

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

November 17, 2006

Derek Seal  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2006 NOV 17 PM 1:20  
CHIEF CLERK'S OFFICE

Re: SOAH Docket No. 582-06-2110; TCEQ Docket No. 2006-0240-UCR; In Re: In the Matter of the Appeal Relating to the Water Rates Adopted by Millersview-Doole Water Supply Corporation

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 6, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than December 18, 2006.

This matter has been designated **TCEQ Docket No. 2006-0240-UCR; SOAH Docket No. 582-06-2110**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Vickery".

Travis Vickery  
Administrative Law Judge

TV/rm  
Enclosures  
cc: Mailing List

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**AGENCY: Environmental Quality, Texas Commission on (TCEQ)**

**STYLE/CASE: MILLERSVIEW-DOOLE WATER SUPPLY CORP**

**SOAH DOCKET NUMBER: 582-06-2110**

**REFERRING AGENCY CASE: 2006-0240-UCR**

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ TRAVIS VICKERY**

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**REPRESENTATIVE / ADDRESS**

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-06-2110  
TCEQ DOCKET NO. 2006-0240-UCR

IN THE MATTER OF THE APPEAL § BEFORE THE STATE OFFICE  
RELATING TO THE WATER RATES §  
ADOPTED BY MILLERSVIEW- § OF  
DOOLE WATER SUPPLY §  
CORPORATION § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

Ratepayers of Millersview-Doole Water Supply Corporation (Millersview-Doole or Utility) appealed a water rate increase set by the Millersview-Doole's Board of Directors (Board) to the Texas Commission on Environmental Quality (TCEQ or Commission), pursuant to the Commission's appellate authority established in TEX. WATER CODE (Water Code) § 13.043.

On July 14, 2006, prior to the preliminary hearing, the Utility filed a Motion for Dismissal for lack of jurisdiction under Water Code § 13.043(c) and 30 TEX. ADMIN. CODE (TAC) § 291.41(b) (Motion to Dismiss). The Utility argued that the ratepayers failed to file a copy of the petition with the Utility within ninety days of the effective date of the rate change. The Utility did not claim surprise or undue prejudice because of this omission. No party disputed that filing a copy of the petition with the Utility within the ninety day deadline is a jurisdictional prerequisite. Therefore, jurisdiction is the only issue addressed herein, not the merits of the rate increase.

For the reasons set forth below, the Commission lacks jurisdiction to consider this appeal because a copy of the petition was not served upon or otherwise delivered to the Utility within ninety days of the effective date of the rate increase. Therefore, the ALJ recommends that this case be dismissed.

## II. PROCEDURAL HISTORY

The Board adopted the rates under appeal in this proceeding at a meeting on November 21, 2005. The effective date of the new rates was January 1, 2006 (Effective Date). Pursuant to Water Code § 13.043(b)(1), the ratepayers filed a petition (Appeal) with the Commission on February 17, 2006. The ratepayers did not file a copy of the Appeal with the Utility. Upon determining that at least ten percent of the affected customers had signed the petition, the Utilities Financial Review Team of the Commission requested the referral of this matter to the State Office of Administrative Hearings (SOAH) on March 8, 2006, for a contested case hearing.

After the matter was transferred to SOAH, motions for continuance of the preliminary hearing were granted on May 11 and June 5, 2006. On July 14, 2006, the Utility filed the Motion to Dismiss, attaching evidence<sup>1</sup> that it had yet to be served with the Appeal. On July 28, 2006, Administrative Law Judge (ALJ) Travis Vickery conducted a preliminary hearing, admitted a number of individual ratepayers as parties (Ratepayers), and assigned Jeffrey Sutton as representative of the Ratepayers. The ALJ also set up a briefing schedule for responses to the Motion to Dismiss. On August 14, 2006, the ED filed a response to the Motion to Dismiss stating that he had no objections to the motion.

On August 16, 2006, Mr. Sutton filed a Motion to withdraw as the Ratepayer's representative. On August 23, 2006, the Utility filed a response objecting to Mr. Sutton's withdrawal until a new representative could be retained. Thereafter, a series of orders and motions followed until October 24, 2006, when a representative of the Ratepayers was granted substitution in Order No. 8. That order also set a final briefing deadline of November 1, 2006, for responses and

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<sup>1</sup> It should be noted that the only evidence supporting this Proposal for Decision is the affidavit of Dedra Leal attached as Exhibit A to the Motion to Dismiss, and ED-A, B and C admitted at the preliminary hearing for the limited purpose of notice and jurisdiction. Nevertheless, since the principal facts are not in dispute, the ALJ has analyzed the Ratepayers' arguments as if they had evidentiary support.

replies to the Motion to Dismiss. On November 1, 2006, the Ratepayers filed a response to the Motion to Dismiss (Response).

### III. ANALYSIS

The Motion to Dismiss is a straightforward jurisdictional argument. Although the Ratepayers timely filed the petition for review with the Commission, it is undisputed that they did not serve the Appeal on the Utility until October 19, 2006,<sup>2</sup> some ten months after the Effective Date. Water Code § 13.043(b)(1) grants the Commission jurisdiction to hear rate appeals by ratepayers of nonprofit water utilities. However, Water Code § 13.043(c) imposes certain mandatory prerequisites to establish jurisdiction:

An appeal under Subsection (b) of this section *must* be initiated by filing a petition for review with the commission *and the entity providing service* within 90 days after the effective day of the rate change . . . [emphasis added].

This provision is also incorporated into the Commission's substantive rules at 30 TAC § 291.41(b).

The Ratepayers argue that they attempted in good faith to comply with the Commission's rule, that this technical failure should be overlooked since it did not harm the Utility, that the Utility was aware of the Appeal at all material times, and that the Utility has participated throughout this proceeding.<sup>3</sup> The Ratepayers point out a March 8, 2006 letter from the Commission to Werner Halfmann, President of the Utility, that attached the petition and notified the Utility of the initiation of this proceeding:

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<sup>2</sup> Response at 2; Attachment A to Motion to Dismiss.

<sup>3</sup> Response; October 14, 2006 letter from Fred Hendricks; Letter from Robert Allen received at SOAH on August 23, 2006, attaching March 8, 2006 letter from the Commission to the Utility.

Dear Mr. Halfmann:

The referenced petition which was received by the Texas Commission on Environmental Quality (TCEQ) on February 17, 2006, has been accepted for filing . . . This matter has been referred to the State Office of Administrative Hearings to schedule a hearing . . . At this preliminary hearing the Commission will first establish jurisdiction . . .<sup>4</sup>

The ALJ agrees that the Utility has not been prejudiced in this proceeding. The ALJ notes, however, that the Utility does not argue surprise or undue prejudice as a result of the Ratepayers' failure to serve it with the petition. The Ratepayers go on to argue that the petition simply seeks oversight of the increased rates to determine whether they are just and reasonable. The Ratepayers argue that the Utility has been the beneficiary of flexibility by the Commission and that fairness dictates that they receive the same flexibility in maintaining this action.

The ALJ, however, does not believe he possesses authority to exercise such discretion. Attached to the Motion to Dismiss was the Commission's Order *In the Appeal of Whiterock Water Supply Corporation's Proposed Rate Increase*, SOAH Docket No. 582-98-1385, TNRCC Docket No. 98-0706-UCR (Whiterock Appeal). There, the Commission rendered an Order squarely on point, finding:

Ratepayers did not file, serve, or otherwise deliver a copy of the original petition for review, which had been filed with the Commission, to the entity providing water service, Whiterock, within ninety days of the effective date of the new rates or at any time thereafter. (Finding of Fact No. 8);

To initiate a rate appeal pursuant to Section 13.043 of the Code and the Commission's substantive rule in 30 TAC § 291.41, the ratepayers must file an original petition for review with the Commission and a copy of the original petition with the entity providing service within ninety days of the effective date of the rate change. (Conclusion of Law No. 4); and

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<sup>4</sup> Letter from Robert Allen received at SOAH on August 23, 2006, attaching a March 8, 2006 letter from the Commission to the Utility.

For the reasons set forth in Findings of Fact Nos. 6-8 and Conclusion of Law No. 4, the Commission has no jurisdiction to consider the appeal of Whiterock's rate, effective date April 1, 1998. (Conclusion of Law No. 5).

The purpose of notice is to ensure the full and fair participation of all parties in a proceeding, and that has occurred here. Nevertheless, in light of the Commission's Order in the Whiterock Appeal, the ALJ agrees with the Utility that the requirements in Water Code § 13.043(c) and 30 TAC § 291.41(b) are jurisdictional.

While this is a harsh result for the Ratepayers, the only authority for a contrary result did not address the Commission's Order in the Whiterock Appeal. In the *Petition by City of Big Wells Ratepayers Living Outside the City Limits for the Appeal of Rates Charged by the City of Big Wells in Dimmit County*, SOAH Docket No. 582-01-1621, TNRCC Docket No. 2000-1112-UCR,<sup>5</sup> SOAH ALJ Barbara Owens held in Order No. 2, and in the Proposal for Decision, that the Texas Supreme Court's decision in *Dubai Petroleum Co. v. Kazi*, rendered the service requirement in Water Code § 13.043(c) non-jurisdictional, reasoning:

In *Dubai*, the Texas Supreme Court held that a party's failure to comply with mandatory statutory requirements goes to a party's right to relief, not to the jurisdiction of a trial court to hear the case. The Court observed that "[t]he trial court in this case had jurisdiction because [the plaintiff's claim] was within its constitutional jurisdiction, not because the plaintiffs satisfied all the grounds listed in the [statute]." Similarly, in this case, the Commission has jurisdiction to hear the ratepayers' appeal of the City's rate increase by virtue of the legislature's grant of authority to hear such appeals under the Water Code.<sup>6</sup>

The ALJ disagrees with this reasoning. First, *Dubai* dealt with the general jurisdiction of a Texas district court established under the Texas constitution, as opposed to limited jurisdiction like the proceedings at the Commission and SOAH.<sup>7</sup> It simply does not follow, that if statutory

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<sup>5</sup> No party cited the ALJ to this Order.

<sup>6</sup> See Order No. 2 at page 2; citing to *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

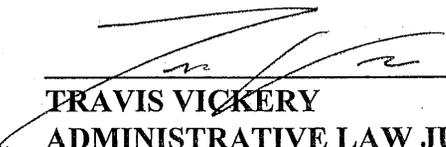
<sup>7</sup> *Dubai*, 12 S.W.3d 74-76.

jurisdictional requirements do not impact courts of general jurisdiction, then they also do not impact agencies of limited (statutorily established) jurisdiction. The jurisdiction to hear this proceeding is specifically established by the Water Code. Second, in *Dubai*, it was unclear whether the party had failed to satisfy the requisites of the statute in question.<sup>8</sup> Here, it is clear and undisputed that the Ratepayers failed to serve the petition on the Utility within the ninety day period.

#### IV. CONCLUSION

To initiate their rate appeal, the Ratepayers were required by the Water Code § 13.043(c) to file a petition for review with the Commission and the Utility. Although the Ratepayers filed the petition for review with the Commission within the required ninety days from the effective date of the new rates, the evidence does not show that the Ratepayers ever filed, served, or otherwise delivered a copy of the petition to the Utility until well after the expiration of the ninety day period. Based on the above, the ALJ recommends that the Commission dismiss the Appeal for lack of jurisdiction.

**SIGNED November 17, 2006.**

  
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**TRAVIS VICKERY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>8</sup> *Dubai*, 12 S.W.3d 76.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Dismissing for Lack of Jurisdiction the Appeal of  
Water Rates Adopted by Millersview-Doole Water  
Supply Corporation; TCEQ Docket No. 2006-  
0240-UCR SOAH Docket No. 582-06-2110**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered whether it had jurisdiction to consider the ratepayers' appeal of water rate increases established by the Board of Directors of the Millersview-Doole Water Supply Corporation (Utility). Travis Vickery, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH) conducted a preliminary hearing on the rate appeal on July 28, 2006, in Paint Rock, Texas. At the hearing, a briefing schedule was developed to address the Utility's Motion for Dismissal (Motion to Dismiss) filed on July 14, 2006. A Proposal for Decision (PFD) was presented by the ALJ, who analyzed the Motion to Dismiss and the response filed by the ratepayers.

The Executive Director, represented by Spencer Marks, Staff Attorney, appeared at the preliminary hearing. The Utility attended the preliminary hearing through its counsel of record, Anthony Corbett. The ratepayers who were admitted as parties (Ratepayers), listed in Attachment A to Order No. 3, were represented by Jeffrey Sutton at the preliminary hearing and by Fred Hendricks in responding to the Motion to Dismiss.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

### I. FINDINGS OF FACT

1. On November 21, 2005, the Board of Directors (Board) of the Millersview-Doole Water Supply Corporation (Utility) voted to increase the rates under appeal in this proceeding.
2. The effective date of the new rates was January 1, 2006 (Effective Date).
3. The Utility's ratepayers were notified of the new rates on December 1, 2005.
4. At least ten percent of the Utility's ratepayers filed a petition for review of the rate increase (Appeal) with the Commission on February 17, 2006, less than ninety days after the Effective Date.
5. The public preliminary hearing was conducted in Paint Rock, Texas on July 28, 2006, pursuant to the following notice:
  - a. Amended notice was mailed by the Chief Clerk of the Commission on July 12, 2006, to those interested persons listed in the mailing list attached to the Chief Clerk's July 12, 2006 affidavit, at least ten days prior to the preliminary hearing.
  - b. Notice was mailed to the Utility's customers by the Utility on July 5, 2006, at least ten days prior to the preliminary hearing.
6. The Ratepayers did not serve the petition for review on the Utility within ninety days of the Effective Date.

## II. CONCLUSIONS OF LAW

1. Millersview-Doole Water Supply Corporation is a member owned and member controlled nonprofit water supply corporation under Ch. 67 of the Texas Water Code (Water Code).
2. Pursuant to Water Code § 13.043, the Commission has jurisdiction to consider rate appeals by ratepayers of a non-profit water supply corporation.
3. Proper notice of the preliminary hearing was given pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. (Government Code) §§ 2001.051 and 2001.052.
4. To initiate a rate appeal pursuant to Water Code § 13.043 and 30 TEX. ADMIN. CODE (TAC) § 291.41, the ratepayers must file an original petition for review with the Commission and a copy of the original petition with the entity providing service within ninety days of the effective date of the rate change.
5. Because the Utility's ratepayers failed to comply with Water Code § 13.043, the Commission lacks jurisdiction to consider the Appeal.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The Appeal is dismissed for lack of jurisdiction.
2. All other motions, requests for entry of specific findings of fact or conclusions of law, and other requests for general or specific relief, if not expressly granted herein, are hereby denied.
3. The Chief Clerk shall provide a copy of this Order to each of the parties.

4. By law, the effective date of this Order shall be the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and 30 TEX. GOV'T. CODE § 2001.144.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Kathleen Hartnett White, Chairman  
For the Commission