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APPLICATION OF DOUGLAS § PUBLIC UTILITY COMMISSION
UTILITY COMPANY TO CHANGE §
WATER AND SEWER RATE/TARIFF § OF TEXAS
IN HARRIS COUNTY, TEXAS §

ORDER ON APPEAL OF SOAH ORDER NO. 3

In this Order, the Commission addresses Equality Community Housing Corporation's appeal of SOAH Order No. 3. For the reasons discussed in this order, the Commission denies Equality's appeal and concludes that a limited evidentiary hearing is necessary to determine whether or not the settlement rates in this proceeding violate section 13.183(a) of the Texas Water Code (TWC). If the Commission concludes that the settlement rates violate that section, this matter would then have to proceed to a hearing to establish legal rates for Douglas. If the Commission concludes otherwise, it will have to consider whether adoption of the settlement agreement is appropriate.

I. Background

On March 12, 2013, Douglas Utility Company filed with the Texas Commission on Environmental Quality (TCEQ) a notice of intent to change Douglas's rates for water and sewer service.¹

On July 29, 2014, Douglas, the executive director of the TCEQ, the Office of Public Interest Counsel, the Fountainview Homeowners Association, and Equality Community Housing Corporation participated in mediation at the State Office of Administrative Hearings (SOAH) and agreed on new water and sewer service rates.² On July 30, 2014, the TCEQ executive

¹ Rate/Tariff Change Application of Douglas Utility Company (Mar. 12, 2013) (filed in this docket on Sep. 23, 2014 as item 41).

² Executive Director of the Texas Commission on Environmental Quality's Motion to Dismiss and Remand at 1 (July 30, 2104) (filed in this docket on Sep. 4, 2014 as item 21).

director filed the settlement document and moved to dismiss the proceeding from SOAH and remand it to the TCEQ executive director for processing.³

However, on July 31, 2014, Douglas filed a response opposing the motion to dismiss and remand. Douglas asserted it was withdrawing from the settlement because, after signing the agreement, Douglas determined that the agreed rates would result in a negative cash flow. Douglas also stated it could not provide continuous and adequate service if it cannot pay its bills.⁴

The executive director, Equality, and Fountainview each made filings arguing Douglas is legally bound by the terms of the mediated settlement document and remand to the TCEQ executive director for processing would be proper.⁵

On August 20, 2014 in SOAH Order No. 3, the SOAH ALJ effectively denied the TCEQ executive director's motion to dismiss and remand. The SOAH ALJ noted that the TCEQ's then-applicable remand rule, 30 TAC § 80.101, contemplates remands of cases in which "no fact or issues remain controverted" and that after remand the application should be considered uncontested.⁶ The ALJ concluded that this matter did not fall within that rule.⁷ On August 28, the TCEQ executive director filed a motion for reconsideration asking the ALJ to reverse her ruling and dismiss this matter and remand it to the executive director as an uncontested matter.⁸

On September 1, 2014, jurisdiction over this proceeding transferred by statute from the TCEQ to this Commission.⁹

³ *Id.*

⁴ Douglas's Response to Motion to Dismiss and Remand at 1 (July 31, 2014) (filed in this docket on Sep. 4, 2014 as item 22).

⁵ Equality's Response Motion to Dismiss and Remand (Aug. 13, 2014) (filed in this docket on Sep. 4, 2014 as item 23); TCEQ ED's Brief in Support of Motion to Dismiss and Remand (Aug. 13, 2014) (filed in this docket on Sep. 4, 2014 as item 24); Fountain View HOA's letter to Administrative Law Judge Penny Wilcox (Aug. 11, 2014) (available via the SOAH's interchange system in SOAH Docket No. 582-14-1052, item no. 22, Aug. 11, 2014).

⁶ SOAH Order No. 3 at 1-2 (Aug. 20, 2014) (filed in this docket on Sep. 4, 2014 as item 26).

⁷ *Id.* at 2.

⁸ Executive Director's Motion for Reconsideration (Aug. 28, 2013) (filed in this docket on September 4 as item 25).

⁹ Act of May 13, 2013, 83rd Leg., R.S., ch. 170 (HB 1600), §2.96, 2013 Tex. Gen. Laws 725, 730; Act of May 13, 2013, 83rd Leg., R.S., ch. 171 (SB 567), §96, 2013 Tex. Gen. Laws 772, 812.

On September 2, 2014, Equality filed a motion for reconsideration and in the alternative a request for summary decision or a request for certification of an issue to the Commission.¹⁰ On the same day, Equality timely filed an appeal of SOAH Order No. 3 in which it incorporated its arguments in its motion for reconsideration. Equality asserted that the ALJ erred by not enforcing the settlement agreement because a mediated settlement agreement is an enforceable contract.¹¹ Equality cited section 154.071(a) of the Texas Civil Practice and Remedies Code, rule 11 of the Texas Rules of Civil Procedure, and the TCEQ's alternative-dispute-resolution rule, 30 TAC § 40.8.¹² Commission Staff timely filed a response in support of Equality's appeal in which it also argued that the settlement agreement is a binding contract.¹³ Douglas late filed a response opposing Equality's appeal on September 22.

On September 16, 2014, the SOAH ALJ denied Equality's motion to reconsider SOAH Order No. 3 and the alternative requests for summary decision or to certify an issue to the Commission.¹⁴ The SOAH ALJ first noted that under the TCEQ's remand rule, 30 TAC § 80.101, that only the applicant—here the utility—may request a remand to the executive director.¹⁵ Furthermore, the ALJ concluded that the rule was inapplicable here because all parties had not reached a settlement, facts and issues were controverted, the application was not uncontested, and the utility did not agree to the action of the executive director.¹⁶ Next, the ALJ concluded that section 154.071(a) of the Texas Civil Practice and Remedies Code did not apply here primarily because a SOAH ALJ has no authority to enforce a contract.¹⁷ The ALJ then concluded that the TCEQ's alternative-dispute-resolution rules were inapplicable because those rules only applied to procedures conducted by the TCEQ itself.¹⁸ Finally, the ALJ stated that Equality had not addressed 'whether entry of the settlement would impact the public's

¹⁰ Equity's Motion for Reconsideration or First Alternative Motion for Summary Decision or Second Alternative Request for Certified Issue (Sept. 4, 2014).

¹¹ Equity's Motion for Reconsideration at 3.

¹² *Id.* at 3-4.

¹³ Commission Staff's Response at 2 (Sept. 8, 2014).

¹⁴ SOAH Order No. 6 (Sep. 16, 2014).

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 4.

expectation of continuous and adequate service within Douglas's service area—an issue raised by Douglas in its opposition to the TCEQ executive director's motion to dismiss and remand—and a statutory obligation of every holder of a certificate of convenience and necessity.¹⁹

II. Discussion

This Commission is an administrative agency and its powers and duties are limited to those expressly conferred upon it by statute and those implied powers reasonably necessary to accomplish its express responsibilities.²⁰ In fixing water and sewer rates, the Commission has an express duty to establish revenues at a level that will “permit the utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable and necessary operating expenses” and “preserve the financial integrity of the utility.”²¹

In carrying out this duty, the Commission may adopt a settlement agreement provided the Commission's decision is supported by the evidentiary record and consistent with the law.²² For a non-unanimous settlement, the parties opposing a settlement must be given an opportunity to be heard on their reasons for opposing the settlement; the matters contained in the settlement must be supported by a preponderance of the credible evidence; the settlement must be in accordance with applicable law; the settlement must result in just and reasonable rates; and the results must be in the public interest, including the interest of those opposing the stipulation.²³

The actions of Douglas in this matter raise serious questions. Permitting a settlement signatory to unilaterally withdraw from the settlement runs the serious risk of subverting an integral purpose of settlement: timely resolution of controversies. Allowing such withdrawal could hinder settlements because parties might be less willing to engage in settlement

¹⁹ *Id.* at 4-5.

²⁰ *Texas Municipal Power Agency v. Public Utility Commission of Texas*, 253 S.W.3d 184, 192-93 (Tex. 2007), quoting *City Public Service Board of San Antonio* at 315 (Tex. 2001); *Southwestern Electric Power Co. v. Grant*, 73 S.W.3d 211, 216 (Tex. 2002), citing *State v. Public Utility Commission*, 883 S.W.2d 190, 194 (Tex. 1994).

²¹ Texas Water Code Ann. § 13.183(a) (TWC).

²² *Nucor Steel-Texas v. Public Utility Commission of Texas*, 363 S.W.3d 871, 890 (Tex. App. – Austin, 2012, no pet.); *City of El Paso v. Public Utility Commission*, 883 S.W.2d. 179, 183 (Tex. 1994)

²³ *City of El Paso*, 883 S.W.2d. at 183 (Tex. 1994).

negotiations for fear of the negotiations serving as undercover fishing expeditions or vehicles for delay. On the other hand, Douglas has asserted that the settlement-agreement rates would result in a negative cash flow for the utility.²⁴ If true, those rates would not provide a reasonable opportunity to earn a reasonable return on Douglas's invested capital, would not allow Douglas to cover its operating expenses, and might not preserve Douglas's financial integrity. The Commission may not adopt a settlement agreement with such rates because the agreement would not be in accordance with applicable law.²⁵

However, the assertions of Douglas remain just that; there is no evidence in this case that would allow the ALJ or this Commission to conclude that the rates in the settlement agreement put Douglas in a negative cash-flow position. Therefore, the Commission determines it is appropriate for SOAH to hold a limited hearing to develop an evidentiary record and prepare a proposal for decision on whether or not the settlement agreement contains rates that violate TWC § 13.183(a). The Commission also concludes that Douglas, the utility and proponent of this proposition, should bear the burden of proof.²⁶

If after hearing the Commission determines that the settlement rates violate TWC § 13.183(a), this matter will have to proceed to a hearing to establish appropriate rates for Douglas. In that case, the Commission will remand the matter to SOAH and issue a preliminary order. If the Commission determines that the settled rates are in accordance with TWC § 13.183(a), the Commission will then address the settlement agreement.

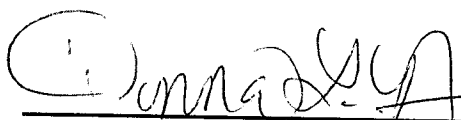
²⁴ Douglas's Response to Motion to Dismiss and Remand at 1.

²⁵ *City of El Paso*, 883 S.W.2d. at 183.

²⁶ See TWC § 13.184(c).

SIGNED AT AUSTIN, TEXAS the 29th day of October, 2014

PUBLIC UTILITY COMMISSION OF TEXAS



DONNA L. NELSON, CHAIRMAN


KENNETH W. ANDERSON, JR., COMMISSIGNER
BRANDY D. MARTY, COMMISSIONER