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**SOAH DOCKET NO. 473-14-5140 (CURRENT)  
 SOAH DOCKET NO. 582-14-1052 (PRIOR)  
 PUC DOCKET NO. 42860**

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 PUBLIC UTILITY COMMISSION  
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<p style="text-align: center;"><b>APPLICATION OF DOUGLAS          UTILITY COMPANY, TO          CHANGE ITS WATER AND          SEWER RATES IN HARRIS COUTNY          TEXAS, CCN NOS. 11369 &amp; 20527</b></p>	<p>§ § § § § § § §</p>	<p style="text-align: center;"><b>BEFORE THE STATE OFFICE OF          ADMINISTRATIVE HEARING</b></p>
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**COMMISSION STAFF’S RESPONSE TO EQUALITY COMMUNITY HOUSING  
 CORPORATION’S MOTION FOR RECONSIDERATION OR FIRST ALTERNATIVE  
 MOTION FOR SUMMARY DISPOSITION OR SECOND ALTERNATIVE REQUEST  
 FOR THE ADMINSTRATIVE LAW JUDGE TO SUBMIT CERTIFIED ISSUE TO THE  
 PUBLIC UTILITY COMMISSION**

COMES NOW, Staff (Staff) of the Public Utility Commission of Texas (PUC) and files this Response to Equality Community Housing Corporation’s (Equality) 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 appeal of Order No. 3 is on the September 26, 2014, Open Meeting agenda. The result of the Commissioners’ decision can possibly render the issues addressed in this response moot. Therefore, this response is made subject to any ruling by the Commission. Staff believes that Order No. 3 should be reversed and that the ALJ dismiss this case before SOAH and remand to the PUC; or alternatively, grant Equality’s motion for summary disposition of the case; 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.

**I. Background**

On July 29, 2014, the parties participated in mediation at the State Office of Administrative Hearings (SOAH). During this mediation, the parties reached an agreement

which they memorialized in a signed settlement agreement. Accordingly, the Executive Director of the TCEQ filed a Motion to Dismiss and Remand the matter to the TCEQ as uncontested. On July 31, 2014, Douglas Utility Company 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.

## **II. Response to Equality's Motion for Reconsideration**

On August 20, 2014, SOAH Order No. 3 held that this case cannot be remanded to the TCEQ ED for processing because the case is no longer uncontested. This line of reasoning was specifically rejected in the Amarillo Court of Appeals case, *Matter of Marriage of Ames*<sup>1</sup>. Specifically that case stated the following: "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...."<sup>2</sup> While this case was in District Court, the same policies apply at SOAH pursuant to the Texas Government Code, which states: "Alternative dispute resolution procedures developed and used by a governmental body must be consistent with Chapter 154, Civil Practice and Remedies Code."<sup>3</sup> Chapter 154 of the Civil Practice and Remedies Code: "If the parties reach a settlement and execute a written agreement disposing the dispute, the agreement is enforceable in the same manner as any other written contract."<sup>4</sup> Additionally, this reasoning is even more vital at SOAH because SOAH does not have the alternative of allowing a Plaintiff to add a contract cause of action to a case in its docket and have the contract adjudicated in order to support the judgment. Staff, therefore agrees that Equality's Motion for Reconsideration should be granted.

## **III. Response to Equality's Alternative Motion for Summary Disposition**

Equality filed its alterative motion for summary disposition pursuant to SOAH's Rule in 1 TAC § 155.505 and/or P.U.C. PROC. R. 22.182. 1 TAC §155.505 (a) provides:

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<sup>1</sup> *In the Matter of the Marriage of Ames*, 860 S.W.2d 590 (Tex. App. –Amarillo 1993, no writ).

<sup>2</sup> *Id.* at 592 footnote 1.

<sup>3</sup> Tex. Gov't Code § 2009.051(a).

<sup>4</sup> Tex. Civ. Prac & Rem. Code § 154.071(a).

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.

P.U.C. PROC. R. 22.182(a) 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.

It is uncontested that the parties signed a mutual settlement agreement on July 29, 2014. This Settlement Agreement provided the terms regarding the rates for water and sewer service for Douglas Utility's customers, and terms to which Douglas would provide refunds for the difference between the rates it proposed in its rate application and the rates established in the Settlement Agreement. This mutual agreement eliminated any genuine issue as to any material fact; therefore, Equality is entitled to a judgment in accordance with the Settlement Agreement. Douglas Utility's unilateral attempt to withdraw its consent to this agreement does not preclude Equality from a summary disposition in this matter. The Houston Court of Appeals addressed this very type of situation in *Tindall v. Bishop, Peterson & Sharp, P.C.*, a case Equality cites in its motion.<sup>5</sup> The Court held that a party's unilateral withdrawal of consent to a settlement agreement before entry of judgment does not preclude summary judgment.<sup>6</sup> Further, the court, citing the Texas Supreme Court, explained what summary judgment is meant to provide under circumstances similar to this very matter:

“Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.”<sup>7</sup>

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<sup>5</sup> *Tindall v. Bishop, Peterson & Sharp, P.C.*, 961 S.W.2d 248 (Tex. App—Houston [1<sup>st</sup> Dis.] 1997, not pet.).

<sup>6</sup> *Id.* at 252.

<sup>7</sup> *Id.* (quoting *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995) (emphasis added in original))

A signed settlement agreement after mediation becomes binding at the moment it is signed and cannot be unilaterally repudiated. The case becomes uncontested at that point and to view it otherwise changes mediation from a method to create judicial efficiency to a tool that can be used to elongate trials and waste resources. It would create a disincentive for parties to enter mediation for fear a party to a signed agreement could singularly repudiate that agreement and negate the process. Rule 11 of the Texas Rules of Civil Procedure provides that agreements between attorneys or parties touch any pending suit will be enforced only if the agreement is “in writing, signed and filed with the papers as part of the record.”<sup>8</sup> All these requirements were met in the Settlement Agreement signed between parties in this matter. Staff therefore requests that Equality’s Alternative Motion for Summary Disposition be granted.

#### **IV. Response to Equality’s Request for the ALJ to Submit Certified Issue to the PUC**

In the second alternative, Equality requests the ALJ to submit a certified issue to the PUC. P.U.C. PROC. R. 22.127(a) provides: “The presiding officer may certify to the commission an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law.” Equality in its motion points out: “As a matter of policy, a settlement agreement that is reach as part of ADR and meets the requirements of Rule 11 [of the Texas Rules of Civil Procedure] should not be allowed to be disregarded because one of the parties subsequently decides it no longer likes the terms of the agreement.”<sup>9</sup> Staff agrees.

The requirements for the enforcement of the Settlement Agreement between the parties have been met, a fact Douglas Utility has never refuted. In fact in its attempt to withdraw its consent, Douglas admitted that: “Douglas participated in the mediation conducted by ALJ Hunter Burkhalter and agreed to the rates...”<sup>10</sup> Equality in its alternative motion for certified question quotes the *Ames* Court, which states:

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<sup>8</sup> TEXAS RULES OF CIVIL PROCEDURE RULE 11 (Vernon 2011).

<sup>9</sup> *Equality Community Housing Corporation’s (Equality) 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*, September 2, 2014, John L. Wilson, Attorney for Equality Community Housing Corporation.

<sup>10</sup> *Douglas Utility Company’s Response to the Executive Director’s Motion to Dismiss and Remand*, July 31, 2014, Mark Zeppa, Attorney for Douglas Utility Company.

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.<sup>11</sup>

The policy effect of ruling that a case cannot be remanded if a party withdraws from a signed mediation settlement would be negative and potentially devastating to the mediation process. It would allow a party to wait as long as it wants and then unilaterally repudiate the agreement, as long as the party does so before the Commission actually signs the order. In some cases this could be many months. The possibility of such a scenario could make parties—who would otherwise be amenable—legitimately reluctant to participate in alternative dispute resolution for fear that a unilateral withdrawal could nullify a mutually agreed upon written contract. For these reasons, Staff agrees with Equality that a certified question is appropriate to settle this matter.

#### **V. REQUEST FOR RELIEF**

Staff is in agreement with Equality's motions and, subject to the Commission's ruling on the appeal of Order No. 3, 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.

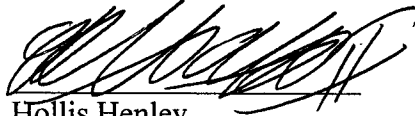
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<sup>11</sup> *Ames*, 800 S.W.2d at 592.

Respectfully Submitted,

Joseph P. Younger  
Division Director  
Legal Division

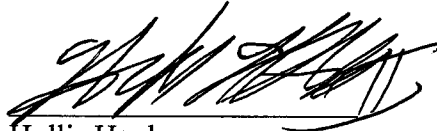
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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on September 16, 2014 in accordance with P.U.C. Procedural Rule 22.74.



Hollis Henley