



Control Number: 50200



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SOAH DOCKET NO. 473-20-3110.WS
PUC DOCKET NO. 50200



APPLICATION OF UNDINE TEXAS, § BEFORE THE STATE OFFICE
LLC AND UNDINE TEXAS §
ENVIRONMENTAL, LLC FOR §
AUTHORITY TO CHANGE RATES § OF
ADMINISTRATIVE HEARINGS

**UNDINE TEXAS, LLC AND UNDINE TEXAS ENVIRONMENTAL, LLC’S
OBJECTIONS TO BEECHWOOD HOA, INC.’S MOTION TO INTERVENE AND, IN
THE ALTERNATIVE, MOTION IN LIMINE**

Undine Texas, LLC and Undine Texas Environmental, LLC (Undine) file these Objections to Beechwood HOA, Inc.’s Motion to Intervene,¹ and would respectfully show as follows:

I. PROCEDURAL HISTORY

The Commission referred this case to the State Office of Administrative Hearings (SOAH) on March 19, 2020, requesting the assignment of an Administrative Law Judge (ALJ) to conduct a hearing and issue a proposal for decision, if necessary. Due to concerns regarding the coronavirus, the SOAH ALJs departed from the normal practice for Class B applications, as specified in SOAH Order No. 1.² Pursuant to SOAH Order No. 1, all requests for intervention were required to be filed by April 21, 2020, and there will not be a separate opportunity to intervene in person at the prehearing conference.³

Further, pursuant to the procedural schedule in SOAH Order No. 1, all objections to motions to intervene were required to be filed by April 27, 2020.⁴ Additionally, pursuant to 16 Texas Administrative Code (TAC) § 22.78(a) and SOAH Order No. 1, unless otherwise specified in the Commission’s procedural rules or an order issued in this case, any responses to a motion or other pleading shall be filed within five working days from receipt of the motion or pleading.⁵

¹ Beechwood HOA, Inc.’s Motion to Intervene (Apr. 27, 2020). (Beechwood HOA’s Motion to Intervene).

² SOAH Order No. 1 at 2-3 (Mar. 26, 2020).

³ SOAH Order No. 1 at 3.

⁴ SOAH Order No. 1 at 4.

⁵ See 16 TAC § 22.78; SOAH Order No. 1 at 8.

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Undine did not become aware of the late-filed request to intervene until after Undine had filed its objections to other interventions before 1:00 p.m. on April 27, 2020. Indeed, Undine only became aware of the late-filed intervention through receipt of an email from Ms. May on April 28 at 4:31 p.m. transmitting a pleading that has not yet been filed on the Commission's interchange. When counsel for Undine thereafter checked the interchange, it was discovered that Beechwood HOA's request for intervention had been filed behind Ms. May's individual request, and the description on the interchange was changed to reflect the intervention by Beechwood HOA instead of Ms. May. This description had been changed at some point in the afternoon on April 27, after counsel for Undine had double-checked the interchange to ensure that all requests for intervention had been identified. There was no indication by noon on April 27 that Beechwood HOA's intervention had been filed.

Because the deadline for filing objections to an untimely motion to intervene is not prescribed by the Commission's procedural rules or SOAH Order No. 1, this filing is timely, within five working days of Beechwood HOA's Motion to Intervene.

II. OBJECTIONS

Undine objects to Beechwood HOA's Motion to Intervene because it does not comply with the Commission's rules, as set forth below:

A. Motion to Intervene filed late.

Pursuant to SOAH Order No. 1, all requests for intervention were required to be filed by April 21, 2020, and there will not be a separate opportunity to intervene in person at the prehearing conference.⁶ Beechwood HOA's Motion to Intervene was filed on April 27, 2020.⁷ Undine objects to Beechwood HOA's Motion to Intervene because Beechwood HOA filed its Motion after April 21, 2020, in violation of Order No. 1.

⁶ SOAH Order No. 1 at 3.

⁷ See Beechwood HOA's Motion to Intervene at 1 (File stamp indicates the Commission received Beechwood HOA's Motion to Intervene on April 27, 2020)

Under 16 TAC § 22.104(d), in considering a motion to intervene that has not been timely filed, the ALJ shall consider:

(A) any objections that are filed; (B) whether the movant had good cause for failing to file the motion within the time prescribed; (C) whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the late intervention; (D) whether any disruption of the proceeding might result from permitting late intervention; and (E) whether the public interest is likely to be served by allowing the intervention.

Beechwood HOA has not demonstrated good cause for its late filing. SOAH Order No. 1 explicitly addresses the revised procedures for parties due to the coronavirus, and states that “parties should review the Commission’s website for the latest information on how the coronavirus is impacting the Commission filing requirements.”⁸ A party’s inexperience with the Commission’s filing procedures and requirements and/or failure to review the information provided by the Commission regarding the effects of the coronavirus are no excuse for failing to timely file a motion to intervene (in this case, over a week late). Beechwood HOA’s Motion to Intervene designates Britney May as the single representative to act for two individuals (Intervening Parties) and “all members of the Beechwood Community.”⁹ Ms. May had already filed a motion to intervene in this proceeding on April 22, 2020, so she was clearly aware of the deadline for filing a motion to intervene in this proceeding. Ms. May’s decision to wait an additional five days to intervene on behalf of the Beechwood HOA results in that intervention being too late to qualify for party status.

Beechwood HOA simply states that it wants “a good cause exception made due to the COVID-19 situation, as well as lack of personnel and staff available at the PUC during which help was needed.”¹⁰ Beechwood HOA makes no further effort to describe how the “COVID-19 situation” or the “lack of personnel and staff available” prevented Beechwood HOA from meeting the filing deadline or filing sooner than April 27, 2020. Beechwood HOA could have

⁸ SOAH Order No. 1 at 8.

⁹ Beechwood HOA’s Motion to Intervene at 1.

¹⁰ *Id.*

filed its Motion to Intervene at any point after the SOAH ALJ specified the filing requirements in SOAH Order No. 1, issued on March 26, 2020. Beechwood HOA does not present any evidence why it did not attempt to file its Motion to Intervene any sooner during the intervention period.

In Britney May's Response to Undine's Objections to her Motion to Intervene,¹¹ she claims, "[a]fter repeated inquiries regarding clarification of the filing procedure, on or about April 23, 2020, Ms. May was finally contacted via telephone by John Harrison of the Public Utility Division regarding her intention to file a Motion to Intervene on behalf of the Beechwood Community Home Owner's Association."¹²

Ms. May also includes an email from Commission Staff outlining her questions regarding a late filing for the Beechwood HOA motion to intervene. In this email, it appears that Ms. May recognized: (1) the past-due date for filing the motion to intervene on behalf of Beechwood HOA; (2) admission that she has already filed a motion to intervene as an individual; and (3) her concerns about representing the HOA, considering that she is involved in a pending lawsuit with Undine.¹³ Beechwood HOA does not explain why it was not originally included in Britney May's untimely filing on April 22, 2020.

Granting Beechwood HOA's Motion to Intervene would prejudice and burden the other parties in this proceeding. Beechwood HOA's untimely filing, featuring other deficiencies later described in this pleading, has already burdened parties in this proceeding. Undine has been burdened with addressing Beechwood HOA's disregard for the SOAH ALJ's clear orders. Additionally, granting Beechwood HOA's Motion to Intervene would prejudice all other parties who filed motions to intervene during the prescribed period.

¹¹ Undine notes that the referenced pleading by Ms. May was received by email on Tuesday, April 28, 2020, but has not been filed in this docket as of the filing of this Objection. Undine refers to the unfiled pleading because of the attempt made in that pleading to excuse the late-filing of the intervention of the Beechwood HOA, and because of Undine's concern that this Objection be timely presented to the ALJs.

¹² Britney May's Response to Undine's Objections to her Motion to Intervene at 2.

¹³ *Id.*, Ex. 1 at 8.

The public interest will not be served by granting Beechwood HOA's intervention. Granting Beechwood HOA's untimely intervention sets a standard in this case that the ALJ's orders and the procedural schedule are merely voluntary. All parties in this proceeding should be treated equally and should be held to the same standards.

Ms. May also claims that, "[o]n or about April 27, 2020, Ms. May was granted leave to amend her initial Motion to Intervene to show her representation in this matter was not just in a personal capacity, but also for the Beechwood Community Homeowner's Association as a whole (See Doc. No. 50200_1938_1063023)."¹⁴ Ms. May does not state who allegedly granted such leave. Because of the referral of this docket to SOAH, only the SOAH ALJs have the authority to allow a late intervention to be filed. The document Ms. May references does not represent an action by the SOAH ALJ granting a motion to amend her initial Motion to Intervene, but it merely reveals that Commission Staff uploaded a document to the interchange behind Britney May's original untimely Motion to Intervene. To Undine's knowledge, Ms. May has not presented a motion for leave to the SOAH ALJ to amend her Motion to Intervene in this matter. Parties' reliance on instruction or guidance from Commission Staff is not an excuse for failure to meet the SOAH ALJs' clear procedural instructions provided in SOAH Order No. 1.

Neither Ms. May nor Beechwood HOA have presented evidence to satisfy the requirements in the Commission's rules for Beechwood HOA's late intervention.¹⁵ For the foregoing reasons, Undine requests the ALJs deny Beechwood HOA's Motion to Intervene.

B. Failure to provide proof of authority to appear on behalf of another person.

Under 16 Texas Administrative Code (TAC) § 22.101(a), "[t]he presiding officer may require a representative to submit proof of his or her authority to appear on behalf of another person."¹⁶ Beechwood HOA's Motion to Intervene included contact information for two

¹⁴ *Id.* at 1.

¹⁵ *See* 16 TAC § 22.104(d).

¹⁶ *See Application of Sw. Pub. Serv. Co. for Auth. to Reconcile Fuel & Purchased Power Costs*, 473-19-1644, 2019 WL 919616, at *1 (Tex. S.O.A.H. Feb. 19, 2019) (Motion of individual to intervene was denied because:

individuals (Intervening Parties), without signatures, claiming to be “homeowners in the single-family residential community of Beechwood Community, and each being members of Beechwood HOA, Inc.”¹⁷ The Intervening Parties designated Britney May as the single representative “to act for the Intervening Parties and all the Members of the Beechwood Community,” without providing proof of their authority to undertake such representation.¹⁸ No documents have been provided that would indicate any action taken by the Beechwood Community or the Beechwood HOA, Inc. authorizing either the intervention or the claimed representation.

Undine objects to Beechwood HOA’s Motion to Intervene because the alleged representatives have not provided proof of Beechwood HOA’s determination to intervene or of their authority to appear in this proceeding on behalf of the HOA or the homeowners in the subdivision, as required by 16 TAC § 22.101(a). Accordingly, Undine requests the ALJs deny Beechwood HOA’s Motion to Intervene.

C. Failure to specify the particular persons or classes of persons the represented in this proceeding.

Under 16 TAC § 22.101(a), “[t]he authorized representative of a party shall specify the particular persons or classes of persons the representative is representing in the proceeding.”¹⁹ The Intervening Parties designated Britney May as the single representative “to act for the Intervening Parties and all the Members of the Beechwood Community.”²⁰ However, the Intervening Parties do not identify the homeowners whom they claim to represent in this

(1) he failed to “specify the particular persons or classes of persons” he was representing; (2) he submitted no proof of his authority to appear on behalf of all citizens of Texas; and (3) the claimed representation is too broad to encompass only persons with a justiciable interest in this case).

¹⁷ Beechwood HOA’s Motion to Intervene at 1.

¹⁸ *Id.*

¹⁹ *Sw. Pub. Serv. Co.*, *supra* footnote 6, at *1; *See also Formal Complaint of Ker-Seva Ltd., Adc W. Ridge, L.P., & Ctr. for Hous. Res., Inc. Against the City of Frisco*, 4, 2016 WL 6566222, at *1-*2 (Tex. S.O.A.H. Sept. 9, 2016) (Motion to intervene was denied, partially because no list of individuals seeking intervention was given).

²⁰ *Id.* at 1.

proceeding or any proof that they have been authorized to speak on behalf of other persons. Accordingly, Undine requests the ALJs deny Beechwood HOA's Motion to Intervene.

III. MOTION IN LIMINE

If the ALJs elect to allow Beechwood HOA to intervene in this proceeding, and deny Undine's objections above, Undine alternatively moves for a motion in limine restricting Beechwood HOA from introducing, mentioning, or in any way referring to the lawsuit filed by Ms. Britney May and others against Undine currently pending in Brazoria County, Texas (the "Beechwood Lawsuit"). Ms. May, Beechwood HOA's designated representative in its Motion to Intervene, is the lead plaintiff in the pending Beechwood Lawsuit. The Beechwood Lawsuit concerns claims by fourteen individuals, seeking money for personal injury and property damage purportedly arising from discolored water. None of the plaintiffs in that lawsuit pursued or exhausted their administrative remedies with either the Commission or the Texas Commission on Environmental Quality.

A motion in limine is a procedural device that permits a party to identify, before trial, certain evidentiary rulings that the court may be asked to make.²¹ The purpose of a motion in limine is to prevent the other party from asking prejudicial questions and introducing prejudicial evidence in front of the jury without first asking the court's permission.²² The same considerations apply to the exclusion of prejudicial evidence in an administrative proceeding because of the need to ensure that only evidence relevant to the Commission's decision be included in the administrative record.²³

Undine files this motion in limine to eliminate the possibility that Beechwood HOA will attempt to use this Commission proceeding as an avenue to acquire information for the pending lawsuit or to unfairly seek to prejudice the Commission. Undine moves to prevent Beechwood

²¹ See *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963).

²² *Id.*

²³ 16 TAC § 22.221(a) ("Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.").

HOA from introducing the issues present in the Beechwood Lawsuit that are distinct from any issues addressed in the Preliminary Order in this proceeding and that are being litigated in the courts, and to prevent such issues from being considered by the ALJs and/or Commission in this proceeding. Indeed, Ms. May has already introduced facts into this proceeding from the Beechwood Lawsuit that are irrelevant to determining the just and reasonable rates Undine may charge its customers, and she claims that she is “uniquely qualified to present information to this Court...” and “denying her ability to speak to her knowledge of the facts, given the context of this sister lawsuit...is unfairly prejudicial to Ms. May and the Beechwood Community.”²⁴ It is clear that Ms. May and the Beechwood HOA want to take this opportunity to litigate the issues present in the Beechwood Lawsuit. Undine asks that the motion in limine be granted to prevent these parties from attempting to litigate issues that are distinct from those presented in the Preliminary Order and are irrelevant to a determination of the rates to be charged by Undine.

Furthermore, Undine has removed from its Application all costs associated with defending the Beechwood Lawsuit.²⁵ Therefore, the Beechwood Lawsuit, the issues being litigated in that suit, and costs of defending that suit are properly excluded from consideration in this proceeding, as they are irrelevant to determining just and reasonable rates Undine may charge its customers.

Undine respectfully requests that the ALJs grant this motion in limine, and order that Beechwood HOA refrain from offering any evidence relating to any matter described above, directly or indirectly, before the Commission or before any ALJ overseeing this matter, during the hearing on the merits, through examining or cross-examining witnesses, offering documentary evidence, making closing argument, or otherwise. Further, Undine respectfully requests that Beechwood HOA and/or its counsel be ordered to instruct any and all witnesses they may call to refrain from any comment, mention, or reference to, directly or indirectly, in any

²⁴ Britney May’s Response to Undine’s Objections to her Motion to Intervene at 6 (currently not filed).

²⁵ See Undine Texas, LLC and Undine Texas Environmental, LLC’s Supplemental Response to OPUC’s Second Request for Information at 3 (Apr. 27, 2020).

manner whatsoever, any of the matters set forth in this motion, and to inform such witnesses of the consequences or violating the Commission's order.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Undine requests the ALJs sustain Undine's objections and deny Beechwood HOA's Motion to Intervene. Alternatively, Undine requests the ALJs grant Undine's motion in limine. Undine also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.**

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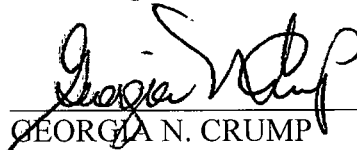
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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on April 29, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.



GEORGIA N. CRUMP