

SOAH DOCKET NO. 582-08-1719
TCEQ DOCKET NO. 2008-0164-UCR

2009 APR - 1 PM 3: 36
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

APPLICATION OF HHJ, INC. DBA
DECKER UTILITIES TO CHANGE
TO CHANGE ITS WATER AND
SEWER TARIFF IN MONTGOVERY
COUNTY, TEXAS,

§
§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

EXCEPTIONS OF HHJ, INC. dba DECKER UTILITIES

HHJ, Inc. dba Decker Utilities (HHJ) files these its Exceptions to the Proposal for Decision (PFD) of Administrative Law Judge Sharon Cloninger (ALJ) in the above-referenced docket.

While it is not in 100% agreement with the analyses and final recommendations of the ALJ in the PFD, in the interest of brevity and judicial economy HHJ will limit its Exceptions to rate case expense issues the ALJ requested the parties to brief.

1. Typo on Amount

The ALJ states in the second paragraph of Section VII (PFD pg 49) that HHJ is seeking to recover \$31,197.23 in rate case expenses. This is a typographic error. The correct amount identified in HHJ's Replies to Exceptions (Pg 11) is \$30,197.23. This correct amount is used by the ALJ in the first paragraph on page 50.

2. Motions for Rehearing.

The difference between HHJ's requested rate case expenses and the ALJ's recommended amount is \$800.00 in legal fees for the preparation of Motions for Rehearing and Replies. In making this adjustment, the ALJ relied upon the arguments of the Staff attorney that motions for rehearing should not be funded by ratepayers because they represented the applicant utility's failure to meet its burden of proof.

The staff's arguments assume that the applicant utility is the only party that might file motions for rehearing, thus generating legal work for the utility asserting its due process rights under TCEQ rules and the Texas Administrative Procedures Act. (Texas Government Code Chapter 2001). There are five named parties to this docket, anyone one of which may file a motion for rehearing if they are dissatisfied with the final order. Intervenor Stacy Moquin has demonstrated a willingness to file untimely briefs and motions.

The Staff's argument denies any applicant an opportunity to exercise its full due process hearing rights on the ground that the amount of time to be spent on motions for rehearing cannot be known at the time of trial. Uncertainty is true for a number of post-hearing procedures and yet they were not challenged.

The following¹ was submitted by HHJ and is part of this record:

Attached are one invoice from Mr. Zeppa's office and three invoices from Mr. Fenner's firm. They cover the rate case from preparation of the application to the mid-point in the preparation of post-hearing briefs. The total cost of reasonable and necessary rate case expenses to this point are \$27,297.23.

The estimated cost to finish the case is \$3,100.00, consisting of:

Finish post-hearing briefing	MHZ	\$200/hr	3.0 hr	\$ 600.00
Exceptions/Replies	MHZ	\$200/hr	4.0 hr	\$ 800.00
Attend Final Orders	MHZ	\$200/hr.	2.0 hr	\$ 400.00
	BWF	\$150/hr	2.0 hr	\$ 300.00
Motions for Rehearing	MHZ	\$200/hr	4.0 hr	<u>\$ 800.00</u>
Total				\$2,900.00

Total rate case expenses sought to be recovered in this case are \$30,197.23. They should be amortized over a period of two years as ordered in the TCEQ's most recent contested rate case.

HHJ would note that none of the time estimates or the billing rates on rate case expenses were challenged or disallowed. The utility would also note that the estimate for legal time on motions for rehearing was the same as the estimate for exceptions and replies which were not challenged. The written statement above is merely a recap of the unchallenged oral testimony of Attorney Mark Zeppa at

¹ HHJ's Replies to Exceptions (Pg 11)

trial, which testimony was based upon 30 years experience in trying utility rate cases. HHJ is unaware of any prior TCEQ decision that disallowed rate case expenses on procedures required by law as a prerequisite to having access to the courts.

3. Settlement Offers

The staff and the ALJ pointed out that the intervenors, through Stacy Moquin, submitted a written settlement offer in October 2008. Thus, it is suggested that rate case expenses should not be allowed after October 14, 2008 because of Rule 291.28(9). That rule disallows rate case expenses after the date of a written settlement offer only if the final rate revenue is equal to or less than the revenues that would be collected under the settlement offer.

While this is a validly adopted rule, its implementation is impossible to achieve under governing Texas law. There is an absolute prohibition² from a trier of fact and law from learning the terms of a settlement offer.³ The logic behind this rule is that the trier of fact should never hear a settlement offer to avoid coloring the final decision in the case. Texas law also wants to encourage the unrestricted exchange of information in settlement negotiations to further dispute resolution without litigation.

² Texas Rule of Evidence 408

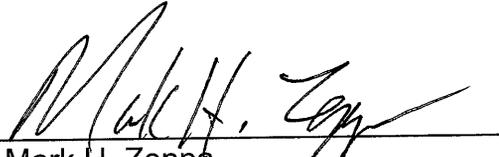
³ HHJ does not suggest that the trier of fact is barred from learning that a settlement offer was made, only the terms of the offer.

Since the settlement offers cannot be put into this record as a matter of law, there are no facts against which the rule can be applied. All the TCEQ can rely on is the unsworn arguments of the parties that the spread between Ms. Moquin's proposed settlement rates and the ALJ's final rates is so great that the rule is not triggered.

4. Summary

HHJ concedes to the ALJ's proposals in the PFD except for rate case expenses after the rendition of a final order. Disallowance of rate case expenses for motions for rehearing is arbitrary and capricious, particularly in this case when there is uncontested testimony supporting them.

LAW OFFICES OF MARK H. ZEPPA, PC

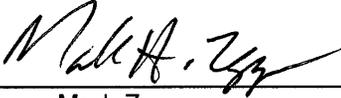
BY: 

Mark H. Zeppa
State Bar No. 22260100
4833 Spicewood Springs Road #202
Austin, Texas 78759-8436
(512) 346-4011, Fax (512) 346-6847

ATTORNEY FOR HHJ, INC. dba DECKER
UTILITIES

SERVICE LIST

I, Mark Zeppa, certify that the foregoing brief was served on the following on 4-1-09 in the manner agreed to and used in this docket..



 Mark Zeppa

REPRESENTATIVE/ADDRESS	PARTIES
Christina Mann Attorney Texas Commission on Environmental Quality Office of Public Interest Counsel PO Box 13087, MC 103 Austin TX 78711-3087 Phone (512) 239-4014 Fax (512) 239-6377 cmann@tceq.state.tx.us	Office of Public Interest Counsel
Erin Selvera Staff Attorney Texas Commission on Environmental Quality PO Box 13087, MC 175 Austin TX 78711-3087 (512) 239-6033 Fax (512) 239-0606	Executive Director
Larry Osborne 32126 Anne Lane Pinehurst TX 77362 larryandrew41@hotmail.com	Larry Osborne
Stacy McCoy-Moquin 12011 Rhonda Lane Pinehurst TX 77362 stacy_moquin@yahoo.com	Stacy McCoy-Moquin
LaDonna Castañuela, Chief Clerk Texas Commission on Environmental Quality Office of the Chief Clerk, MC 105 PO Box 13087 Austin, Texas 78711-3087 Tel: (512) 239-3300 Fax: (512) 239-3311	Office of the Chief Clerk Original + 11 copies
Honorable Sharon Cloninger Administrative Law Judge State Office of Administrative Hearings 300 West 15 th Street Austin TX 78701 (512) 463-8526 Fax (512) 427-5097	SOAH
Docket Clerk SOAH (512) 475-4994	