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PETITION OF RODNEY EARL	§	PUBLIC UTILITY COMMISSION
MOHNKE, STEPHEN LEE MOHNKE,	§	
MELVIN MAX MOHNKE, KENNETH	§	OF TEXAS
WAYNE MOHNKE, KATHLEEN ANN	§	
MOHNKE-BLAKELY, AND MEL	§	
MOHNKE, TRUSTEE OF THE	§	
MOHNKE LIVING TRUST DATED	§	
DECEMBER 7, 1996, TO AMEND H-M-	§	
W SPECIAL UTILITY DISTRICT'S	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY IN HARRIS COUNTY	§	
BY EXPEDITED RELEASE	§	

ORDER NO. 9
GRANTING PETITIONERS' REQUEST FOR AN ORDER THAT PETITIONERS ARE
NOT OBLIGATED TO RESPOND TO DISCOVERY

This Order addresses the August 5, 2021 requests for information (RFIs) filed by H-M-W Special Utility District to Rodney Earl Mohnke, Stephen Lee Mohnke, Melvin Max Mohnke, Kenneth Wayne Mohnke, Kathleen Ann Mohnke-Blakely, and Mel Mohnke, Trustee of the Mohnke Living Trust dated December 7, 1996 (collectively, the petitioners). On August 25, 2021, the petitioners objected to the RFIs in their entirety and requested that the administrative law judge (ALJ) enter an order finding that the petitioners are not obligated to respond to the RFIs. The petitioners contend that, because streamlined expedited release cases are not contested cases and there is no right to a hearing in such cases,¹ there is also no right to conduct discovery in such cases.

The Administrative Procedure Act (APA)² is applicable to all state agencies, including the Commission, and its purpose is to “provide minimum standards of uniform practice and procedure for state agencies.”³ The APA defines a “contested case” as “a proceeding . . . in which the legal

¹ Texas Water Code §§ 13.254 and 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(h)(7).

² Administrative Procedure Act, Tex. Gov't Code §§ 2001.001–.903.

³ Tex. Gov't Code § 2001.001(1).

rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”⁴ The Commission’s rules use an identical definition.⁵ Under the definition, a “contested case” is a type of “proceeding.” The APA empowers the parties to a “contested case” to engage in discovery.⁶ The APA does not authorize the use of discovery outside the context of a contested case.

The Commission’s procedural rules, found at chapter 22 of the Texas Administrative Code (TAC), generally follow the approach taken in the APA, although the rules sometimes use different terminology. Rather than using the term “contested cases,” the Commission’s rules often refer to “proceedings.” For example, the purpose of the Commission’s rules is to “provide a system of procedures for practice before the [Commission] that will promote the just and efficient disposition of proceedings,” and the procedural rules “govern the initiation, conduct, and determination of proceedings required or permitted by law . . . whether instituted by order of the Commission or by the filing of an application, complaint, petition, or any other pleading.”⁷

Under 16 TAC § 22.2(35), a “proceeding” is defined as “[a]ny hearing, investigation, inquiry or other fact-finding or decision-making procedure, including the denial of relief or the dismissal of a complaint, conducted by the commission or the utility division of [the State Office of Administrative Hearings].” This definition indicates that a proceeding has a broader definition than a contested case; that is, a proceeding encompasses more than solely matters in which there is a right to an adjudicative hearing.

Unlike the APA, the Commission’s rules regarding discovery repeatedly use the word “proceeding,” rather than the term “contested case.”⁸ At first glance, this might suggest that the Commission rules allow discovery in a broader array of matters than solely in contested cases.

⁴ Tex. Gov’t Code § 2001.003(1).

⁵ 16 TAC § 22.2(16).

⁶ *See, e.g.* Tex. Gov’t Code § 2001.091 (state agency “in which a contested case is pending” may order a party to produce documents); Tex. Gov’t Code § 2001.092 (the identities of witnesses “in a contested case” are discoverable); Tex. Gov’t Code §§ 2001.094-.102 (authorizing the taking and use of depositions in “contested cases”).

⁷ 16 TAC § 22.1(a) and (b)(1).

⁸ *See, e.g.*, 16 TAC § 22.141(a) (parties may obtain discovery “that is relevant to the subject matter in the proceeding”); 16 TAC § 22.142(d)(1)(A), (B), (G), (H) (when deciding whether to limit the scope of discovery, the presiding officer must consider the “type of proceeding,” the complexity of “the proceeding, the novelty of “the

Upon closer inspection, however, it becomes clearer that the intent of the Commission's rules is that, consistent with the APA, discovery should be allowed only in those cases in which there is a right to an adjudicative hearing. The Commission's rules repeatedly explain when and how "parties" may participate in discovery.⁹ Under the Commission's rules, "parties to proceedings have the right to present a direct case, cross-examine all witnesses, conduct discovery, make oral or written legal arguments, and otherwise fully participate in any proceeding."¹⁰ The rights to present a direct case, cross-examine witnesses, conduct discovery, and make oral arguments are the kinds of rights that exist within a contested case. They do not exist outside of a contested case. Therefore, the ALJ concludes that in a Commission proceeding that is not a contested case (i.e., in which there is no right to an adjudicative hearing) there is no right to conduct discovery.

The petition at issue in the present docket is for streamlined expedited release. The Commission has repeatedly held that such dockets do not constitute contested cases and do not include a right for an adjudicative hearing. The procedure for seeking streamlined expedited release is set forth in 16 TAC § 24.245(h). Under that rule, a party seeking streamlined expedited release must file a petition, and any supporting documentation, that is verified by a notarized affidavit. The CCN holder may file a response to the petition within the specified timeframe, which must be verified by a notarized affidavit. Under 16 TAC § 24.245(h)(7), the Commission's decision will be based on "the information filed by the landowner, the current CCN holder, and Commission Staff" and "[n]o hearing will be held." Because there is no opportunity for an adjudicative hearing in a streamlined expedited release case and streamlined expedited release cases are not contested cases, the participants are not entitled to conduct discovery.

Accordingly, the ALJ grants the petitioners' request and strikes H-M-W SUD's RFIs.

proceeding," and the scope of discovery in "similar proceedings"); 16 TAC § 22.143 (allowing depositions in "any proceeding"); 16 TAC § 22.144(b)(2) (requiring RFIs to be served upon "all parties to the proceeding").

⁹ See, e.g., 16 TAC § 22.141(a) ("parties may obtain discovery"); 16 TAC § 22.142(a) (the presiding officer may limit discovery "to protect a party"); 16 TAC § 22.143(b) (allowing "the parties" to waive the requirement to issue a commission for a deposition); 16 TAC § 22.144(a) (empowering "any party" to serve RFIs "upon any other party").

¹⁰ 16 TAC § 22.102(b).

Signed at Austin, Texas the 10th day of September 2021.

PUBLIC UTILITY COMMISSION OF TEXAS

A handwritten signature in black ink, appearing to read "Christina Denmark", written over a horizontal line.

CHRISTINA DENMARK
ADMINISTRATIVE LAW JUDGE