax (512) 495-6093

By: _____
John L. Wilson (SBN 21700800)
jwilson@mcginnislaw.com
Phil Haag (SBN 08657800)
phaag@mcginnislaw.com

ATTORNEYS FOR EQUALITY COMMUNITY HOUSING CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing appeal has been served as indicated below upon the following on the 2nd day September, 2014.

Mark Zeppa 4833 Spicewood Springs Rd., #202 Austin, TX 78759 512 346-4011 attorney for Douglas Utility Company Fax 512-346-6847 markzeppa@austin.rr.com mark@zeppalaw.com	Hand Delivery _____ Fax ___X___ Overnight Courier _____
Jim Rourke Texas Office of Public Utility Counsel P.O. Box 12397 Austin, TX 78711 Fax - 512-936-7525	Hand Delivery _____ Fax ___X___ Overnight Courier _____
Hollis Henley Public Utility Commission P.O. Box 13325 Austin, TX 78711 Fax 512-936-7268 Hollis.henley@puc.texas.gov	Hand Delivery _____ Fax ___X___ Overnight Courier _____
Karl E. Wolf Fountainview Homeowners Association 5523 Mendota lane Houston, TX 77032 713-301-7149 kwolffsr@att.net	Hand Delivery _____ Fax_____ Overnight Courier __X___
Penny A. Wilkov ALJ, SOAH 300 W. 15th Street, Suite 504 Austin, TX 78701 Penny.wilkov@soah.texas.gov Fax 512-322-2061	Hand Delivery _____ Fax ___X___ Overnight Courier _____

John L. Wilson

Exhibit A
Equality Community Housing Corporation's
Motion for Reconsideration or
First Alternative Motion for Summary Disposition or
Second Alternative Request for the Administrative Law
Judge to Submit Certified Issues to the
Public Utility Commission of Texas

SOAH DOCKET NO. 582-14-1052
PUC DOCKET NO. _____
(former TCEQ DOCKET NO. 2013-1735-UCR)

APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARIFF IN HARRIS COUNTY, TEXAS	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

EQUALITY COMMUNITY HOUSING CORPORATION'S MOTION FOR RECONSIDERATION OR FIRST ALTERNATIVE MOTION FOR SUMMARY DISPOSITION OR SECOND ALTERNATIVE REQUEST FOR THE ADMISTRATIVE LAW JUDGE TO SUBMIT CERTIFIED ISSUE TO THE PUBLIC UTILITY COMMISSION OF TEXAS

NOTICE TO PARTIES in regard to the Alternative Motion for Summary Disposition: This motion requests the judge to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 14 days after you receive this motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits. See SOAH's rules at 1 Texas Administrative Code § 155.505. These rules are available on SOAH's public website.

TO: THE HONORABLE ADMINISTRATIVE LAW JUUDGE PENNY WILCOV:

COMES NOW Equality Community Housing Corporation (Equality) and files this Motion for Reconsideration or First Alternative Motion for Summary Disposition or Second Alternative Request for the Administrative Law Judge to Submit Certified Issue to the Public Utility Commission of Texas.

The Administrative Law Judge's (ALJ) Order No. 2 dated June 6, 2014, referred the above referenced case to mediation. The mediation was held all day on July 29, 2014, before a State Office Administrative Hearings (SOAH) Judge acting as mediator. The mediation was successful and the parties signed a written settlement agreement providing details of the agreement including terms on the agreed to utility rates and a schedule for reimbursement of rate

overcharges (Settlement Agreement). The next day, July 30, 2014, the Texas Commission on Environmental Quality's (TCEQ), Executive Director (ED), through its attorney Brian MacLeod, filed a copy of the Settlement Agreement with the TCEQ and SOAH and filed a motion asking the ALJ to dismiss the case before SOAH and remand the matter to the TCEQ. On August 4, 2014, SOAH Judge Hunter Burkhalter, acting as mediator, filed his mediation report stating that "[t]he parties reached agreement during the mediation."

Karl Wolff, acting on behalf of the Fountainview Homeowners & Occupants Association, on August 4, 2014, filed a letter stating that all the parties had reached an agreement during mediation and thus the matter should be settled. Mr. Wolff also stated that if the agreement was set aside it would cause him extreme hardship and expense. Equality filed a motion and brief on August 5, 2014, that among other things, confirmed the execution of the Settlement Agreement and joined the ED's request that the matter be dismissed from SOAH and remanded to the TCEQ. The ED filed a Brief in Support of Motion to Dismiss and Remand on August 13, 2015.

Shockingly, two days after the Settlement Agreement was executed, Douglas Utility Company (Douglas) filed a request to "withdraw from the mediated settlement" and requested that the matter should proceed to a contested case hearing.[1] In other words, Douglas stated that it no longer wanted to abide by the terms of the Settlement Agreement. The only justification provided was that Douglas no longer liked the terms of the Settlement Agreement -- the explanation was that Ms. Zieben, the owner of Douglas and an active participant in the mediation, had performed another analysis of the agreed to rates and did not like the results.

Judge Wilkov issued Order No. 3, essentially holding that Douglas did not have to abide by the terms of the Settlement Agreement, that was agreed to and executed by all the parties

[1] Douglas Utility Company's Response to the Executive Director's Motion to Dismiss and Remand, 07/14/14

7

during the mediation process. Order No. 3 denied the motions to dismiss the case and remand it to the TCEQ.[2] On August 28, 2014, Hollis Henley, acting on behalf of the ED, filed a motion stating that the ruling in Order No. 3 was in error, asked the ALJ to reconsider her ruling, and asked that the ALJ vacate Order No. 3, and remand and dismiss the case as uncontested.[3] Equality agrees with and supports the ED's motion.

This filing consists of three sections, each of which is incorporated into the other herein by reference.

I. MOTION FOR RECONSIDERATION

Just as expressed by the ED in its Motion for Reconsideration, Equality also believes that the decision not to acknowledge and enforce the Settlement Agreement, and not to dismiss and remand the case was error. Accordingly, Equality hereby also requests that the ALJ reconsider her ruling, vacate Order No. 3, and dismiss the case and remand it to the Public Utility Commission of Texas (PUC).[4] Equality hereby incorporates by reference its Motion to Dismiss and Remand the Case[5] and the ED's Brief in Support of Motion to Dismiss and Remand.[6]

Statutes, rules and case law all provide that a mediated settlement agreement, even if one of the parties tries to withdrawal its prior consent to the agreement, is a contract that is enforceable. Section 154.071(a) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE provides: "If the parties reach a settlement and execute a written agreement disposing of the dispute, **the**

---

[2] *Order No. 3 Regarding Motion to Dismiss and Remand and Requesting Dates for a Prehearing Conference,* August 20, 2014.

[3] *Executive Director's Motion for Reconsideration*, August 28, 2014.

[4] This case was originally before the Texas Commission on Environmental Quality, but the jurisdiction of water and sewer rate cases is transferred to the PUC effective September 1, 2014. 16 TAC § 22.248(c)(1).

[5] August, 5, 2014

[6] August 13, 2014

8

agreement is enforceable in the same manner as any other written contract."[7] TEXAS RULES OF CIVIL PROCEDURE, Rule 11 provides that a **signed agreement that is filed with SOAH is an enforceable contract.**[8] SOAH rules also provide that an agreement made by the parties or their attorneys, during the time the case is pending before SOAH, **will be enforced** as a contract unless it is not in writing, not signed, or not filed with SOAH.[9] The TCEQ's rule 30 TAC § 40.8 provides: "Agreements of the participants reached as a result of [Alternative Dispute Resolution] ADR must be in writing, and are **enforceable in the same manner as any other written contract.**"[10]

> Rule 11 of the Texas Rules of Civil Procedure provides:
>
> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

This rule has existed since 1840.[11] The rational for the rule is:

> Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel, respecting their causes shall be in writing, and if not, the court will not enforce them. They will speak for themselves, and the court can judge of their import, and proceed to act upon them

---

[7] (Vernon 2011) (emphasis added).

[8] "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

[9] 7 TAC § 155.415 ("Unless otherwise provided in this chapter, no agreement between attorneys or parties regarding a contested case pending before SOAH will be enforced unless it is in writing, signed, and filed with SOAH or entered on the record at the hearing or prehearing conference.").

[10] (emphasis added).

[11] *Padilla v. LaFrance*, 907 S.W.2d 454, 459 (Tex. 1995).

> with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.[12]

To be enforceable, a Rule 11 agreement needs to be filed with the court, or in this case with SOAH or the TCEQ, at anytime, including even after one of the parties to the agreement tries to withdrawal its approval. "The purpose of the rule--to avoid disputes over the terms of oral settlement agreements--is not furthered by requiring the writing to be filed before consent is withdrawn."[13] In this matter, the Settlement Agreement was filed prior to Douglas' attempt to withdrawal its consent.

The Settlement Agreement is a Rule 11 agreement: (1) it is in writing; (2) signed by the parties, either by the party's attorney or by the party representative at the mediation;[14] (3) and it has been filed with SOAH and the TCEQ.[15] Thus, the Settlement Agreement is enforceable as a contract despite Douglas' attempt to retract its consent to the agreement. There are cases that provide that if consent is withdrawn by a party before an agreed judgment has been entered then the court can no longer enter into an agreed judgment (or order); however, those cases, including ones decided by the Texas Supreme Court, also provide that the agreement **can be enforced as a contract and judgment entered based on the terms of the contract.** As stated by the Texas Supreme Court in *Padilla v. LaFrance*:

> [one of the parties] confuse the requirements for an agreed judgment with those for an enforceable settlement agreement. Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court . . . from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter

---

[12] *Id.* at 460 (quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (1857).

[13] *Id.* at 461.

[14] "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." ALJ Order No. 2, June 6, 2014 (emphasis added).

[15] A copy of the Settlement Agreement was filed as part of the ED's Motion to Dismiss and Remand, July 30, 2014.

10

> case is not an agreed judgment, but rather is a judgment enforcing a binding contract. [16]

When the validity of the agreement is in question, a two step process is required: (1) the first step is to validate the agreement, and (2) the second step is enforce the contract by entering a judgment based on the terms of the agreement.[17] As discussed below, Douglas has admitted the validity of the Settlement Agreement and the first step is not required, and a final order can be issued in this matter without proceeding to a contested case hearing.

The Amarillo Court of Appeals in *Matter of Marriage of Ames*[18] held that a settlement agreement, reached using the alternative dispute resolution procedures prescribed by Chapter 154 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, can be the basis for entering an agreed judgment even if one of the parties to the agreement retracts his consent to the settlement prior to the issuance of judgment. While not specifically stated in the ruling, apparently the Court held that step one (i.e. validating that a contract was formed) is not required when the settlement agreement is reached using the Chapter 154 ADR process.[19] The Court explained that to allow a party to withdraw its consent after entering into a mediated settlement agreement would render mediation futile and useless:

> If voluntary agreements reached through mediation were non-binding, many positive efforts to amicably settle differences would be for naught. If parties were

---

[16] *Id.* at 461. *See also, Green v. Midland Mortgage Co.*, 342 S.W.3d 686, 693 (Tex. App.--Houston [14th Dist.] 2011, no pet.) (motion for extension of time to file an appeal was granted June 24, 2001)(citing to *Padilla,* 907 S.W.2d at 461).

[17] [W]e reverse the judgment of the court of appeals and remand to the trial court with instructions to enforce the parties' settlement agreement." *Padilla v. LaFrance*, 907 S.W.2d 454, 455 (Tex. 1995).

[18] 800 S.W.2d 590 (Tex. App.--Amarillo, 1993, no pet.).

[19] *Id.* ("We are aware of the 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 described in chapter 154 of the Texas Civil Practice and Remedies Code." *Id.* at 592, n.1.

> 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 negotiations. Again, no party to a dispute 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.

In *Coale v. Scott,* the court of appeals also held that a Rule 11 settlement agreement can be used to issue a final judgment even when one of the parties later attempts to withdrawal his consent to the agreement. When a Rule 11 settlement agreement is reached, that also appears to eliminate the need for the first step of confirming the formation of the agreement.

> Rule 11 requires that the agreement be filed of record before the court may enforce it. If the accord is in writing, signed by the parties or their attorneys, and filed of record, it does not matter whether a party no longer agrees to it when the trial court is finally asked to enforce it. This is so because the agreement becomes a contract when executed, not when the trial court attempts to enforce it. Indeed, the trial court's order is simply a judgment enforcing a binding contract.[20]

As provided by the Texas Supreme Court when looking at a Rule 11 settlement agreement: "Because we hold that the letters constituted an enforceable Rule 11 agreement, we reverse the judgment of the court of appeals and remand to the trial court with instructions to enforce the parties' settlement agreement."[21] The Supreme Court reached a similar decision one year later in *Mantas v. Fifth Court of Appeals*, when it provided: "a written settlement agreement may be enforced though one party withdraws consent before judgment is rendered on the agreement."[22]

---

[20] 331 S.W.3d 829, 831-32 (Tex. App.--Amarillo 2011, no pet.)

[21] *Padilla v. LaFrance*, 907 S.W.2d 454, 155 (Tex. 1995).

[22] *Mantas v The Fifth Court of Appeals,* 925 S.W.2d 656, 368 (Tex. 1996).

The Settlement Agreement in this matter is both a Rule 11 settlement agreement and also one that was reached by mediation in accordance with the procedures established in Chapter 154 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE; accordingly, no further proceedings are required and this matter can immediately be dismissed and remanded to the PUC to approve a tariff and rates, which are based on and act to enforce the terms of the Settlement Agreement. Furthermore, even if the ALJ believes that step one cannot be eliminated when a Chapter 154 mediated settlement agreement or Rule 11 settlement agreement is involved, step one is not necessary and can be eliminated because Douglas has admitted to the formation of the contract. All that is left to be done is for the PUC to issue a final order incorporating the terms of the Settlement Agreement.

Douglas itself has admitted it executed and entered into the Settlement Agreement. "Douglas participated in the mediation conducted by ALJ Burkhalter and agreed to rates" contained in the Settlement Agreement.[23] Douglas then asks to "withdraw from the mediated settlement."[24] If Douglas had not entered into the Settlement Agreement, there would no need to try to withdraw from it. "Assertion of facts, not plead in the alternative, in the live pleadings[25] of a party are regarded as formal judicial admissions. Any fact admitted is conclusively established in the case without the introduction of the pleadings or presentation of the evidence."[26]

---

[23] *Douglas Utility Company's Response to the Executive Director's Motion to Dismiss and Remand* (Douglas Response), July 31, 2014.

[24] *Id.*

[25] Pleading are defined to include motions - "Pleading--A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding." 16 TAC § 22.2(34).

[26] *Houston First American Savings v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983).

Douglas' attempt to withdraw from the Settlement Agreement should be denied. First, Douglas has admitted to the formation of a valid agreement.[27] Second, while it does not appear to be the case, if Douglas is trying to challenge the fact that a contract was formed, the justification provided by Douglas is not one recognized by law. The only reason given by Douglas for trying to withdraw from the Settlement Agreement is an allegation of unilateral mistake - "Ms. Zieben had the settlement rates run through her computer billing program. She determined that the settlement rates would put Douglas into a negative cash flow situation."[28] However, unilateral mistake is not legally recognized as a means of challenging the validity and enforcement of the Settlement Agreement. "A mistake by only one party to an agreement, not known to or induced by acts of the other party will not constitute grounds for relief."[29] A person signing a contract must protect his own interests by exercising reasonable prudence and is charged with knowledge of all facts which he could have discovered.[30] Failure to exercise reasonable diligence is not grounds for the relief requested by Douglas. As held by *Sweeny v. Taco Bell, Inc.*, a written agreement cannot be avoided on grounds that a party failed to read the agreement or was ignorant or mistaken about its contents.[31] "A person who intentionally

---

[27] Douglas' response was filed and signed by its attorney. However, when an attorney-client relationship exists the acts of an attorney are considered also to be the acts of the client. *Green,* 342 S.W.3d at 691. (citing *Gavenda v. Strrata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex. 1986) (even the negligence of an attorney is deemed as an act of the client)).

[28] Douglas Response.

[29] *Johnson v. Snell*, 504 S.W.2d 397, 399 (Tex. 1973).

[30] *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197, 205 (1957).

[31] 824 S.W.2d 289, 291 (Tex. App.-- Fort Worth 1992, writ denied).

assumes the risk of unknown facts cannot escape a bargain by alleging mistake or misunderstanding."[32]

The parties to this matter: participated in mediation; negotiated the rates to be applied for water and sewage service; negotiated the time for reimbursement of the excess rates collected by Douglas; and signed the Settlement Agreement.[33] In other words, the Settlement Agreement contains the agreement of the parties and Douglas admitted to its execution of the Settlement Agreement. While Douglas may no longer agree to the terms of the Settlement Agreement, what is important is that the Settlement Agreement reflects Douglas' agreement at the time the contract was formed and became binding.[34]

> Consent judgments are subject to the law of contracts. We see no reason in not applying the law of contracts to settlement agreements themselves . . . . No onerous burden is placed on the recipient of the offer. That party merely has to decide whether to accept that offer, but once accepted, she should not be permitted to withdraw from the contract arbitrarily. Once the party elects to accept the offer, the election should be binding.[35]

After the Settlement Agreement was executed, Douglas cannot subsequently, and the ALJ should not allow, Douglas to avoid the contract by simply alleging unilateral mistake or that at the time it executed the Settlement Agreement it did not really understand its terms.

II. ALTERNATIVE MOTION FOR SUMMARY DISPOSITION

---

[32] *Geodyne Energy Income Production Partnership I-E v. Newton Corp.* 161 S.W.3d 482, 491 (Tex. 2005).

[33] The Settlement Agreement was signed on behalf of Douglas by its attorney. As held in *Green v. Midland Mortgage Co.* an attorney can sign an enforceable Rule agreement on behalf of his client. 342 S.W.3d at 691. (citing *Gavenda*, 705 S.W.2d at 693; *In re R.B.*, 225 S.W.3d 798, 803 (Tex. App.--Fort Worth 2007, no pet.).

[35] *Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App.--Beaumont 1981, writ ref'd n.r.e.).; *Ortega-Carter v. Am. Int'l Adjustment Co.*, 834 S.W.2d 439, 442 (Tex. App.--Dallas 1992, writ denied).

If the ALJ decides not to act on Equality's Motion for Reconsideration, Equality files this motion that the entire case be resolved by summary disposition in accordance with SOAH's rule contained in 1 TAC § 155.505 and/or PUC's rule contained in 16 TAC § 22.182, as applicable.

Section 155.505 (a) provides:

> Final decision or proposal for decision on summary disposition. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. Summary disposition is not permitted based on the ground that there is no evidence of one or more essential elements of a claim or defense on which the opposing party would have the burden of proof at hearing.

The PUC has a similar rule, 16 TAC § 22.182(a), which provides:

> The presiding officer may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion.

The following documents and pleadings (without service lists) are attached as summary disposition evidence.

Attachment "A"	Order No. 2, Referring the Case to Mediation, 06/06/14
Attachment "B"	ED's Motion to Dismiss and Remand, 07/30/14, which includes the Settlement Agreement filed with SOAH
Attachment "C"	Douglas Utility Company's Response to the Executive Director's Motion to Dismiss and Remand, 07/31/14
Attachment "D"	Mediator's Report on Mediation, 08/04/14.
Attachment "E"	Fountainview Homeowners & Occupants Association Letter, 08/04/14
Attachment "F"	Equality's Motion to Dismiss and Remand the Case, 08/05/14

Attachment "G" ED's Brief in Support of Motion to Dismiss and Remand, 08/13/14

Attachment "H" Order No. 3 Regarding Motion to Dismiss and Remand and Requesting Dates for a Prehearing Conference, 08/20/14

As discussed in Section I, the parties participated in mediation and reached a Settlement Agreement (i.e. offer and acceptance). The Settlement Agreement provides the agreement of the parties, and includes among other things, terms regarding the rates for water and sewer service for Douglas' utility customers, that a customer's prior three winter months (Dec. Jan., and Feb.) water use average in gallons will be used for determining gallons to be billed for monthly sewage service, specifies the time period over which refunds will be issued, and that refunds will be provided for the difference between the rates proposed by Douglas in its rate application and the rates agreed to in the Settlement Agreement. Mutual consideration is evidence in the Settlement Agreement with Douglas agreeing to provide utility services and the utility customers agreeing to pay for those services at the agreed to rates.

As previously discussed in Section I, the parties signed the Settlement Agreement and Douglas admitted to its execution of the contract. While Douglas attempted to void the Settlement Agreement, case law makes clear that unilateral mistake cannot be used to void the agreement and that the Settlement Agreement is enforceable as a binding contract. Even when a party no longer agrees to the terms of a settlement agreement, that settlement agreement can be used as grounds for granting summary judgment.

> Defendant asserted in his response that, because he had withdrawn his consent to the settlement agreement before entry of judgment, summary judgment was precluded. Defendant is mistaken.[36]

[36] *Tindall v. Bishop, Peterson & Sharp*, 961 S.W.2d 248, 252 (Tex. App.--Houston [1st Dist.] 1997, no pet.). *See also, Green,* 342 S.W.3d 686 (affirming lower court's granting summary judgment based on a settlement agreement that one party no longer consented to at the time judgment was entered).

The Houston Court of Appeals, citing to *Padilla*, held that a settlement agreement, even an oral settlement agreement that does meet the Rule 11 requirements, can be used to grant summary judgment when one of the parties at the time of entering judgment no longer consented to the agreement.[37]

"Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law."[38] The Settlement Agreement can be construed as a matter of law and can be the basis for granting summary disposition in this matter.

III. ALTERNATIVE REQUEST FOR THE ALJ TO SUBMIT CERTIFIED QUESTION TO THE PUC

If the ALJ does grant Equality's Motion for Reconsideration and does not grant Equality's first alternative Motion for Summary Disposition, then as its second alternative, Equality requests that the ALJ submit a certified issue to the Commissioners of Public Utility Commission asking, whether under applicable law and under the facts of this case, the ED's motion for SOAH to dismiss the case and remand it to the PUC should be granted.[39] While the ALJ in Order No. 3 suggested that one of the **parties** could submit a certified question to the PUC, that does appear to be allowed by the rules. According to 16 TAC § 22.127, the presiding officer (i.e. the ALJ) may certify to the Commissioners of the PUC certain issues including "whether commission

[37] *Tindall*, 961 S.W2d at 252.

[38] *Chrysler Insurance Co. v. Greenspoint Dodge*, 297 S.W.3d 248, 252 (Tex. 2009).

[39] The ED's motion requested the matter be remanded to the TCEQ, but the correct agency is the PUC on or after September 1, 2014.

policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding."[40]

As a matter of policy, a settlement agreement that is reached as part of ADR and meets the requirements of Rule 11 should not be allowed to be disregarded because one of the parties subsequently decides it no longer likes the terms of the agreement.

> 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 negotiations. Again, no party to a dispute 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.[41]

REQUEST FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Equality Community Hosing Corporation respectfully requests that the Administrative Law Judge: (1) revoke Order No. 3, dismiss the case before SOAH, and remand to the PUC; (2) or alternatively, grant Equality's motion for summary disposition of the case; (3) or alternatively, submit the question of whether the Settlement Agreement should be binding on the parties and used to issue final tariffs and rates to the PUC as a certified issue. Equality Community Housing Corporation additionally requests any other relief to which it may be entitled.

---

[40] 16 TAC 22.127(a) provides that the presiding officer may submit a certified issue and subsection (c) related to the procedure for submission provides again that the submission shall be submitted by the presiding officer. "Presiding officer" is defined to include any "administrative law judge presiding over a proceeding or any portion thereof." 16 TAC § 22.2(34).

[41] *Ames*, 800 S.W.2d at 592.

Respectfully submitted,

MCGINNIS LOCHRIDGE
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 495-6000
Fax (512) 495-6093

By: _____
John L. Wilson (SBN 21700800)
jwilson@mcginnislaw.com
Phil Haag (SBN 08657800)
phaag@mcginnislaw.com

ATTORNEYS FOR EQUALITY COMMUNITY HOUSING CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served as indicated below upon the following on the 2nd day September, 2014.

Mark Zeppa 4833 Spicewood Springs Rd., #202 Austin, TX 78759 512 346-4011 attorney for Douglas Utility Company markzeppa@austin.rr.com mark@zeppalaw.com	Mail_____ Fax_____ E-mail__x__
Jim Rourke Texas Office of Public Utility Counsel P.O. Box 12397 Austin, TX 78711 Fax - 512-936-7525	Mail_____ Fax_____ E-mail__x__
Hollis Henley Public Utility Commission P.O. Box 13325 Austin, TX 78711 Fax 512-936-7268 Hollis.henley@puc.texas.gov	Mail_____ Fax_____ E-mail__x__
Karl E. Wolf Fountainview Homeowners Association 5523 Mendota lane Houston, TX 77032 713-301-7149 kwolffsr@att.net	Mail_____ Fax_____ E-mail__x__
Penny A. Wilkov ALJ, SOAH 300 W. 15th Street, Suite 504 Austin, TX 78701 Penny.wilkov@soah.texas.gov Fax 512-322-2061	Mail_____ Fax_____ E-mail__x__

John L. Wilson

Attachment A
Order No. 2
Referring the Case to Mediation

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

APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARIFF IN HARRIS COUNTY, TEXAS	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

ORDER NO. 2
REFERRING CASE FOR MEDIATION

By motion filed June 3, 2014, the Executive Director of the Texas Commission on Environmental Quality asks that this matter be abated and referred to mediation. The motion is unopposed. The Administrative Law Judge has determined that motion has merit. Accordingly,

IT IS ORDERED:

1. This case is hereby referred to SOAH's Alternative Dispute Resolution Team Leader, Judge Renee M. Rusch, for appointment of a mediator and a period of mediation. With the issuance of this Order, the official file in this case is transferred to Judge Rusch.

2. The mediator will schedule the mediation in consultation with the parties. **The parties have requested that the mediation be scheduled on June 27, or any day in July after July 18, 2014.**

3. 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.

4. All discovery and discovery deadlines are abated until the conclusion of the mediation process.

SIGNED June 6, 2014.

Penny A. Wilkov

PENNY A. WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Attachment B
ED's Motion to Dismiss and Remand

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 COUTN Y TEXAS, CCN NOS. 11369 & 20527	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

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 Motion to Dismiss and Remand the above-referenced case. On July 29, 2014, the parties participated in mediation and settled all matters of dispute in this cause. Attached hereto are the settlement documents signed by all parties.

Wherefore, premises considered the ED requests that the case be dismissed from SOAH's docket and remanded to the Executive Director of the TCEQ for processing.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Richard A. Hyde, P.E., Executive Director

Robert Martinez, Director
Environmental Law Division

Brian D. MacLeod

Brian MacLeod
Staff Attorney
Environmental Law Division
State Bar of Texas No. 12783500
P.O. Box 13087; MC 173
Austin, Texas 78711-3087
Phone: (512) 239-0750
Fax: (512) 239-0606

ATTORNEYS FOR THE
EXECUTIVE DIRECTOR

CASE SETTLEMENT RECORD

UTILITY Douglas Utility Co. CCN NO. 20527

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

HEARINGS EXAMINER Penny Wilkov APPLICATION NO. 37555-R

PLACE, DATE & TIME OF HEARING SOAH, 7-29-14, 9:00 am

AGREED SETTLEMENT

EFFECTIVE DATE OF AGREED RATES - 7-29-14

WHICH APPLIES TO ALL SERVICE PROVIDED ON OR AFTER (DATE) 8-12-2014

WATER RATES:

GALLONAGE RATE: $ 1.65 /1,000 gallons

METER SIZE	MINIMUM BILL
5/8 or 3/4	$ 20.00
1	$ 50.00
1 1/2	$ 100.00
2	$ 160.00
3	$ 300.00
4	$ 500.00
6	1,000.00
8	1,600.00

Ø GALLONS INCLUDED IN MINIMUM BILL

WINTER MONTHS AVERAGE DEC, JAN, FEB FOR ALL CUSTOMERS

MISCELLANEOUS FEES:

RESIDENTIAL TAP FEE	$ 650.00
RECONNECTION FEES	
DISCONNECTED FOR NON PAYMENT (TCEQ RULES)	$ 25.00
OTHER THAN NON PAYMENT CUSTOMER REQUEST	$ 50.00
TRANSFER	$ 25.00
RETURNED CHECK FEE	$ 30.00
CUSTOMER DEPOSIT (TCEQ RULES)	$ 50.00
LATE PAYMENT PENALTY (TCEQ RULES)	$ 5.00
METER TEST FEE (TCEQ RULES)	$ 25.00

CASE SETTLEMENT RECORD (cont'd)

SEASONAL RECONNECTION: N/A

PASS THROUGH RATE ADJUSTMENT CLAUSE:
REASON FOR CLAUSE: N/A
COMPUTATION FOR ADJUSTMENT:
MINIMUM BILL =
GALLONAGE CHARGE =

SURCHARGE:
AMOUNT - $ Ø PER CONNECTION PER MONTH FOR _____ MONTHS
TERMS:

- SURCHARGE CONSIDERED CUSTOMER CONTRIBUTIONS IN AID OF CONSTRUCTION.
- FUNDS DEDICATED TO SPECIFIC IMPROVEMENTS LISTED BELOW.
- FUNDS PLACED IN SPECIAL SURCHARGE ACCOUNT.
- UTILITY MUST ISSUE A MONTHLY STATEMENT OF ACCOUNT.
- COMMISSION APPROVAL (IN WRITING) REQUIRED FOR DISBURSEMENT.

QUALITY OF SERVICE:
REQUIRED IMPROVEMENT N/A DATE DUE

VIOLATION TO BE CORRECTED: N/A
(CCN PROBLEMS, TCEQ RULES OR ORDERS)

CASE SETTLEMENT RECORD (cont'd)

REFUNDS: (YES) NO

___ LUMP SUM -- DUE: _____ AMOUNT: _____

___ BILLS CREDITED -- $_____ PER CONNECTION EACH MONTH FOR 21 MONTHS
(ATTACH COMPUTATIONS IF NECESSARY)

REFUNDS ARE FOR THE DIFFERENCE BETWEEN PROPOSED RATES AND SETTLED RATES.

PARTIES:

TCEQ Exec. Director: [illegible] as witness

Public Interest Council: [illegible] (WITNESS ONLY)

Utility: [illegible]

Protestants: Karl E. Wolff - KARL E. WOLFF REPRESENTING FOUNTAINVIEW HOMEOWNERS ASSOCIATION.

Michael B. White - MICHAEL B. WHITE REPRESENTATIVE OF EQUALITY COMMUNITY HOUSING CORP. / HAVERSTOCK

(Additional pages attached ☐)

ATTACHMENTS:

___ PREVIOUSLY APPROVED TARIFF.

___ RELATED SCHEDULES OR COMPUTATIONS.

___ BLANK TARIFF OR RATE SCHEDULE PAGE.

___ QUALITY OF SERVICE COMPLIANCE SCHEDULE.

CASE SETTLEMENT RECORD

UTILITY Douglas Utility Co CCN NO. 11369

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

HEARINGS EXAMINER Penny Wilcox APPLICATION NO. 37554-R

PLACE, DATE & TIME OF HEARING SOAH, 7-29-14 9:00 am

AGREED SETTLEMENT

EFFECTIVE DATE OF AGREED RATES - 7-29-14

WHICH APPLIES TO ALL SERVICE PROVIDED ON OR AFTER (DATE) 8-12, 2014

WATER RATES:

GALLONAGE RATE: $ 2.00 /1,000 gallons $4.85/1000 gallons City of Houston GRP fe

METER SIZE	MINIMUM BILL	
5/8 or 3/4	$ 15.00	Ø GALLONS INCLUDED IN MINIMUM BILL
1	$ 37.50	
1 1/2	$ 75.00	
2	$ 120.00	
3	$ 225.00	
4	$ 375.00	
6	750.00	
8	1200.00	

MISCELLANEOUS FEES:

RESIDENTIAL TAP FEE	$ 875.00
RECONNECTION FEES	
DISCONNECTED FOR NON PAYMENT (TCEQ RULES)	$ 25.00
OTHER THAN NON PAYMENT CUSTOMER REQUEST	$ 50.00
TRANSFER	$ 25.00
RETURNED CHECK FEE	$ 30.00
CUSTOMER DEPOSIT (TCEQ RULES)	$ 50.00
LATE PAYMENT PENALTY (TCEQ RULES)	$ 5.00
METER TEST FEE (TCEQ RULES)	$ 25.00

CASE SETTLEMENT RECORD (cont'd)

SEASONAL RECONNECTION: N/A

PASS THROUGH RATE ADJUSTMENT CLAUSE: SEE ATTACHED
REASON FOR CLAUSE:
COMPUTATION FOR ADJUSTMENT:
MINIMUM BILL =
GALLONAGE CHARGE =

SURCHARGE:
AMOUNT - $ Ø PER CONNECTION PER MONTH FOR _____ MONTHS
TERMS:

- SURCHARGE CONSIDERED CUSTOMER CONTRIBUTIONS IN AID OF CONSTRUCTION.
- FUNDS DEDICATED TO SPECIFIC IMPROVEMENTS LISTED BELOW.
- FUNDS PLACED IN SPECIAL SURCHARGE ACCOUNT.
- UTILITY MUST ISSUE A MONTHLY STATEMENT OF ACCOUNT.
- COMMISSION APPROVAL (IN WRITING) REQUIRED FOR DISBURSEMENT.

QUALITY OF SERVICE:
REQUIRED IMPROVEMENT N/A DATE DUE

VIOLATION TO BE CORRECTED: N/A
(CCN PROBLEMS, TCEQ RULES OR ORDERS)

CASE SETTLEMENT RECORD (cont'd)

REFUNDS: (YES) NO

___ LUMP SUM -- DUE: _____ AMOUNT: _____

___ BILLS CREDITED -- $_____ PER CONNECTION EACH MONTH FOR 21 MONTHS
(ATTACH COMPUTATIONS IF NECESSARY)

REFUND IS FOR THE DIFFERENCE BETWEEN PROPOSED RATES AND SETTLED RATES.

PARTIES:

TCEQ Exec. Director: Jim R. McCulloch as Witness

Public Interest Council: Daniel Gaither (WITNESS ONLY)

Utility: [signature]

Protestants: Karl E. Wolff - KARL E. WOLFF REPRESENTING FOUNTAIN VIEW HOME OWNERS ASSOCIATION

Michael B. White - MICHAEL B. WHITE REPRESENTATIVE OF EQUALITY COMMUNITY HOUSING CORP. / HAVERSTOCK

(Additional pages attached ☐)

ATTACHMENTS:

___ PREVIOUSLY APPROVED TARIFF.

___ RELATED SCHEDULES OR COMPUTATIONS.

___ BLANK TARIFF OR RATE SCHEDULE PAGE.

___ QUALITY OF SERVICE COMPLIANCE SCHEDULE.

CUSTOMER DEPOSIT RESIDENTIAL (Maximum $50) $50.00

COMMERCIAL AND NON-RESIDENTIAL DEPOSIT 1/6TH EST. ANNUAL BILL

METER TEST FEE (actual cost of testing the meter up to) $25.00
THIS FEE MAY BE CHARGED IF A CUSTOMER REQUESTS A SECOND METER TEST WITHIN A TWO-YEAR PERIOD AND THE TEST INDICATES THAT THE METER IS RECORDING ACCURATELY.

TEMPORARY WATER RATE:

Unless otherwise superseded by TCEQ order or rule, if the Utility is ordered by a court or governmental body of competent jurisdiction to reduce its pumpage, production or water sales, the Utility shall be authorized to increase its approved gallonage charge according to the formula:

$$TGC = cgc + \frac{(prr)(cgc)(r)}{(1.0-r)}$$

Where:
TGC = temporary gallonage charge
cgc = current gallonage charge
r = water use reduction expressed as a decimal fraction (the pumping restriction)
prr = percentage of revenues to be recovered expressed as a decimal fraction, for this tariff prr shall equal 0.5.

To implement the Temporary Water Rate, the utility must comply with all notice and other requirements of 30 T.A.C. 291.21(l).

GROUNDWATER REDUCTION PLAN FEE

The Houston Groundwater Reduction Plan Fee is calculated as follows:

(GRP Fee per 1000 gallons) x (Total Usage in month in 1000 gallon units)

For period before treated surface water is actually used, the GRP Fee, based on Monthly Pumpage at the Wells, will be passed through as follows:

GRP Fee Per 1000 gallons usage by customers = (Q x R x P) / GS

Q = Quantity of groundwater pumped in billing period in 1000 gallons
R = Groundwater Reduction Plan Fee per 1000 gallons
P = Percentage of total required by contract
GS = Total gallons sold during billing period in 1000 gallons

Attachment C
Douglas Utility Company's Response to
the Executive Director's Motion to
Dismiss and Remand

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

APPLICATION OF DOUGLAS UTILITY COMPANY, TO CHANGE ITS WATER AND SEWER RATES

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOUGLAS UTILITY COMPANY'S RESPONSE TO THE EXECUTIVE DIRECTOR'S MOTION TO DISMISS AND REMAND

TO THE HONORABLE PENNY WILKOV, ADMINISTRATIVE LAW JUDGE:

Douglas Utility Company (Douglas) files this response to the Executive Director's (ED) motion to dismiss and remand the above-referenced rate case. Douglas opposes the motion for the following reason:

Douglas participated in the mediation conducted by ALJ Hunter Burkhalter and agreed to rates that, from the resources Douglas had available to it in Austin, led Douglas' President Carol Zieben to believe would maintain Douglas' financial integrity until Douglas could file another rate case. Upon returning to Houston, Mrs. Zieben had the settlement rates run through her computer billing program. She determined that the settlement rates would put Douglas into a negative cash flow situation.

Douglas cannot provide continuous and adequate water or sewer service if it cannot pay its bills. Accordingly, Douglas must regrettably withdraw from the mediated settlement and request that this case remain on (or be restored to) the SOAH General Docket.

Respectfully submitted,

By: _____
Mark H. Zeppa
State Bar No. 22260100
Law Offices of Mark H. Zeppa, PC
4833 Spicewood Springs Road #202
Austin, Texas 78759-8435
(512) 346-4011, Fax (512) 346-6847
markzeppa@austin.rr.com

ATTORNEY FOR DOUGLAS UTILITY CO.

Attachment D
Mediator's Report

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

APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARIFF IN HARRIS COUNTY, TEXAS	§	BEFORE THE STATE OFFICE
	§	
	§	OF
	§	
	§	ADMINISTRATIVE HEARINGS

MEDIATOR'S REPORT ON MEDIATION

On July 29, 2014, the parties participated in mediation at the State Office of Administrative Hearings (SOAH) in Austin, Texas. The parties reached agreement during the mediation. Counsel for the Executive Director has indicated that he will be filing a motion to remand this matter to the Commission for proceedings consistent with the terms of the settlement agreement. This file is being returned at this time to the presiding ALJ.

SIGNED August 4, 2014.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE/MEDIATOR
STATE OFFICE OF ADMINISTRATIVE HEARINGS

cc: Attorneys in case
Renee M. Rusch, ALJ ADR Team Leader
Penny A. Wilkov, Presiding ALJ

Attachment E
Fountainview Homeowners & Occupants
Association Letter

Fountainview Homeowners & Occupants Association
Karl E. Wolff, Board Member
5523 Mendota Lane
Houston, Texas 77032-4314
Telephone 281-442-8045
Cell 713-301-7149
kwolffsr@att.net

The Honorable Penny Wilcox
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: **Douglas Utility Company**
TCEQ Docket No. 2013-1735-UCR
SOAH Docket No. 582-14-1052

Dear Judge Wilcox:

It was my understanding that when all parties agreed to accept mediation and what was agreed upon at the mediation, that this case would be settled and adhered to ***as agreed.***

Douglas Utility Company has now made a motion to set aside the mediation and proceed to trial. This would cause an extreme hardship upon myself and the Homeowners Association should I have to miss work again to appear in Austin for a trial. To travel to Austin from Houston requires a 3 1/5 hours start to arrive on time. As the last mediation didn't end until four-forty five in the evening, I didn't arrive home until eight fifteen that evening. This doesn't include the cost of gas.

As the representative of The Fountainview Homeowners & Occupants Association, I am asking that the results of the mediation are not set aside but adhered to. We have all worked too hard to reach a settlement that everyone agreed and signed upon. My homeowners association is pleased with the settlement, and if it is set aside, this would cause an unjust hardship on the members of the association.

Sincerely yours,

Karl E. Wolff
Board Member FVHOA

cc: FVHOA

Attachment F
Equality's Community Housing Corporation's
Motion to Dismiss and Remand

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

APPLICATION OF DOUGLAS UTILITY COMPANY TO CHANGE WATER AND SEWER RATE/TARIFF IN HARRIS COUNTY, TEXAS	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

EQUALITY COMMUNITY HOUSING CORPORATION'S MOTION TO DISMISS AND REMAND THE CASE

Equality Community Hosing Corporation (Equality),[1] by and through its attorneys and pursuant to Texas Practice and Remedies Code § 154.071(a), 7 Texas Administrative Code (TAC) § 155.415, 30 TAC § 40.8, and other applicable authority, hereby moves to the Administrative Law Judge (ALJ), Penny Wilkov, to dismiss the case from SOAH's docket and remand it to the Executive Director of the Texas Commission on Environmental Quality (ED) for approval of tariffs and rates in accordance with the terms of the parties mediated settlement agreement.

Background

Prior to holding an evidentiary hearing on the above referenced case, the case was referred to mediation to a State Office of Administrative Hearings (SOAH) mediator. On July 29, 2014, the parties participated in mediation and entered into a settlement agreement (Settlement Agreement).[2] Brian MacLeod, Texas Commission on Environmental Quality

[1] Prior filings have been made on behalf of Haverstock Hills Apartments by Rainbow Housing Assistance Corporation (Rainbow); however, Equality is the actual owner of Haverstock Hills Apartments and Rainbow is an entity affiliated with Equality. Protests to the rates were signed by Equality and Haverstock Hills Apartments. For purposes of all prior pleadings please substitute Equality for Rainbow.

[2] *Mediator's Report on Mediation*, Aug. 4, 2014, Hunter Burkhalter, Administrative Law Judge/Mediator, SOAH.

(TCEQ) Staff Attorney, on July 30, 2014, filed a copy of the Settlement Agreement with SOAH and requested that the case be dismissed from SOAH's docket and remanded to the Executive Director (ED) of the TCEQ for processing (ED's Motion).[3] We support the ED's Motion. Subsequently, Mark Zeppa, attorney for Douglas Utility Company (Douglas), filed a response opposing the ED's motion to dismiss the case from SOAH's docket. Mr. Zeppa essentially provided that Douglas no longer likes the terms of the Settlement Agreement that it executed and requests to withdraw its approval of the Settlement Agreement.

Request for Dismissal and Remand

The Settlement Agreement is an executed contract and this point is not contested. Mr. Zeppa in his motion provides: "Douglas participated in the mediation . . . and agreed to [the mediated] rates . . . ." Likewise, Mr. MacLeod, Mr. Burkhalter, and Mr. Karl Wolff, Fountainview Homeowners & Occupants Association (HOA)[4] all have acknowledged that the case was settled and the Settlement Agreement was agreed to by all the parties to the case.

The TCEQ's rules provide that the Settlement Agreement is an enforceable contract. "Agreements of the participants reached as a result of [Alternative Dispute Resolution] ADR must be in writing, and are enforceable in the same manner as any other written contract."[5] Similarly, SOAH's rules provide that an agreement signed by the parties and filed with SOAH is enforceable.[6] Furthermore, § 154.071(a) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE provides: "If the parties reach a settlement and execute a written agreement disposing of the

---

[3] *Motion to Dismiss and Remand,* July30, 2014, Brian MacLeod, Staff Attorney, TCEQ.

[4] *See,* Letter filed by Mr. Wolff with SOAH on August 5, 2014.

[5] 30 TAC § 40.8.

[6] 7 TAC § 155.415 ("Unless otherwise provided in this chapter, no agreement between attorneys or parties regarding a contested case pending before SOAH will be enforced unless it is in writing, signed, and filed with SOAH or entered on the record at the hearing or prehearing conference.").

dispute, the agreement is enforceable in the same manner as any other written contract."[7] Additionally, Rule 11 of the Texas Rules of Civil Procedure provides that a signed agreement that is filed with SOAH is an enforceable contract.[8]

The Settlement Agreement is binding as a contract and is enforceable and may not be repudiated by Douglas. As provided *In the Matter of the Marrage of Ames*: "a party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement."[9] Furthermore, the Settlement Agreement is not entitled to be revoked because of an alleged mistake on the part of Douglas. Mr. Zeppa wants to withdraw the settlement on the basis of a unilateral mistake by Douglas; however, a party to an arms-length transaction cannot set-aside the contract by alleging that he did not know what he was signing.[10] "The role of the courts is not to protect parties from their own agreements, but to enforce contacts that parties enter into freely and voluntarily."[11] "Sophisticated parties, like all parties to a contract, have 'an obligation to protect themselves by reading what they sign.'"[12] A court is not allowed to change the allocation of risks among the parties, but only to enforce the allocation as specified in the agreement. *Id.*

---

[7] (Vernon 2011).

[8] "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

[9] 800 S.W.2d 590, 592 (Tex. App.--Amarillo, 1993, no writ).

[10] *Miles Homes of Texas, Inc. v. Brubaker*, 649 S.W.2d 791, 794 (Tex. App.-- San Antonio, 1983, writ ref. n.r.e.).

[11] *El Paso Field Services, L.P. v. MasTec North America, Inc.*, 389 S.W.3d 802, 810-11 (Tex. 2012).

[12] *Id.* at 811 (quoting *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)).

A settlement agreement reached through mediation must be treated as a contract and the parties required to honor the agreement.[13] If a party were allowed to withdraw from a mediation agreement, the entire mediation process would be for naught.[14]

Request for Relief

For the foregoing reasons, Equality Community Hosing Corporation respectfully requests that the Administrative Law Judge dismiss the case from SOAH's docket and remand the case to the TCEQ, where the ED can approve the rates and tariffs agreed to by the parties in accordance with the Settlement Agreement, and grant Equality Community Housing Corporation any other relief to which it may be entitled.

Respectfully submitted,

MCGINNIS LOCHRIDGE
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 495-6000
Fax (512) 495-6093

By: _____
John L. Wilson (SBN 21700800)
jwilson@mcginnislaw.com
Phil Haag (SBN 08657800)
phaag@mcginnislaw.com

ATTORNEYS FOR EQUALITY COMMUNITY HOUSING CORPORATION

[13] *Ames*, 800 S.W.2d at 592.

[14] *Id.*

Attachment G
ED's Brief in Support of
Motion to Dismiss and Remand

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

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.

---

[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

---

[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

---

[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.