

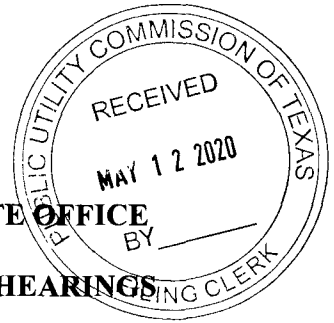
Control Number: 50200



Item Number: 1979

Addendum StartPage: 0

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



APPLICATION OF UNDINE TEXAS, §
LLC AND UNDINE TEXAS §
ENVIRONMENTAL, LLC FOR §
AUTHORITY TO CHANGE RATES §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 2
RULING ON MOTIONS TO INTERVENE AND MOTIONS IN LIMINE,
REQUIRING FILINGS FROM PARTY REPRESENTATIVES,
REVISING DISCOVERY DEADLINES

I. MOTIONS TO INTERVENE

State Office of Administrative Hearings (SOAH) Order No. 1 set the deadline for intervention as April 21, 2020. Timely motions to intervene were filed by Country Vista Homeowners Committee (CVHC); Demi-John Community Residents (Demi-John Residents); Mayfair South Homeowners Association, Inc. (Mayfair South HOA);¹ The Reserve at SugarTree POA, Inc. (SugarTree POA); Brandon Smith, Monica Jones, and Debbie Yancey, homeowners in the Reserve at SugarTree community and members of SugarTree POA; Homeowners Association of Tejas Lakes (Tejas Lakes HOA); Town of Dennis, Texas; Gary Blanchat; Marie Butler; and Eurice Meeker. Motions to intervene were also filed on April 22, 2020, by Riverside Ranch Homeowners Association (Riverside Ranch HOA), and Britney May, a homeowner in the Beechwood community and member of Beechwood HOA, Inc. (Beechwood HOA). On April 27, 2020, Ms. May and Samantha Stanley also filed a motion to intervene on behalf of Beechwood HOA.²

¹ Mayfair South HOA's motion to intervene is file-stamped April 20, 2020, but did not appear on the Commission's Interchange until May 1, 2020, or later. Based on the file-stamp, the Administrative Law Judges (ALJs) consider the motion to be timely filed. However, given the irregularities in its posting to the Commission's Interchange, the ALJs also consider the Applicants' objections to the intervention filed on May 8, 2020.

² Beechwood HOA's motion to intervene is document 50200_1938_1063023 under Item No. 1938 of the Commission's Interchange, which shows a filing date of April 21, 2020, but the file-stamp on the motion is dated April 27, 2020.

1979

Undine Texas, LLC and Undine Texas Environmental, LLC (collectively, Applicants) objected to several of the motions to intervene on various grounds. They objected to the interventions of Riverside Ranch HOA, Ms. May, and Beechwood HOA because they were filed late.³ Riverside Ranch HOA's motion does not contain a file-stamped date from the Public Utility Commission of Texas (Commission) confirming when it was filed, but the Commission's Interchange filing system shows the filing date as April 22, 2020. Ms. May's intervention is file-stamped April 22, 2020. Beechwood HOA's intervention is file-stamped April 27, 2020, but requests a good cause exception to the intervention deadline due to COVID-19 and the lack of Commission personnel to assist with the filing.

Under 16 Texas Administrative Code (TAC) § 22.104(d)(1), a late-filed motion to intervene may be granted after considering:

- (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.

The Applicants' objections primarily point to the lateness of the filings. However, the Administrative Law Judges (ALJs) find that COVID-19 has resulted in unprecedented procedural changes, including the need for online filings and the loss of the usual ability to intervene in person at a prehearing conference, that provide good cause for accepting Riverside Ranch HOA's and Ms. May's interventions, which were one day late. Further, Beechwood HOA's response to the

³ The Applicants also objected to Mayfair South HOA's motion to intervene as late-filed, but as stated above, the ALJs consider the motion to be timely filed.

Applicants' objection includes copies of communications with the Commission starting prior to the intervention deadline that show a good-faith effort to comply with the filing requirements. Given that a procedural schedule has been set, there is no indication that the late-filed interventions will result in prejudice to, or burdens upon, existing parties, or a disruption of the proceeding. The ALJs also find that the public interest is likely to be served by allowing the interventions. Accordingly, the objections are overruled.

The Applicants also objected to Ms. May's intervention because she did not include her email address. However, the Applicants state that they later obtained Ms. May's email address, and she also included it in her April 27, 2020 filing on behalf of Beechwood HOA. Accordingly, the ALJs conclude that this objection is moot.

The Applicants objected to Mayfair South HOA's motion to intervene because it was not served on the Applicants. Due to irregularities in how the motion was filed on the Commission's Interchange, the Applicants state that the lack of service would have resulted in a lack of fair notice of the pleading if they had not been alerted by SOAH personnel. However, the Applicants were able to respond to the motion, and the ALJs do not deny the intervention on that basis. The parties are advised that when they file a document with the Commission, they must also serve the document on every other party in this proceeding using email service.⁴

The Applicants also objected to the interventions of Beechwood HOA; CVHC; Demi-John Residents; Mayfair South HOA; Riverside Ranch HOA; SugarTree POA and the representational intervention of Mr. Smith, Ms. Jones, and Ms. Yancey; and Tejas Lakes HOA on the basis that they did not provide proof of authority to appear on behalf of another person and did not specify the particular persons or classes of persons represented. The Applicants raise these objections under 16 TAC § 22.101(a), which states that:

Any person may appear before the commission or in a hearing in person or by authorized representative. The presiding officer may require a representative to

⁴ See SOAH Order No. 1 (Mar. 26, 2020).

submit proof of his or her authority to appear on behalf of another person. The authorized representative of a party shall specify the particular persons or classes of persons the representative is representing in the proceeding.

Responses were filed by CVHC and SugarTree POA.⁵ CVHC provided a list of homeowners who had signed proxies authorizing the individuals who moved to intervene in this case to represent them.⁶ SugarTree POA filed a power of attorney executed by Kel Devlin, president and general partner of Yalumba Partners, LP (Yalumba), granting Mr. Smith authority to act on Yalumba's behalf. The power of attorney represents that Yalumba is the developer of the SugarTree community, a lot owner, and declarant of SugarTree POA.⁷

Under 16 TAC § 22.101(a), a representative is not required to submit proof of authority to appear on behalf of another person unless the presiding officer requires it. No such order has been issued in this case, and therefore, the ALJs do not deny the motions to intervene on that basis. However, the ALJs conclude that proof of authority should be required. After a review of the motions and filings, the ALJs conclude that CVHC has provided sufficient proof of authority to represent the homeowners listed as signing proxies authorizing its representation. While SugarTree POA submitted a power of attorney authorizing Mr. Smith to act on behalf of Mr. Devlin and Yalumba, it does not provide proof that either Mr. Devlin or Yalumba is authorized to act on behalf of SugarTree POA. Further, the ALJs do not reach a conclusion on whether Mr. Devlin or Yalumba are affected persons because no motions to intervene were filed by them or on their behalf.

Accordingly, the representatives of **Beechwood HOA, Demi-John Residents, Mayfair South HOA, Riverside Ranch HOA, SugarTree POA, and Tejas Lakes HOA** are **ORDERED** to file on or before **May 27, 2020**, proof of their authority to appear on behalf of the

⁵ Ms. May filed a response, but did not address the Applicants' objections to Beechwood HOA's intervention.

⁶ Due to concerns for the privacy of the homeowners, CVHC did not provide copies of the executed proxies, which contain the homeowners' addresses, phone numbers and email addresses.

⁷ In this context, a declarant is a developer of a planned community who is named in the declaration of restrictive covenants and may retain control over the property owners' association. *See* Tex. Prop. Code § 209.00591(c).

entities they purport to represent. Examples of such proof may include bylaws identifying designated persons to act on behalf of the group, official meeting minutes documenting the designation of a representative, or a letter from an officer of the group designating a representative along with proof of the officer's authority. The filings should also identify the particular persons or classes of persons each representative is representing. The ALJs note that if "classes of persons" can be identified (e.g., all members of the group), a listing of each individual is not required. The ALJs will address the motions to intervene for Beechwood HOA, Demi-John Residents, Mayfair South HOA; Riverside Ranch HOA, SugarTree POA, and Tejas Lakes HOA at the prehearing conference scheduled for June 2, 2020. These entities shall have the rights and obligations of a party pending the ALJs' final rulings on the motions.⁸

No objections were filed to the interventions of Town of Dennis, Mr. Blanchat, Ms. Butler, and Ms. Meeker, nor to the intervention of Mr. Smith, Ms. Jones and Ms. Yancey in their individual capacities as SugarTree homeowners. Therefore, their motions are **GRANTED**.

Having overruled the objections to CVHC's and Ms. May's interventions, their motions to intervene are **GRANTED**.

II. MOTIONS IN LIMINE

If Ms. May's and Beechwood HOA's interventions are granted, the Applicants alternatively request a motion in limine restricting Ms. May and Beechwood HOA from referring to the pending lawsuit against the Applicants in Brazoria County, Texas, involving claims by fourteen individuals, including Ms. May as the lead plaintiff, for personal injury and property damage purportedly arising from discolored water (Beechwood Lawsuit). The Applicants state that they have removed all costs of defending against the Beechwood Lawsuit from their application and that it is not relevant to this proceeding. Ms. May responded that the motion in limine is vague, overly broad, premature, and without valid basis.

⁸ See 16 Tex. Admin. Code § 22.104(c).

A motion in limine is a procedural device that prevents a party from asking prejudicial questions or introducing prejudicial evidence before a jury without first asking the court's permission.⁹ Therefore, a motion in limine is not proper when a case is tried by a judge, rather than a jury.¹⁰ To the extent that the Applicants' motion is seeking to limit the scope of this proceeding to relevant issues, the motion is premature. If discovery or testimony is filed that goes beyond the scope of this proceeding, the parties may object to such filings at that time. Accordingly, the Applicants' motions in limine are **DENIED**. The ALJs advise the parties that only relevant evidence is admissible in this proceeding¹¹ and requests for information must be reasonably calculated to lead to the discovery of admissible evidence.¹²

III. PROCEDURAL SCHEDULE

SOAH Order No. 1 established a provisional procedural schedule to govern this proceeding, subject to future input by the parties. On April 27, 2020, the Applicants requested the following modifications to the discovery deadlines set in SOAH Order No. 1:

1. For written discovery on the Applicants' application and direct testimony:
 - a. Responses are due within **15 calendar days** of the discovery request; ...

2. For written discovery on Staff's and Intervenors' direct testimony:
 - a. Responses are due within **6 calendar days** of the discovery request; ...

3. For written discovery on the Applicants' rebuttal testimony and Staff's and Intervenors' cross-rebuttal testimony:
 - a. Responses are due within **5 business days** of the discovery request; ... and

⁹ *Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, 526 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

¹⁰ *Id.*

¹¹ Tex. R. Evid. 401-402.

¹² Tex. R. Civ. P. 192.3(a).

4. Written discovery requests received after 2:00 p.m. on a Friday are deemed to have been received on the following Monday.

The Applicants state that the existing deadlines are shorter than those commonly established in SOAH proceedings and that COVID-19 has created difficulties in responding to multiple sets of discovery while the Applicants' employees are working remotely and separately. On May 1, 2020, responses were filed by the Office of Public Utility Counsel, which stated that it requested change No. 2 above and was unopposed to the other changes, and by Staff, which stated that it concurred with the existing procedural schedule. The Applicants' request notes that Staff did not agree to change No. 3 above, but Staff's response did not address it. No other responses were filed. The ALJs conclude that the Applicants showed good cause for the requested changes. Accordingly, the four discovery-deadline modifications listed above are **ADOPTED**.

No other changes to the provisional procedural schedule and deadlines established in SOAH Order No. 1 were filed. Therefore, except as modified above, the procedural schedule and deadlines established in SOAH Order No. 1 shall govern this proceeding.

SIGNED May 12, 2020.



ROSS HENDERSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



CASSANDRA QUINN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS