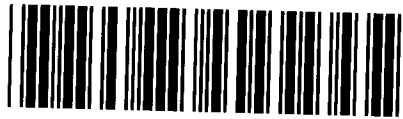


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SOAH DOCKET NO. 473-14-5140
DOCKET NO. 42860

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

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§

PUBLIC UTILITY COMMISSION
OF TEXAS

PUBLIC UTILITY COMMISSION
FILING CLERK

**COMMISSION STAFF'S REPLY TO DOUGLAS UTILITY COMPANY'S RESPONSE
TO STAFF'S STATUS UPDATE**

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest and files this reply to Douglas Utility Company's (DUC) response to Staff's status update and would show the following:

I. ARGUMENTS AND AUTHORITIES

Staff files this limited reply to DUC's response in order to correct two misperceptions of DUC. DUC incorrectly states that the Commission addressed interim rates and that an evidentiary hearing would be necessary to set interim rates. First, the Commission never addressed interim rates at the Open Meeting held on September 26, 2014 or in the Commission's Order on Appeal of SOAH Order No. 3. Staff is attaching hereto the full open meeting transcript regarding this case. As may be seen, each Commissioner was inclined to adopt the settlement rates in a final order—so long as the rates did not result in harm to DUC's financial integrity. The sole purpose of the remand is to determine whether the settlement rates would result in harm to the utility's financial integrity, yet this case has not been heard in almost a year due to very unfortunate circumstances. However, continued delay may be avoided by setting interim rates.

Second, DUC is incorrect in its assertion that setting interim rates would require an evidentiary hearing.¹ Interim rates may be established at any time during the proceeding where the proposed rates "could result in . . . unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility."² Further, "the Commission may limit its consideration of the matter to oral arguments of the affected parties."³

DUC's proposed, and currently effective, rates are unjust and unreasonable because they result in an unreasonably high return on its invested capital used and useful in rendering service

¹ DUC's Response to Commission Staff's Status Update and Request for Interim Rates.
² 16 TAC § 24.29(d).

81

to the public over and above its reasonable and necessary operating expenses. Each Commissioner has indicated their preference for adopting the settlement rates. The only issue is whether the settlement rates would impair DUC's financial integrity. Setting interim rates at this juncture would avoid the additional cost to ratepayers if the final rate authorized is less than that of DUC's proposed rate. In setting interim rates, the ALJ must determine whether the interim rates would result in an unreasonable economic hardship on the utility.⁴ The economic hardship standard is a distinct legal standard from the financial integrity standard. A critical distinction in this case is that interim rates may be trued up to the final rates set by the Commission.⁵ Whether or not the interim rates have the potential to result in an economic hardship is dependent not only on the sufficiency of the interim rates, but on the amount of time for which they are effective.⁶

The settlement rates provide DUC the opportunity to earn a reasonable return on its invested capital over and above its reasonable and necessary operating expenses as Staff is prepared to demonstrate at the pre-hearing conference. However, the ALJ need not reach such a review at this time. DUC has the opportunity to effectively prosecute its case to a final Commission decision. DUC may not argue that interim rates cause an undue economic hardship when it is DUC's requested indefinite continuance that necessitates interim rates. In other words, DUC should not be permitted to use its own voluntary request for an indefinite continuance as an exigent circumstance requiring the denial of interim rates.

However, if the ALJ believes she needs evidence on the sufficiency of the settlement rates or the financial integrity of the utility given the settlement rates, Staff is willing to provide written testimony if given a one week notice prior to any filing deadline or one week notice prior to the prehearing conference if live testimony is preferred.

³ 16 TAC § 24.29(e).

⁴ 16 TAC § 24.29(e).

⁵ 16 TAC §§ 24.29(h) and (i).

⁶ Commission Staff's Status Update & Request for Interim Rates

II. CONCLUSION

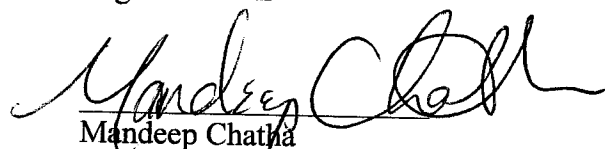
Staff provides these comments and the attached open meeting transcript to clarify the record. Given the unfortunate circumstances in this case, Staff also provides these comments to alert the ALJ and parties of Staff's position in advance of the upcoming prehearing conference.

Dated: August 3, 2015

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director
Legal Division

Stephen Mack
Managing Attorney
Legal Division

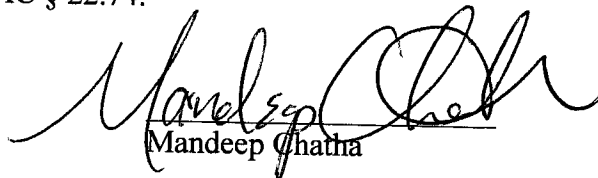


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**SOAH DOCKET NO. 473-14-5140
DOCKET NO. 42860**

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this August 3, 2015 in accordance with 16 TAC § 22.74.



Mandeep Chattha

1 TRANSCRIPT OF PROCEEDINGS
2 BEFORE THE
3 PUBLIC UTILITY COMMISSION OF TEXAS
4 AUSTIN, TEXAS
5
6
7
8

9 IN THE MATTER OF THE OPEN MEETING)
10 OF FRIDAY, SEPTEMBER 26, 2014)
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15

16 BE IT REMEMBERED THAT AT approximately 9:35
17 a.m., on Friday, the 26th day of September 2014, the
18 above-entitled matter came on for hearing at the Public
19 Utility Commission of Texas, 1701 North Congress Avenue,
20 William B. Travis Building, Austin, Texas,
21 Commissioners' Hearing Room, before DONNA L. NELSON,
22 CHAIRMAN and KENNETH W. ANDERSON, JR., and BRANDY MARTY,
23 COMMISSIONERS; and the following proceedings were
24 reported by Lou Ray, Certified Shorthand Reporter.
25

1 CHAIRMAN NELSON: Right. And I do, too.
2 And so if we could get -- if y'all could work with the
3 stakeholders as you've been doing and with ERCOT, and
4 come up with a way of handling the two parallel paths --

5 MS. DENNEY: Okay.

6 CHAIRMAN NELSON: -- and bring them back
7 to us, then I think we're pretty much amenable to
8 y'all -- I'm sure we're overlooking things. So if you
9 come back to us and say, Hey, have you thought about
10 this and -- I think it would be ripe for us to discuss
11 at the meeting. Okay. Thank you.

12 MS. DENNEY: Thanks.

13 CHAIRMAN NELSON: Okay. 15 through 22 are
14 not taken up today -- actually through 25. So now we
15 move to the water part of the agenda. Let's just wait a
16 minute and let the room clear.

17 AGENDA ITEM NO. 26

18 DOCKET NO. 42860 - APPLICATION OF DOUGLAS
19 UTILITY COMPANY TO CHANGE WATER AND SEWER
 RATE/TARIFF IN HARRIS COUNTY

20 CHAIRMAN NELSON: Okay. Let's start with
21 Item 26, Docket No. 42860.

22 And this is one where a settlement was
23 reached, and then, I guess, a day or two afterwards the
24 water system company changed its mind. And so the issue
25 before us is whether to rely on the agreement or to, I

1 guess, send it back for hearing. And I have to tell you
2 I'm sort of leaning towards relying on the agreement
3 because I just worry about the precedent that it sets.
4 So I'd love to hear what the two of you think.

5 COMM. ANDERSON: And I -- that was my
6 initial reaction as well; that we're not in the business
7 of saving individuals from their own bad deals. On the
8 other hand, after looking at some of the other
9 settlement agreements, I hope that we don't see anymore
10 of these settlement agreements on -- written out on Big
11 Chief tablet and forms that are illegible.

12 We actually -- well, anyway, my concern
13 with simply accepting the settlement is that we're
14 really not permitted to do it if it violates -- violates
15 statute. And because Section 13.183 of the Water Code,
16 among its other provisions, requires that the
17 Commission, you know, set revenue that will permit a
18 utility a reasonable opportunity to earn a reasonable
19 return on invested capital used and useful and to
20 preserve the financial integrity, and I don't think we
21 can actually approve a settlement that violates the
22 statute.

23 And if in fact -- and that remains a
24 question -- as the company asserted that the settlement
25 would result in a negative cash flow, then I think it

1 would impair and potentially violate those two
2 provisions of the Water Code. The problem is, in this
3 case, there's no real evidence --

4 CHAIRMAN NELSON: That's right.

5 COMM. ANDERSON: -- as to whether the
6 settlement would either -- would result in negative cash
7 flow and what the impact of a negative cash flow would
8 be. The company merely asserts that it will result.

9 So what I think should happen is that the
10 Commission -- the Commission should deny the appeal, but
11 instruct the SOAH ALJ to conduct a limited hearing
12 solely on the issue of whether or not the settlement
13 rates would result in negative cash flow for Douglas
14 and, therefore, violate either of the two referenced --
15 referenced provisions. The hearing would develop a
16 record upon which the ALJ, and ultimately the
17 Commission, can determine whether or not the settlement
18 rates would violate the Water Code.

19 You know, if the settlement rates, you
20 know, comply with those two provisions of the Water
21 Code, then I would adopt the settlement, you know, as
22 is.

23 CHAIRMAN NELSON: Well --

24 COMM. ANDERSON: But if they do violate
25 the Water Code, then I think we should reject the

1 settlement, you know, issue a preliminary order and
2 instruct the ALJ to move forward with the procedural
3 schedule and hearing. I mean, that's how I would deal
4 with the issue, but --

5 CHAIRMAN NELSON: Well, I think from a
6 legal standpoint there's a real issue as to whether that
7 provision of the Texas Water Code, 13.183(a) where we're
8 preserving the financial integrity of the utility, I
9 think there's a real question if a utility enters into a
10 settlement if that then they have had the reasonable
11 opportunity and -- to earn a reasonable -- I mean, they
12 were in the best position of anyone when they were
13 having those settlements negotiations to know what the
14 financial integrity of the utility was.

15 And I just question whether, you know,
16 setting aside this and sending it back, I'm -- I am more
17 okay with sending it back to address that limited issue
18 as you described than I am with making it a broader --
19 but I do still, nonetheless, have concern about the
20 signal this sends.

21 So I guess with that sort of caution I
22 would say, one, if you go into a settlement, you should
23 understand what -- as a company, what's required to
24 maintain the financial integrity of the utility. And
25 the person who's there should either know that

1 information and have the ability to make a deal, but
2 they should also, if they don't have that ability to
3 know that information, they should have someone with
4 them who does.

5 COMM. ANDERSON: I agree, and I think this
6 certainly, in the preliminary order, if it comes to
7 that, then an issue that the ALJ ought to make a
8 recommendation on is -- is -- was the company negligent
9 and, therefore, should any attorneys' fees incurred by
10 the company after -- well, this -- from this date on, be
11 either excluded or reduced in some amount because -- the
12 recovery of those fees, because the reason those fees
13 were incurred was, you know, because of --

14 COMM. MARTY: Right.

15 COMM. ANDERSON: -- the Company's conduct
16 in this case.

17 CHAIRMAN NELSON: So what say you,
18 Commissioner Marty?

19 COMM. MARTY: I have a question. If we
20 were to approve their -- if we were to stick with the
21 settlement, then can the company back and do another
22 rate case right away?

23 CHAIRMAN NELSON: Yes.

24 COMM. ANDERSON: I think, yes, they could.
25 And that's a -- and that's -- I actually considered that

1 as well. And it's -- ultimately I was just trying to
2 comply with the Water Code, but I -- I certainly -- and
3 be a little more efficient. But, you know, I don't feel
4 so strongly about this that it's --

5 COMM. MARTY: Well, I do think you parsed
6 it in a really interesting way that I could probably
7 live with as well.

8 CHAIRMAN NELSON: But it does give me --

9 COMM. MARTY: It's a dangerous --

10 CHAIRMAN NELSON: Yeah. There needs to be
11 some really strong language in the order that comes out
12 about settlements, because I don't -- I don't want to be
13 presented with this situation again. And if I am, I'm
14 going to say the company is on notice that if they enter
15 into a settlement, then we're going to assume from a
16 legal standpoint that they have met the standards of the
17 Texas Water Code. Because ultimately it's their
18 obligation to do that.

19 COMM. ANDERSON: That's a valid point,
20 which is why it also, if -- if -- and these are all --
21 this is speculation -- but if we get to the point where
22 we have to issue a preliminary order, I think one of the
23 issues needs to be whether the company can recover its
24 attorneys' fees or how much they should recover given
25 that some of these costs are -- were clearly -- are

1 being incurred-- wouldn't have been incurred if the
2 company had -- or unlikely to occur if the company had
3 been on its toes.

4 MS. L. COOPER: So isn't that clear as
5 mud, Stephen?

6 MR. JOURNEYAY: As soon as you make a
7 motion, I think it will be.

8 (Laughter)

9 CHAIRMAN NELSON: Okay. So I will
10 entertain a motion to remand the case to SOAH for the
11 limited purpose of fleshing out the issue of whether the
12 settlement agreement allows the company to meet Texas
13 Water Code 13.183(a).

14 COMM. ANDERSON: That's -- I would second
15 that.

16 CHAIRMAN NELSON: So you move?

17 COMM. ANDERSON: I would move.

18 MR. JOURNEYAY: You want it limited just to
19 that section or just the reasonable opportunity to --

20 COMM. ANDERSON: Well, it would be the --

21 CHAIRMAN NELSON: Well, that's the
22 section. That's the --

23 COMM. ANDERSON: 13.183, whether it
24 violates 13.183.

25 MR. JOURNEYAY: Okay.

1 COMM. ANDERSON: And the two relevant
2 sections or subsections are the opportunity to earn -- a
3 reasonable opportunity to earn a reasonable return, and
4 preserve the financial integrity.

5 MR. JOURNEAY: Okay.

6 COMM. ANDERSON: Because I think there's
7 six -- if I recall, there's six clauses under that
8 section, but the only two I think that are directly
9 relevant are the two that I referred to.

10 MS. DWYER: Y'all have been discussing
11 (a) (1) and (a) (2).

12 COMM. ANDERSON: Yeah.

13 CHAIRMAN NELSON: Okay. So we have a
14 motion --

15 MR. JOURNEAY: And then so that if -- if
16 the Judge finds that the utility is not impaired or what
17 not, then the settlement agreement will stand?

18 COMM. ANDERSON: Yes. But if the Judge
19 finds there's a violation --

20 MR. JOURNEAY: Then it's okay to allow
21 them to withdraw and move forward --

22 COMM. ANDERSON: Yes, but I want a
23 preliminary order issued in that case, including the
24 issue I talked -- or at least I would like --

25 CHAIRMAN NELSON: You have to wonder, from

1 a judicial efficiency standpoint if what Commissioner
2 Marty suggests is more efficient, to just approve the
3 settlement and let them refile because then we're not in
4 the position where we're looking at whether the
5 settlement agreement allows them to earn -- you know,
6 meet the standards of 13.183(a) --

7 COMM. ANDERSON: If we did that, we'd have
8 to order -- it would still go back to the Judge -- or
9 somebody has to order a refund because they've been
10 collecting interim rates, if I recall.

11 MS. DWYER: That's correct.

12 COMM. ANDERSON: So if we do that, then I
13 think we'll need to include in that --

14 MR. JOURNEAY: Well, if the Judge finds
15 that they can't come out of the settlement agreement,
16 then there should be something to true-up the proposed
17 rates with the settled rates, I guess, that we would
18 need them to do also.

19 COMM. ANDERSON: Yeah. So it will be a
20 remand back to the Judge one way or the other.

21 CHAIRMAN NELSON: Okay. Let me ask. I'd
22 really be curious to see -- to discuss this with someone
23 from Staff who participated and say -- you know, because
24 I know that y'all said support the -- y'all supported
25 the concept of letting the settlement stand. So my

1 question would be: Do you have a concern that if we
2 left the settlement stand -- given the allegations that
3 the utility has made, do you have a concern about that
4 provision of the Water Code being violated?

5 MS. HUBBARD: Karen Hubbard for Staff.
6 Actually, yes, the Staff for TCEQ participated in the
7 mediation for two days, and we're in a position where we
8 could do nothing more than to support the mediation and
9 the agreement absent any record evidence whatsoever --

10 CHAIRMAN NELSON: Right.

11 MS. HUBBARD: -- other than a statement.
12 But we certainly would support the Commission's finding
13 to send it back to determine the violation in order to
14 actually protect the company.

15 CHAIRMAN NELSON: Okay.

16 COMM. MARTY: Okay.

17 CHAIRMAN NELSON: So with that do I have a
18 second?

19 COMM. MARTY: Yes -- wait. Let's see.
20 Did you make a motion? Who made a motion?

21 (Laughter)

22 CHAIRMAN NELSON: Ken did.

23 COMM. ANDERSON: I think I made -- I made
24 a motion that we refer it back to the ALJ -- that we
25 deny the appeal, but remand it back to the ALJ to

1 determine -- make the factual -- well --

2 CHAIRMAN NELSON: For the limited purpose.

3 COMM. ANDERSON: -- for the limited
4 purpose of examining whether the settlement agreement
5 violates 13.183(a)(1) and (a)(2) of the Water Code. If
6 they do -- if it does, if the Judge finds that, then we
7 would -- we'd have to issue a supplemental preliminary
8 order -- or maybe it would be a preliminary order, I'm
9 not sure where we stand procedurally -- which would come
10 back to us. If the Judge determines that it's not,
11 again, I guess, that would come back in the form of a
12 recommendation of some sort, and at that point, I would
13 just state on the record that I would support enforcing
14 the settlement agreement. But there's a fact -- there's
15 some evidence that has to be actually examined and a
16 factual determination made.

17 CHAIRMAN NELSON: That might be the
18 longest motion we've ever had.

19 (Laughter)

20 COMM. MARTY: And I second.

21 (Laughter)

22 CHAIRMAN NELSON: Thank you. Thank you.

23

24

25