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SOAH DOCKET NO. 473-14-5140
PUC DOCKET NO. 42860

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

ORDER NO. 6
DENYING REQUEST TO RECONSIDER ORDER NO. 3

Equality Community Housing Corporation (Equality) has filed a Motion for Reconsideration of Order No. 3. In the request, Equality asks that the Administrative Law Judge (ALJ) change her decision to “not acknowledge and enforce the Settlement Agreement, and [to not] dismiss and remand the case [as] error.” The Public Utility Commission (PUC) Staff in its response filed on September 8, 2014, supports the request because allowing Douglas Utility (Applicant) to unilaterally withdraw from a signed settlement agreement will undermine the integrity of the mediation process and render it meaningless.

By way of background, the above-referenced matter was referred to mediation on June 6, 2014, with all deadlines established in Order No. 1 abated until the conclusion of the mediation process. On August 4, 2014, the mediator assigned to mediate this case reported in writing that an agreement had been reached in mediation and that the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) would be filing a motion to remand this matter to the Commission. On July 30, 2014, the ED filed a Motion to Dismiss and Remand (Motion). On July 31, 2014, Applicant filed a Response to the Motion, opposing the dismissal and stating:

Douglas participated in the mediation . . . and agreed to rates that, from the resources Douglas had available to it in Austin, led Douglas’s President Carol Zieben to believe would maintain Douglas’ [sic] 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 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.

Dismiss and Remand Motion

In Order No. 3, the ALJ examined the requirements of TCEQ procedural rule, 30 Texas Administrative Code § 80.101, entitled “Remand to Executive Director.” The rule provides stringent requirements associated with the delegation of the authority from the Commission to the ED to act upon the application without the necessity of a commission meeting or commission approval:

At the request of the applicant, a judge shall remand an application to the executive director if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested and the applicant is deemed to have agreed to the action of the executive director. The executive director may act on the application or set it for a commission meeting. (Emphasis added).

In the instant case, several elements related to this rule were missing: the Applicant did not request the remand; all parties to the contested case had not reached a settlement so that no facts or issues were controverted; the application was not uncontested; and the applicant did not agree to the action of the ED. Thus, with these crucial elements missing, the ALJ had no discretion, pursuant to 30 Texas Administrative Code § 80.101, to grant the request to dismiss and remand to the Executive Director to act on the application in an uncontested manner.

Texas Civil Practice and Remedies Code and the Powers of the ALJ

Equality has further advocated that the ALJ enforce the mediated settlement as a contract, pursuant to Section 154.071(a), entitled “*Effect of Written Settlement Agreement*” of the Texas Civil Practice and Remedies Code. This section, cited by Equality as authority for the ALJ to enforce the agreement, provides that “[I]f the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as a written contract.” The next section of that section is telling, however, in its statement that “the court in its discretion may incorporate the terms of the agreement in the court’s final decree.” Court is defined in Section 154.001(1) of the Texas Civil Practice and Remedies Code as including appellate, district, and constitutional courts. The

definition of court, however, does not include ALJs with the State Office of Administrative Hearings (SOAH). Therefore, despite Equality's advocacy of the ALJ's perceived powers to enforce a contract pursuant to the Texas Civil Practice and Remedies Code, the ALJ has not been granted discretion to enforce the agreement in the same manner as a District, County, or Appellate Court.

But what powers does the ALJ possess to enforce a contract? The enabling statute of SOAH, and specifically Texas Government Code § 2003.042 (a), lists the specific powers granted by the legislature to SOAH ALJs to:

- (1) administer an oath;
- (2) take testimony;
- (3) rule on a question of evidence;
- (4) issue an order relating to discovery or another hearing or prehearing matter, including an order imposing a sanction;
- (5) issue an order that refers a case to an alternative dispute resolution procedure, determines how the costs of the procedure will be apportioned, and appoints an impartial third party as described by Section 2009.053 to facilitate that procedure;
- (6) issue a proposal for decision that includes findings of fact and conclusions of law;
- (7) if expressly authorized by a state agency rule adopted under Section 2001.058(f), make the final decision in a contested case;
- (8) serve as an impartial third party as described by Section 2009.053 for a dispute referred by an administrative law judge, unless one of the parties objects to the appointment; and
- (9) serve as an impartial third party as described by Section 2009.053 for a dispute referred by a government agency under a contract.

As shown by the enabling statute, the power to enforce a contract is not one of the powers a SOAH ALJ was granted by the legislature, and the parties have not cited any statutory authority that empowers the ALJ "to incorporate the terms of an agreement in its decree," as permitted by Section 154.071(a) of the Texas Civil Practice and Remedies Code.

TCEQ Alternative Dispute Rules

Next, Equality cites the provisions of the TCEQ Alternative Dispute Resolution Rules for further authority that the ALJ should enforce the written agreement. Specifically, 30 Texas Administrative Code § 40.8, entitled “*Agreements*,” provides that “[a]greements of the participants reached as a result of ADR must be in writing, and are enforceable in the same manner as any other written contract.” As far as the applicability to a SOAH ALJ of this provision, there are two other provisions in that same chapter 40, which are pertinent to this discussion. First, the next section, 30 Texas Administrative Code § 40.8, entitled “*Stipulations*,” provides that “[w]hen ADR procedures do not result in the full settlement of a contested matter, the participants . . . shall limit the contested issues through the entry of written stipulations. Such stipulations shall be . . . presented to the judge assigned to conduct the hearing on the merits.” Here, there were no written stipulations presented to the ALJ.

Second, another section in that same chapter, 30 Texas Administrative Code § 40.5, entitled “*Qualifications of Mediators*,” states that TCEQ shall establish a pool of commission staff mediators to resolve contested matters through ADR procedures. Thus, it can be surmised that these sections are applicable to TCEQ-conducted mediations. As such, these provisions do not persuasively impart the ALJ with the authority to enforce a non-unanimous settlement agreement as a contract or to dismiss and remand a non-settled case.

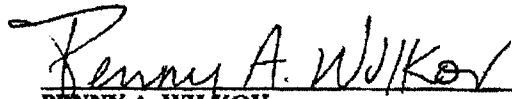
Continuous and Adequate Water Service

Lastly, Equality has not addressed the issue of whether the entry of the settlement agreement will impact the public’s expectation of continuous and adequate service within the area of service, as was raised in Applicant’s Response to the Motion to Dismiss and Remand. In particular, Texas Water Code § 13.250 (b), entitled “*Continuous and Adequate Service; Discontinuance, Reduction, or Impairment of Service*,” specifically prohibits the holder of a Certificate of Convenience and Necessity (CCN) certificate from discontinuing, reducing, or impairing service to a certified service area except under specific circumstances such as non-payment, nonuse, or other seminal reasons in the usual course of

business. As stated, the statute does not make an exception for a CCN holder to be held to a settlement agreement that, although beneficial to certain parties, would negatively affect customers' water service.

Accordingly, for all these reason, the ALJ declines to reconsider the motion to dismiss and remand or to acknowledge and enforce the settlement agreement.

SIGNED September 15, 2014.



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