

Control Number: 42860



Item Number: 40

Addendum StartPage: 0

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

RECEIVED
2014 SEP 22 PM 4:32
PUBLIC UTILITY COMMISSION
FILING CLERK

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

**EQUALITY COMMUNITY HOUSING CORPORATION'S
SUPPLEMENTAL BRIEF REGARDING INTERIM APPEAL**

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

COMES NOW Equality Community Housing Corporation (Equality) and files this its Supplemental Brief in support of Equality's interim appeal of the Administrative Law Judge's (ALJ) Order No. 3.

On September 15, 2014, the ALJ issued Order No. 6 denying Equality's motion for reconsideration of Order No. 3. While the ALJ appears to agree that the Settlement Agreement executed on July 29, 2014, is an enforceable contract, the ALJ stated that the term "court" as defined in § 154.001(1) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE "does not include ALJs with the State Office of Administrative Hearings (SOAH)" and therefore an ALJ cannot enforce the mediated settlement agreement as a contract." Furthermore, the ALJ provided that she could not remand the case back to the Texas Commission on Environmental Quality (TCEQ) under TCEQ procedural rule 30 Texas Administrative Code (TAC) § 80.101 because "the Applicant [Douglas Utility Company (Douglas)] 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 [Executive

Director] ED." Lastly, the ALJ contends that Equality did not address the issue of whether the entry of the Settlement Agreement will impact continuous and adequate utility service - an issue allegedly raised by Douglas.

Equality is uncertain as to why the ALJ addresses her alleged lack of powers to enforce a contract. The motions that have been filed with SOAH have asked for the ALJ to dismiss the case from SOAH and remand the case to the PUC. Once remanded, it would be the PUC, not the ALJ that would be issuing a final order and tariffs in the case.¹ The ALJ has been asked to recognize the existence of the Settlement Agreement, but not to enforce it.

Next the ALJ concludes that she does not have the power to remand the case to the PUC. However, rather than looking to the rules applicable to SOAH and the PUC, the ALJ attempts to support her proposition based on the Texas Commission on Environmental Quality's (TCEQ) procedural rules. While the TCEQ originally had jurisdiction, that jurisdiction was transferred on September 1, 2014, to the PUC.²

¹ The PUC "has the power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction. TEX. PUBLIC UTIL. CODE, §14.001 (Vernon Supp. 2014). The PUC is encouraged to use alternative dispute resolution to resolve disputes under the PUC's jurisdiction. TEX. PUBLIC UTIL. CODE, §14.025 (Vernon Supp. 2014). "The [Public] utility commission may regulate and supervise the business of each water and sewer utility within its jurisdiction The utility commission . . . may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction. . . ." Tex. Water Code, § 13.041(a) (Vernon Supp. 2014). The Public Utility Commission may fix and regulate rates of utilities. Tex. Water Code, § 13.181(b) (Vernon Supp. 2014).

² Since the jurisdiction transferred from the TCEQ to the PUC on September 1, 2014, the PUC's rules are applicable. According to the rules enacted to implement the transfer in jurisdiction: "The procedural rules of the [Public Utility] commission shall be used in every retail public utility proceeding transferred to the commission as soon as practicable or as established by this section." 16 TAC § 22.248(c)(2). Additionally, 16 TAC § 22.248(c)(3) provides: "The presiding officer shall have authority to determine in accordance with this section whether the commission's procedural rules, the TCEQ's procedural rules as continued in force by this section, or any combination of those agencies' rules shall apply in each retail public utility proceeding." However, the presiding officer's choice of which procedural rules apply appears to be limited to a choice of procedural rules related to discovery and not other procedural issues. *See*, 16 TAC § 22.248(d)(2), which applies to this matter since a preliminary hearing has already been held while jurisdiction was with the TCEQ, but a hearing on the merits has not been held. Under that subsection, the presiding officer (ALJ) is to hold another preliminary hearing to establish several matters including whether the TCEQ's or PUC's procedural rules apply in regard to discovery. The provision

The relevant issue is whether the ALJ has the power to remand the case to the PUC for further action. The answer is yes. SOAH's procedural rules provide that "a judge may dismiss a matter from SOAH's docket with or without prejudice if . . . the parties settle all matters in controversy."³ the parties to the case settled all matters in controversy when they entered into the mediated Settlement Agreement. The Settlement Agreement contains the agreement of the parties at the time the contract was executed. The ALJ has the power to dismiss the case from SOAH and remand it to the PUC.

Equality also disagrees with the ALJ's unsupported contention that approving tariffs consistent with the terms of the Settlement Agreement might negatively impact Douglas' ability to provide continuous and adequate utility service. There is NO evidence in the record that shows continuous and adequate utility will not be provided with rates agreed to in the Settlement Agreement. It appears the ALJ is relying on a filing by Douglas whereby Douglas' attorney stated: "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." However, this statement is not supported by any evidence and even if it were being offered as evidence during an evidentiary hearing by Mr. Zeppa, it would be excluded as hearsay.⁴

Although it had the opportunity to do so, Douglas has not provided any evidence to support its allegation:

- Douglas did not provide any supporting evidence when it filed its Response to the Executive Director's Motion to Dismiss and Remand on July 31, 2014.

does not ask the presiding officer to decide which rules apply in regard to other types of procedural matters other than those related to discovery.

³ 1 TAC § 155.503(c)(1). The ALJ is required to follow SOAH's procedural rules unless they conflict with the underlying agency's procedural rules. There does not appear to be a conflict between the PUC's and SOAH's rules. The PUC does not have a rule similar to the TCEQ procedural rule 30 TAC § 80.101

⁴ See, Rule 802 of the TEXAS RULES OF EVIDENCE; 16 TAC § 22.221(A).

- Douglas did not file any response, including any evidence, in the five (5) days it was allowed to file a response to Equality's September 2, 2014, 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. Although, 16 TAC § 22.123(a)(4) provides such an opportunity. "Any response to an appeal shall be filed within five working days of the filing of the appeal."

- Douglas did not file any response, including any evidence, in the fourteen (14) days it was allowed to file a response to Equality's September 2, 2014 motion for summary disposition of the case in accordance with 1 TAC § 155.505(c)(1). That section provides: "A party may file a response and summary disposition evidence to oppose a motion for summary disposition. The response and opposing summary disposition evidence shall be filed within 14 days of receipt of the motion"

The only evidence in the record related to this issue is contrary to Douglas' unsupported contention. That evidence is the execution of the Settlement Agreement itself, which Douglas admitted. Douglas would not have agreed to the terms and signed the Settlement Agreement unless it thought the agreed to rates would be sufficient for Douglas to provide adequate and continuous service. Thus, the ONLY evidence in the record is that the rates paid under the Settlement Agreement will support Douglas's ability to provide continuous and adequate utility service.

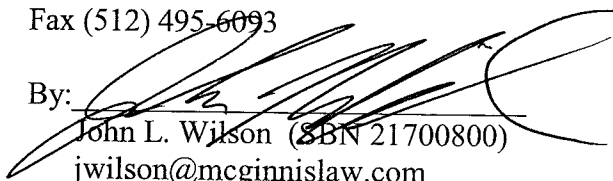
REQUEST FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Equality Community Housing 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 document has been served as indicated below upon the following on the 22nd day of 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	Hand Delivery _____ Fax <u> X </u> Overnight Courier _____ E-mail _____
Hollis Henley Public Utility Commission P.O. Box 13325 Austin, TX 78711 Fax 512-936-7268 Hollis.henley@puc.texas.gov	Hand Delivery _____ Fax <u> X </u> Overnight Courier _____ E-mail _____
Karl E. Wolf Fountainview Homeowners Association 5523 Mendota lane Houston, TX 77032 713-301-7149 kwolffsr@att.net	Hand Delivery _____ Fax _____ Overnight Courier <u> X </u> E-mail <u> X </u>
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 <u> X </u> Overnight Courier _____ E-mail _____


John L. Wilson