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BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

FILED
SEP 27 2013

APPLICANT: BROOKS MITCHELL)
DIRECTOR OF ADMINISTRATION)
ADMINISTRATION DIVISION)
OKLAHOMA CORPORATION)
COMMISSION)

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

INTERESTED PARTY:)
THE PHOENIX GROUP)

PSD CAUSE NO.
201100034

RELIEF SOUGHT: CORRECTION AND)
MODIFICATION OF RECORD MADE IN)
CAUSE 201000122)

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON AN
ORAL APPEAL IN RESPONSE TO MOTION TO DISMISS AND
MOTION TO STRIKE NOTICE OF WITHDRAWAL OF
APPLICATION**

The Motion to Dismiss and Motion to Strike Notice of Withdrawal came on for hearing before **Michael L. Decker**, Administrative Law Judge ("ALJ") for the Corporation Commission of the State of Oklahoma, on the 4th day of June, 2013, at 1:30 p.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Yasodhara Mitty Means**, Deputy General Counsel, and **Jeff Southwick**, Deputy General Counsel, appeared on behalf of Movant/Substitute Applicant, Lori Wrotenbery, Director of Administration, Oklahoma Corporation Commission (Commission "Staff"); **Jana Harris Hight**, attorney, appeared on behalf of The Phoenix Group ("Phoenix" or "TPG"); **Aletia Haynes-Timmons**, attorney, appeared on behalf of Terri Roberts in her individual capacity; Commission employees **Terri Roberts** and ALJ **Michael Norris**, appeared as interested parties; **Aletia Haynes-Timmons**, attorney, appeared on behalf of Terri Roberts ("Roberts"); and **Jim Hamilton**, Deputy General Counsel for the Conservation Division, filed notice of appearance.

The ALJ filed his Report of the Administrative Law Judge in Response to Motion to Dismiss and Motion to Strike Notice of Withdrawal of Application on the 17th day of June, 2013 and filed his Amended Report on the 18th day of June, 2013, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 1st day of August, 2013. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

ALJ Decker recommends Phoenix's Motion to Strike the Notice of Withdrawal of the Application in Cause PSD 201100034 should be granted. The ALJ recommends the Staff's Motion to Dismiss Cause PSD 201100034 should be denied. The ALJ further recommends Phoenix's Response and Request for Affirmative Relief should be permitted as a basis for the right to a hearing; however, the Request for Affirmative Relief should be denied where it seeks written apologies, redaction of transcript and audio recording material, and an award of attorney's fees and costs. The ALJ recommends the Motion to Settle Terms of the Report and Recommendation of ALJ Michael Decker and/or Final Order in Cause PSD 201100034 should be continued on the motion docket until the Motion to Dismiss has been adjudicated by the Commission en banc.

On November 9, 2010, the PSTD of the Commission filed an enforcement action against tank owners for penalty assessment, stemming from alleged violations of the Commission's PSTD rules pertaining to a regulated facility operated by Ashraf Chowdhury, and Farhat Chowdhury denoted the "Moore Superette" located in Moore, Oklahoma. Phoenix was named as the consultant in the application and was provided notice of the enforcement hearing, EN 20100122, but Phoenix was neither represented nor present at the hearing.

The EN 20100122 hearing took place in December 2010 and the Commission entered final Order No. 581667 on December 30, 2010 granting judgment to the PSTD and against the tank owners, operators.

When Phoenix obtained Order No. 581667 and transcript of proceedings, it commenced actions to complain about the evidence and testimony presented in the hearing, which Phoenix perceived to have inferred negative factors regarding its involvement in the Chowdhury case. Cause PSD 201100034 was then filed by the Office of General Counsel at the request of the Director of Administration, Brooks Mitchell, on September 8, 2011. The application in the present cause sought a review of the record established in Cause EN

201000122 with Phoenix as the interested party being given the opportunity to respond to certain allegations and representations set forth in Cause EN 201000122 and "to modify the record and Order in Cause EN 201000122 to reflect the views of all parties and such other and further relief the Commission deems appropriate and proper."

On September 30, 2011 ALJ Decker heard Phoenix's case to re-open the record. At the close of the hearing ALJ Decker ordered Applicant's counsel to prepare a proposed order and to circulate the proposed order to all parties and counsel. Phoenix and its counsel rejected the proposed order and offered modifications that were unacceptable to the Applicant.

On April 12, 2013 Phoenix filed a motion to settle the terms of the proposed order. The motion was initially heard on April 22, 2013 but was continued thereafter. The Wrotenbery/Substitute Applicant then filed a notice of withdrawal on May 6, 2013, a Motion to Dismiss on May 6, 2013, and a Motion to Substitute Applicant Due to Resignation from Office on May 8, 2013.

The parties agreed that the Motion to Substitute should be determined prior to the hearing concerning the Motion to Dismiss and the Motion to Substitute was heard on May 14, 2013 and the Motion to Substitute was granted by the ALJ on May 23, 2013.

On May 28, 2013 Phoenix filed a Motion to Strike the Wrotenbery/Substitute Applicant's Notice of Withdrawal which was set on June 4, 2013 in conjunction with the continued Motion to Dismiss.

EXCEPTIONS OF STAFF:

1) The ALJ erred in failing to address the principal argument in the Motion to Dismiss, namely, that the Commission lacked jurisdiction over the action as the challenge to any portion of the record in Cause EN 201000122 was made nine months after the appeal time had run. Cause PSD 201100034 is a collateral attack on the proceedings of EN 201000122 and should be dismissed as untimely. (see ALJ Report, p. 23).

2) Commission rules on Post Order relief, OCC-OAC 165:5-17-1 and OCC-OAC 165:5-13-3(p), were not followed and the case should be dismissed for lack of jurisdiction due to:

A. The ALJ erred in failing to address violation of OCC-OAC 165:5-17-1 concerning requests for post order relief which must be filed within ten (10) days after a Commission order is entered. Final Order No. 581667 in EN 201000122 was entered on December 30, 2010 and no post order relief was requested by any party within 10 days of December 30, 2010.

B. The ALJ erred in his consideration of OCC-OAC 165:5-13-3(p). Pursuant to this rule, the Record may only be reopened by the Commission upon motion before the final order issues in the cause and must be served in the same manner as notice provided in OCC-OAC: 165:5-9-1(b).

C. The ALJ erred in ruling that the Notice issued was sufficient and proper in PSD 201100034. For post order relief more than 10 days after an order issues, OCC-OAC 165:17-2 requires notice to be served on all affected parties, and the Commission must have jurisdiction over that action, because the Notice failed to be served on the Respondent tank owner and the accused Commission witnesses, Terri Roberts and ALJ Michael Norris.

3) The ALJ lacked jurisdiction to correct the record after the appeal time of EN 201000122 had expired. *Arbuckle Simpson Aquifer Protection Federation of Okla. v. Okla. Water Res. Bd.*, 2013 OK 29 (unpublished opinion), is inapplicable to this case because a challenge to the testimony of a witness and ensuing writ was made during the pendency of that action. In that case, a final order had not issued at the time the appellate court issued its decision.

4) The ALJ erred in not allowing the Substitute Applicant to withdraw the Application by dismissing the cause pursuant to OCC-OAC 165:05-9-2(E)(3), upon 5 business days' notice to parties of record on the grounds of res judicata, withdrawal and moot question or obsolete application and lack of jurisdiction. OCC-OAC 165:5-9-2 (B), (C), (D) and (E).

5) The ALJ erred in relying on *Samedan Oil Corp. v. Corporation Com'n of State of Okl.*, 755 P.2d 664 (Okl. 1988), to find an "improper change of position" had occurred. In *Samedan*, an operator argued that it had made a valid pooling election, and the Commission ruled in favor of *Samedan*, finding that the election was valid in a final, unappealed order. Thereafter, the operator denied the validity of the election and refused to pay its share of costs. The Supreme Court found it would be inappropriate to allow *Samedan* to change its position and thereby cause reversal of the Commission's final order. However, in the current case, Cause PSD 201100034, the Substitute Applicant would modify the Applicant's position prior to any final order.

6) The ALJ erred in concluding that there were mistakes in the record of EN 201000034. The ALJ also erred in relying on the unilateral testimony of Applicant Brooks Mitchell and Respondent Denny Hight in this case, to conclude there were errors made in EN 201000034. The Motion to Dismiss addressed legal issues and the ALJ's comment on the evidence in support of affirmative relief was improper and should be reversed.

7) The ALJ erred in determining that Phoenix was an environmental consultant licensee and entitled to due process afforded such licenses.

8) The ALJ erred in relying that Phoenix's status was the Respondent in its consideration of the Substitute Applicant's Motion to Dismiss.

9) The ALJ erred in finding that the Substitute Applicant's Motion to Dismiss conflicts with the position of the original Applicant. The original Applicant, Brooks Mitchell, was in favor of a dismissal order prepared in this cause at the direction of the former General Counsel to the Commission, Andrew Tevington. A copy of that proposed order was circulated to Phoenix.

10) The ALJ erred in determining that this matter had not become a personnel matter. At the beginning of this cause, the focus was whether the Commission should clarify there had not been a finding of wrongdoing by Phoenix in an earlier proceeding. However, as the case devolved, it became apparent that Phoenix would not accept an agreed upon order which did not criticize Commission personnel.

11) The ALJ erred not allowing Commission personnel Terri Roberts and ALJ Mike Norris to make statements on the record in April, but only allowed Phoenix to present evidence and cross-examine witnesses. Without the testimony of Commission witnesses, ALJ Norris and Terri Roberts, the Commission will not have the evidence necessary to have a complete and correct understanding of the evidence in PSD 201100034.

12) The ALJ erred in attempting to craft a remedy based upon a nonapplicable rule. As discussed earlier, Phoenix is not a licensed consultant. On page 28, paragraph 4, the ALJ recommends that a Final Order refer the matter to PSTD to issue a report pursuant to the Commission's consultant license rule, OCC-OAC 165:29-3-90(9) and (h).

13) Wherefore, premises considered, Substitute Applicant respectfully requests that this cause be dismissed, or, in the alternative, the cause remanded back to the ALJ for further testimony from Commission staff and the Respondent tank owner, Mr. Chowdhury, to develop a full, fair and complete record in this matter, and to allow all parties of record an opportunity to present testimony and evidence.

EXCEPTIONS OF PHOENIX:

1) In the Conclusions of Law, paragraph 7 of the Report of the ALJ, the ALJ recommends that Phoenix's request for attorney's fees and costs be denied. In order to fully and specifically set forth Phoenix's exceptions to this recommendation denying Phoenix's attorney's fees and costs, paragraph 7 must first be deconstructed, with specific exceptions identified as they relate to each specific concept within the paragraph. Paragraph 7 states:

The Affirmative Relief requested by The Phoenix Group and argued on June 4, 2013 in the course of the Motion to Dismiss concerning the award of attorney's fees and costs associated with the participation of Phoenix's counsel in the proceedings in PSD 201100034 should be denied. The hearing on September 30, 2011 did not address any matter with respect to the prayer for attorney's fees and costs as articulated in The Phoenix Group's Response and Request for Affirmative Relief. The Petroleum Storage Tank Release Program statutes do not allow a claim for recovery of attorney's fees except in the case of disallowance of a claim. Otherwise, legal expenses cannot be recovered. The Phoenix Group argued on June 4, 2013 in the context of the Motion to Dismiss that, (1) Staff's actions and ensuing delays created by the breakdown in negotiations between itself and the OCC's attorneys to gain a final order in PSD 201100034; and (2) the Staff's change of position and attempt to bring a Motion to Dismiss the Application; (sic) constituted oppressive conduct by Staff. Pursuant to authority of *City National Bank v. Owens*, The Phoenix Group contended the OCC should invoke its inherent equitable power to award attorney's fees and costs because of the Staff's oppressive conduct. There has been no evidence to support The Phoenix Group's request for award of attorney's fees and costs. The record of PSD 201100034 on the merits of the Application and The Phoenix Group's Response and Request for Affirmative Relief is closed. Review of the emails and other items provided by The Phoenix Group in its various motions, responses, and replies certainly shows an impasse was reached with Staff since a point in 2012, which clearly became more acute beginning in April 2013. The ALJ considers the circuitous procedural route taken by PSD 201100034 since September 30, 2011 to be something of a mystery; however, the ALJ finds no oppression or retaliatory motives in the Staff's positions. The Staff attorneys have raised legitimate legal arguments; as has The Phoenix Group in its responses. The Phoenix Group's request for award of attorney's fees and costs should be denied.

(See Report of the ALJ, pages 35-36, paragraph 7, citations and footnotes omitted here for brevity by Phoenix.)

2) Phoenix respectfully and specifically disagrees that Phoenix's request for attorney's fees and costs should be denied. Phoenix does not take exception to the ALJ's recommendation in paragraph 7 that attorney's fees and costs may be denied with respect to the September 30, 2011 proceedings related to the hearing on the merits of Cause PSD 201100034, as Phoenix agrees with the ALJ that the record on the hearing on the merits of this cause is now closed. However, in the June 4, 2013, hearing on the Motion to Dismiss and Motion to Strike, Phoenix did not seek an award of attorney's fees and costs related to the September 30, 2011 hearing on the merits. Rather, in the June 4, 2013, hearing on Wrotenbery's Motion to Dismiss and on Phoenix's Motion to Strike, Phoenix sought attorney's fees and costs as those fees and costs related to the proceedings specifically involving the Motion to Dismiss and the Motion to Strike, not for the September 30, 2011 hearing on the merits. In fact, Phoenix argued that it was these procedural aspects of Cause PSD 201100034 (Wrotenbery's Motion to Dismiss and Phoenix's Reply and Motion to Strike pertaining to Wrotenbery's Notice of Withdrawal) that gave rise to the court's inherent equitable authority to award fees, and it was in this respect that Phoenix's counsel argued the applicability of *City National Bank v. Owens*, 565 P.2d 4 (Okl. 1977) among other arguments, in support of this specific request for attorney's fees and costs. Therefore, Phoenix specifically takes exception to the denial of attorney's fees and costs on the basis that fees and costs are not awardable for the September 30, 2011 hearing on the merits, as this was not the argument made on June 4, 2013. (See e.g., Transcript, June 4, 2013, incorporated as Exhibit "A", specifically page 14, lines 10-25; page 18, lines 17-25; pages 19-21, page 23, lines 17-25; pages 24-25, page 26, lines 1-10; page 33, lines 6-25; and page 42, lines 9-15)

3) In paragraph 7, the ALJ enumerates certain arguments made by Phoenix in the context of the Motion to Dismiss that, (1) Staff's actions and ensuing delays created by the breakdown in negotiations between Phoenix and the Commission Staff's attorneys to gain a final order in PSD 201100034; and (2) the Staff's change of position and attempt to bring a Motion to Dismiss the Application; constituted oppressive conduct by Staff. Pursuant to authority of *City National Bank v. Owens*, supra, Phoenix contended the Commission should invoke its inherent equitable power to award attorney's fees and costs because of Staff's oppressive conduct. Phoenix does not take specific exception to this generalization of Phoenix's arguments. However, after enumerating these arguments and setting forth Phoenix's reliance on *City National Bank v. Owens*, supra, in support of these arguments, the ALJ concludes that there has been no evidence to support Phoenix's request for award of attorney's fees and costs and that the record of PSD 201100034 on the merits of the Application and Phoenix's Response and Request for Affirmative Relief is closed. It is this conclusion with which Phoenix specifically takes exception, as this conclusion is based on the record pertaining to the merits of the cause, the

hearing for which took place on September 30, 2011. This conclusion is not based on the arguments made in the June 4, 2013 hearing pertaining to the actions and conduct taken by the Commission Staff from October 1, 2011 through June 4, 2013 and more specifically, to those acts of the Commission Staff as they relate to the timing of the filing of the Motion to Dismiss, as those acts relate to the meritless contents of the Motion to Dismiss, and as those acts relate to the frivolous and invalid pleading styled "Notice of Withdrawal", to which the *City National Bank v. Owens*, supra, and its progeny do apply.

4) Phoenix references Paragraph 7 and takes specific exception to the ALJ's denial of Phoenix's attorney fees and costs relating to the Notice of Withdrawal and Motion to Dismiss because the ALJ found no oppression or retaliatory motives in the Commission Staff's positions and also because the ALJ found that the Commission Staff have raised legitimate legal arguments. First, Phoenix specifically takes exception to the denial of attorney's fees and costs on this basis, as these reasons for denying attorney's fees and costs are directly contradicted by the ALJ's findings elsewhere in the Report of the ALJ.

5) The ALJ recommends that Phoenix's Motion to Strike Wrotenbery/Substitute Applicant's Notice of Withdrawal be granted on the basis that Wrotenbery's Notice of Withdrawal cannot be considered a separate motion (as was argued by Staff despite the document's fatal flaws) and on the basis that Wrotenbery/Substitute Applicant's Notice of Withdrawal appears to be "surplusage," as the issues raised by this filing were incorporated into Wrotenbery/Substitute Applicant's Motion to Dismiss. This fatally flawed document that appears to be "surplusage" gave rise to extraordinary and unnecessary fees and costs incurred by Phoenix, as Phoenix was required to respond to this illegitimate filing despite its inability to be converted to a motion and despite the fact that it appears to be "surplusage." The ALJ cannot recommend granting Phoenix's Motion to Strike the Notice of Withdrawal for these reasons (that it is not a proper filing and that it is surplusage) while in the same breath claiming that the filing of this document was legitimate and not oppressive. These inconsistencies cannot be reconciled. For this reason, Phoenix specifically takes exception to the ALJ's denial of attorney fees and costs as related to Wrotenbery/Substitute Applicant's Notice of Withdrawal.

6) The ALJ also concludes Staff's arguments in the Motion to Dismiss are legitimate in paragraph 7, while at the same time the ALJ states on page 33 of the Report that Staff's contention that this cause should be dismissed because it is an application for sanctions against Commission employees should be rejected because "From the commencement of PSD 201100034, there has been no disagreement that the Application is not a personnel action."

7) If it has been clear to the ALJ from the commencement of the cause that this cause is not a personnel action, then it is not legitimate for Commission Staff to have argued in the Motion to Dismiss that this cause is a personnel

action. Respectfully, Phoenix must take specific exception to the ALJ's recommendation that Phoenix's request for attorney's fees and costs should be denied, as Phoenix's costs in responding to the illegitimate argument that this matter is a personnel action are extraordinary.

8) Phoenix respectfully submits the foregoing in support of its specific exceptions to the Conclusions of Law, paragraph 7 of the Report of the ALJ recommending that Phoenix's request for attorney's fees and costs be denied. Phoenix also respectfully has submitted a Brief in Support for its filed exceptions here. (See June 21, 2013 Exceptions filed by Phoenix, pages 7 through 18, Section III. Brief in Support.)

THE ALJ FOUND:

1) The Staff's application in Cause PSD 201100034 was filed on September 8, 2010, seeking correction of the record in EN 201000122. An unprotested hearing occurred on September 30, 2011, which culminated with the ALJ's oral recommendations that the Application be granted insofar as it was an unprotested cause filed and presented by the Commission's Staff. The ALJ instructed the Commission's Staff to prepare "an order that will set forth the clarifications that are needed and that order will be circulated to the folks involved, which will include these two interested parties who are sitting here, who are part of the Commission staff, and we will try to come up with something that will get this matter finalized, at least at this point." (Tr., page 136, lines 23-25).

2) No final order was forthcoming, and on April 12, 2013, Phoenix filed its Motion to Settle the terms of a final order. The Motion to Settle was heard by the ALJ on the Motion Docket of April 22, 2013, and based upon the position of the Staff counsel appearing on that date; the ALJ again recommended the parties attempt to settle the terms of a final order. The ALJ continued the Motion to Settle several times for the purpose of attempted resolution of the motion. Thereafter, the present PSD 201100034 application was the subject of a Motion to Substitute the Applicant Due to Resignation from Office, a Notice of Withdrawal, and a Motion to Dismiss brought by the Successor Applicant, Lori Wrotenbery, Director of Administration. On May 14, 2013, the instant ALJ heard and took under advisement the Motion to Substitute Applicant. On May 23, 2013, the ALJ entered an oral recommendation to grant the substitution of the Applicant pursuant to 12 O.S. Section 2025(D)(1), but reserved for the Motion to Dismiss recommendations regarding the impact on the affirmative relief requested by Phoenix and the ability of the Applicant to change positions on issues involved in the original application. The Motion to Dismiss was heard by the Commission's ALJ on the Motion Docket of June 4, 2013. In conjunction with the Motion to Dismiss, the ALJ heard Phoenix's Motion to Strike the Applicants "Notice of Withdrawal". The Motion to Settle was continued so that the Motion to Dismiss could be determined.

3) Pursuant to the Motion to Strike the Notice of Withdrawal, the ALJ recommends the Motion to Strike be granted. The Notice of Withdrawal appears to be surplusage to the Motion to Dismiss and cannot be considered a separate motion pursuant to OCC-OAC 165:5-21-5. The issues about the Successor Applicant's choice to dismiss Cause PSD 201100034 were incorporated in the Motion to Dismiss.

4) Pursuant to the Motion to Dismiss and reserved issues involving the Motion to Substitute Applicant, the ALJ recommends that the Motion to Dismiss be denied. It is abundantly clear from review of the proceedings in Cause EN 201000122 and Cause PSD 201100034, that several essential and regrettable mistakes were made by the Commission's Staff and other parties to the enforcement action that resulted in erroneous assumptions by the Commission's witness, which the ALJ in Cause EN 201000122 accepted as a correct and proper investigation of the incident. The record in Cause PSD 201100034 certainly demonstrates unfortunate mistakes were made in the Staff's investigation, and erroneous assumptions were included in testimony, which resulted in erroneous points in the ALJ's rationale for the fine assessments recommended for Order No. 581667. The instant ALJ recommends a final order be entered in Cause PSD 201100034 in the form of a referral of the matter to the Petroleum Storage Tank Division for a proper disposition by report regarding the erroneous allegations and inferences negatively impacting the Consultant's License held by Phoenix pursuant to OCC-OAC 165:29-3-90(g) and (h).

5) The ALJ recommends denial of the Motion to Dismiss for several reasons:

First, pursuant to 12 O.S. Section 2025(D)(1), the substitution of the Applicant because of the resignation of a public officer provides that a misnomer shall be disregarded only if it does not affect "the substantial rights of the parties." The law of substitution of a party holds that the successor litigant steps into the shoes of the predecessor party, *Ransom v. Brennan*, 437 F.2d 513 at 516 (C.A. Tex. 1971). Also, in Commission proceedings the Oklahoma Supreme Court has held it is not proper for a party to take inconsistent positions on material issues at different stages of a cause. *Samedan Oil Corporation v. Corporation Commission*, 755 P.2d 664 (Okl. 1988). In this case, Phoenix filed a Response and Request for Affirmative Relief, which (although asserting several unattainable prayers for relief) certainly preserves its right to a fair resolution of the ultimate issue regarding the creditability and integrity of its actions as a "Consultant Licensee" in the Chowdhury incident. The Motion to Dismiss is an inconsistent position of the Successor Applicant and cannot be recommended by the ALJ.

Second, the application in Cause PSD 201100034 should be considered a proper application for post order relief pursuant to OCC-OAC 165:5-17-2.

Likewise, the Applicant pleaded for a hearing and order pursuant to 17 O.S. Section 306(22). The Application seeks review and correction of the record in Cause EN 201000122. The erroneous allegations were presented in the hearing in Cause EN 20100122 regarding Phoenix's performance as a Consultant Licensee pursuant to the Petroleum Storage Tank Division rules. The Application did not request a modification or vacation of a Commission order; however, the status of the Petroleum Storage Tank Division as both the enforcement and licensing agency impacting the legal standing of a Consultant Licensee should result in the determination by the Commission that a remedy should be afforded through application, hearing, and order to rectify the negative inferences established in the Cause EN 20100122 proceeding. It is axiomatic that license holders are to be afforded Due Process protections in state administrative agency proceedings pursuant to the 14th Amendment to the U.S. Constitution. In the present application, the best result would entail an adjudicative remedy for Phoenix, which the omnibus jurisdictional provision of 17 O.S. Section 306(22) should empower the Commission to provide. In this instance, the Commission Staff elected to file the application in question to provide due process to Phoenix. Phoenix filed a responsive pleading seeking affirmative relief in the form of "an order for a public and written retraction of the defamatory and false statements made in Cause No. EN 201000122 and that this written retraction be placed in the Petroleum Storage Tank Division files and in the OCC Court files pertaining to Cause No. EN 201000122...and such other relief as the Commission deems appropriate." An unopposed adjudicative hearing occurred, which provided uncontroverted evidence demonstrating the Commission Staff's erroneous investigation and assumptions entered into the record of Cause EN 20100122. Because of the status of the Petroleum Storage Tank Division as the enforcement and licensing agency, its substantive rules provide a mechanism for closure of Phoenix's complaints in the Chowdhury matter through the issuance of a final order in Cause PSD 201100034, which will (1) identify the erroneous nature of the investigation and assumptions presented by the Staff witness, which resulted in the ALJ's inadvertent misunderstanding about the facts; and (2) refer the matter to the Petroleum Storage Tank Division for disposition of the cause by report under OCC-OAC 165:29-3-90(g) and (h). Accordingly, a due process remedy should be afforded the Consultant Licensee through the instant Application. The Commission Staff's contention that the issues in the instant adjudication are moot and the Application should be dismissed, should be rejected.

Third, the Motion to Dismiss should be denied because the Commission Staff's contention that Phoenix's complaint constitutes an improper application for sanctions against Commission personnel should be rejected. From the commencement of Cause PSD 201100034, there has been no disagreement that the Application is not a personnel action. The Commission Staff members who participated in the hearing in Cause EN 201000122 are granted absolute

judicial and witness immunity from any damage claims rising from statements made in the course of judicial proceedings. *Hammett v. Hunter*, 117 P.2d 511 (Okl. 1941). Judicial and witness immunity does not apply to disciplinary proceedings. See *Gilchrist v. Board of Review of the Oklahoma Employment Security Commission*, 94 P.3d 72 (Okl. 2004) and *Kirschstein v. Haynes*, 788 P.2d 941 (Okl. 1990). However, according to the ALJ's best knowledge and belief, there have been no adverse consequences for the Commission's Staff members affected by the instant Application, except for the stressful experiences created by the contentious proceedings that have occurred in Cause PSD 201100034. These are good employees who have served the Commission well for many years. The ALJ considers the Phoenix/Chowdhury matter to be an unfortunate misunderstanding caused by an incomplete Commission Staff investigation and erroneous assumptions expressed by the Commission Staff's witness in the enforcement hearing. The subject matter of the consultant/ subcontractor's role in the facts of Cause EN 201000122 should have been irrelevant to the enforcement adjudication. The facility operator has the non-delegable duty to comply with the Commission's rules and regulations. *Stamford Energies Co., Inc. v. Corporation Commission*, 764 P.2d 880 (Okl. 1988). The business relationships between sub-contractors and a facility operator are private matters beyond the Commission's jurisdiction. See *Rogers v. Quiktrip Corp.*, 230 P.3d 853, 857 (Okl. 2010) where the Court stated "The Commission is without authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved." The Commission Staff counsel who presented Cause EN 201000122 should have recognized the consultant issue was a red herring to the primary question of the tank operator's responsibility to file correct reports with Petroleum Storage Tank Division. The consultant issue should not have been pursued to the extent it was on December 12, 2010. If there was reason to question the ethics or propriety of the consultants' actions with regard to the Chowdhury facility, the Commission Staff should have followed the procedures set forth in OCC-OAC 165:29-3-90(g) and (h) instead of pursuing the matter in an enforcement adjudication at which the consultants were not present to respond. The findings in Order No. 581667 quoted in the ALJ Report In Response to Motion to Dismiss and Motion to Strike Notice of Withdrawal of Application on page 3, 4 and 5, should not have been included in the order.

6) The Commission Staff argument regarding the lack of standing by Phoenix to file a valid Response and Request for Affirmative Relief should be rejected. Phoenix was clearly a "Party of Record" with the prerogative to file a response pursuant to the Commission's Rules of Practice. OCC-OAC 165:5-1-3 provides:

Definitions..."Party of Record" means a person who makes formal appearance either in person or by an

attorney at any stage of a cause whether or not seeking affirmative relief.

The Commission Staff position that Phoenix as an "Interested Party" is foreclosed from filing a response, since it was not named by Commission Staff as Respondent to Cause PSD 201100034 is not consistent with the language in the Application. The application states, in part, at page 2, the hearing should provide the "...opportunity for Interested Party The Phoenix Group to respond to certain allegations and representations set forth in Cause EN 201000122;..." The lack of standing argument regarding the status of Phoenix fails to recognize it is a Consultant Licensee, which must be afforded due process to respond to the Commission Staff's own assertions that created a taint on its competence as such license holder.

7) The Affirmative Relief requested by Phoenix and argued on June 4, 2013 in the course of the Motion to Dismiss concerning the awarding of attorney's fees and costs associated with the participation of Phoenix's counsel in the proceedings in Cause PSD 201100034 should be denied. The hearing on September 30, 2011 did not address any matter with respect to the prayer for attorney's fees and costs as articulated in Phoenix's Response and Request for Affirmative Relief. The Petroleum Storage Tank Release Indemnity Program statutes do not allow for recovery of attorney's fees except in the case of disallowance of a claim. 17 O.S. Section 356(L). Otherwise, legal expenses cannot be recovered. 17 O.S. Section 356(I)(5). Phoenix argued on June 4, 2013 in the context of the Motion to Dismiss hearing that, (1) the Commission Staff's actions and ensuing delays created by the breakdown in negotiations between itself and the Commission's attorneys to gain a final order in Cause PSD 201100034; and (2) the Commission Staff's change of position and attempt to bring a Motion to Dismiss the Application constituted oppressive conduct by Staff. Pursuant to the authority of *City National Bank v. Owens*, 565 P.2d 4 (Okla. 1977) Phoenix contended the Commission should invoke its inherent equitable power to award attorney's fees and costs because of the Commission Staff's oppressive conduct. There has been no evidence to support Phoenix's request for award of attorney's fees and costs. The record of PSD 201100034 on the merits of the Application and Phoenix's Response and Request for Affirmative Relief is closed. Review of the emails and other items provided by Phoenix in its various motions, responses, and replies certainly shows an impasse was reached with Commission Staff since a point in 2012, which clearly became more acute beginning in April 2013. The ALJ considers the circuitous procedural route taken by Cause PSD 201100034 since September 30, 2011 to be something of a mystery; however, the ALJ finds no oppression or retaliatory motives in the Commission Staff's positions. The Commission Staff attorneys have raised legitimate legal arguments; as has Phoenix in its responses. Phoenix's request for award of attorney's fees and costs should be denied. Also the requests for formal written apologies from Commission Staff members and redaction of the transcribed and recorded

proceedings in EN 201000122 with respect to the statements Phoenix considers objectionable are not feasible. On a couple of occasions in the course of the hearings in PSD 201100034, the affected Commission Staff members have been present and made conciliatory statements to Phoenix representatives about the mistake they precipitated. The request to redact transcribed material and recorded proceedings in EN 201000122 steps into the legal work product of the Commission Court Reporting staff and is just not feasible or justifiable.

8) In conclusion, the ALJ has worked assiduously to formulate a potential pathway for Phoenix to receive a just result in this unfortunate case. A just result is also needed for the Commission Staff's members who have been caught in this difficult process. Mistakes were made in Cause EN 201000122 and Phoenix is deserving of recourse to correct those errors. The ALJ is apologetic to Phoenix and the Commission Staff members that they have been forced to endure the circumstances that have unfolded in the instant application. It is hoped the pathway outlined in the ALJ's Report can be a means to achieve a fair and final outcome for the parties.

POSITIONS OF THE PARTIES

STAFF

1) **Jeff Southwick**, Deputy General Counsel, appearing on behalf of Mitchell/Applicant and Wrottenbery/Substitute Applicant, stated that Staff's current position is that Mitchell/Applicant had no right to file an application to try to correct a record that had already been established in an enforcement action. By statute, only three parties can file a PSD application: the PSTD, the Director of the PSTD, and the District Attorney for the county in which the matter arises. Mitchell was none of these.

2) ALJ Decker erred in relying on the *Arbuckle Simpson and Aquifer Protection Federation of Okla., Inc. v. Okla. Water Resources Bd.*, 2013 OK 29 (unpublished opinion), and *Samedan Oil Corporation v. Corporation Commission*, 755 P.2d 664 (Okl. 1988) cases because the facts are distinguishable from the case at bar. The *Arbuckle* case involved an ALJ who had ex parte communications with a party and then relied on the ex parte communications in making his decision. Southwick argues that this case is inapplicable because ex parte communications of this type are not at issue here. The *Samedan* cause stands for the proposition that a party can't change his position midstream. The *Samedan* case involved one party who changed his position several times post-order. Southwick argues that the facts of this case differ from the *Samedan* case since Wrottenbery, who was substituted for Brooks, did not change positions. Rather, the Substitute Applicant endeavored to dismiss the case altogether, which she is allowed to do.

3) As support for the argument that the Substitute Applicant can dismiss at anytime, Southwick points to two rules, a "general rule of practice" and a "PSTD-specific rule". Southwick cites OCC-OAC 165:5-9-2(e), a "general rule" for subsequent pleadings, which states: "The applicant may dismiss the application with, or without prejudice at any time prior to the record being opened at the hearing on the merits in said cause..." Southwick also cites OCC-OAC 165:5-21-5(c)(2)(A), a "PSTD-specific rule": "The applicant may dismiss his application with or without prejudice at any time..." Southwick argues that since the "PSTD-specific rule" lacks the "prior to the record being opened at the hearing on the merits in said cause" language of the "general rule", Wrotenbery is allowed to dismiss its cause at any time.

4) Southwick argues that ALJ Decker erroneously attached procedural due process rights to Phoenix, rights Phoenix was not entitled to since it is not a Commission licensee. Southwick acknowledges that the statutes and rules afford a Commission licensee some procedural due process rights. But the Commission does not license Phoenix, as a company. Although the Commission licenses as an environmental consultant some of Phoenix's staff members, none of the licensed staff was ever involved in the case. So, it was error for ALJ Decker to attach procedural due process rights to the company and allow them to pursue affirmative relief (i.e. an apology). Since Phoenix is not a licensee and does not have any procedural due process rights, ALJ Decker's recommendation to resolve the case by sending it to the PSTD Director to investigate was inappropriate.

5) Although OCC-OAC 165:5-21-5(c)(2)(A) allows an applicant to dismiss his application at any time, the rule further states: "The dismissal shall not dismiss the cause as to affirmative relief sought by any respondent." "Respondent" is a defined term in the rules, and Phoenix does not fall within that definition. Phoenix was named as an interested party, not a party respondent. Therefore, the argument that Wrotenbery's dismissal does not function to dispose of Phoenix's request for affirmative relief is incorrect because the rule only applies to respondents, not interested parties.

ROBERTS

1) **Aletia Haynes-Timmons**, attorney, appeared on behalf of Roberts in her individual capacity. In the ALJ's December 30, 2010 final order, the ALJ discussed Roberts' testimony. Specifically, the order mentions that Roberts testified that she believed that Mr. Chowdhury had received bad advice.

2) Although no appeal had been filed, nor any objections to the final order made, Mitchell/Applicant filed an application to correct the statements made by Roberts at the hearing because they were damaging to Phoenix. Mitchell/Applicant had no jurisdictional, factual, or procedural basis for filing the application.

3) A hearing on Mitchell/Applicant's application was held on September 30, 2011 before ALJ Decker. Mr. Hight, a representative of Phoenix, appeared and gave testimony. During the course of his testimony he made several negative statements about Roberts, specifically, about her job performance, her attitude, and her professional competence. Although Roberts was not given notice of the hearing, she found out about it and made a point to attend. She listened to Mr. Hight's testimony and asked ALJ Decker for an opportunity to respond to the statements he made about her. Roberts was not given an opportunity to address the allegations that Mr. Hight made in his testimony. The Court denied Roberts her due process rights because it did not allow her an opportunity to respond, nor did the Court allow anyone from the Commission to call her as a witness during the September 30, 2011 hearing.

4) As the record stands, there are uncontested allegations against Roberts that impugn her employment status. The record also contains discussions about complaints that Mr. Hight made to Roberts' supervisors.

5) During her testimony, Roberts alleged that false documents had been submitted. As a result, one ALJ issued a fine to Mr. Chowdhury and the other ALJ did not reverse/rescind the fine.

6) Phoenix is seeking costs and attorney fees for having to defend against Roberts' statements. As a witness, Roberts' testimony is privileged and she should have immunity for what she says during her testimony. As an expert, Roberts should be allowed to give her opinion without fear of being sued. Particularly, because the opinion she gave was not overturned by either ALJ Norris or ALJ Decker.

PHOENIX

1) **Jana Harris-Hight**, attorney, appearing on behalf of Phoenix, stated Staff filed a 68 page brief to support the Staff's Exceptions less than 18 hours before this hearing. Hight orally moved the Court to strike the brief, or, alternatively, to grant a continuance so Phoenix would have an opportunity to file a written response. The Court gave Phoenix five days from the date Staff filed its brief to file a Response Brief by Phoenix.

2) Phoenix took exception to one primary determination by the ALJ: that Phoenix should be denied fees and costs associated with certain aspects of this case. ALJ Decker erred in denying fees and costs because he misunderstood the basis on which Phoenix was asking for such relief. ALJ Decker understood that Phoenix was requesting fees based on having to respond to Mitchell/Applicant's application. But that is not correct. Phoenix is not requesting fees/costs based on the September 30, 2011 hearing. It seeks fees and costs based upon the Office of General Counsel's oppressive and vexatious conduct from October 1, 2011 thru yesterday (July 31, 2013), specifically Phoenix was seeking fees based on the acts in filing the Notice of Withdrawal; the content of the Notice of Withdrawal; and filing the Motion of Withdrawal

3) Generally, fees are not awarded absent a contractual or statutory provision, but there are exceptions. In *City National Bank & Trust Co. v. Owens*, 565 P.2d 4 (Okl. 1977), Plaintiff sought to dismiss their cause after the evidence had closed, after the trial, after the judge prepared jury instructions. Here, Wrottenbery/Substitute Applicant sought to dismiss after a full hearing, after the record was closed, and after ALJ Decker gave instructions. The *Owens* case held that this creates a substantial injustice and is highly prejudicial. So, even though the OAC provisions allow Wrottenbery/Substitute Applicant to seek dismissal if she wants to, it's the timing of those actions that are the basis for the fee. *Walker v. Ferguson*, 102 P.3d 144 (Okl. 2004), holds that there must be bad faith and oppressive conduct on the record.

4) The record and the chronology of this case show that there has been oppressive conduct, most recently the 68 page brief filed less than 18 hours ago. There was no basis in either the Commission Rules of Practice or the rules specifically enumerated for the PSTD on which to file the Notice of Withdrawal. Nonetheless, it was filed and required Phoenix to respond. The Office of General Counsel set hearings and filed documents to forestall, delay, and prevent ALJ Decker from making a decision on Phoenix's Motion to Settle Terms, which had been filed on April 12th and heard April 22nd. The Office of General Counsel filed the Notice of Withdrawal and the Motion to Dismiss more than 500 days after the record was closed. All of this oppressive conduct provides ample basis for an exception to the American Rule.

5) Phoenix deserves to have a correct record. That's what Mitchell/Applicant was trying to do. Mitchell/Applicant brought this application in an effort to be fair and impartial.

6) Staff argues that Mitchell/Applicant had no standing to bring this application. If the Director of Administration of the Oklahoma Corporation Commission doesn't have standing to see that the proceedings are fair and impartial, who does?

7) Staff argues that *Arbuckle Simpson Aquifer Protection Federation of Okla. v. Okla. Water Res. Bd.*, 2013 OK 29 (unpublished opinion), is inapplicable in this case, but it is not the facts of that case that are important so much as the Supreme Court's attitude about fairness and impartiality in agency administrative proceedings.

RESPONSE OF STAFF

1) Despite what Ms. Hight says, Phoenix was afforded an opportunity to speak, to examine, to cross-examine, to present evidence. Furthermore, the Office of General Counsel has presented Phoenix with at least six orders, but Phoenix has declined every one of them.

2) OCC-OAC 165:5-13-5 provides that "[a] person may be permitted to amend his exceptions, or to present at the initial hearing on exceptions thereon additional grounds for exceptions from the report." The rule does not require the applicant to enclose its brief with its exceptions and it is the practice at the Commission for attorneys to present their briefs at any time within the rule. Furthermore, this "late" brief does nothing more than flesh out the exceptions.

RESPONSE OF ROBERTS

1) Timmons clarifies that she is appearing on behalf of Roberts, in her individual capacity, because Phoenix filed a pleading accusing Roberts of perjury (or defamation) based on the statements she made about Phoenix giving bad advice. The pleading also requests that the ALJ order Roberts or the Commission to pay fees and costs.

2) Additionally, Phoenix has served a Motion for Sanctions upon the Commission alleging that Roberts made false statements, requesting a public apology from Roberts and ALJ Norris, and requesting fees. Although the Motion was not filed, the Commission took it very seriously.

3) Ultimately, Timmons argues that several statements and comments that directly involved Roberts were made and that Roberts has not been afforded an opportunity to defend herself. Roberts takes this very seriously because she has worked at the Commission for ten years and has never had her integrity questioned.

4) Phoenix had an opportunity for due process. Phoenix had after the December 30, 2010 hearing the ability to appeal the statements made and

findings made by the ALJ. They didn't do that. They didn't ask for a Motion to Reconsider or a Motion to Clarify.

5) Timmons request that the court dismiss Mitchell/Applicant's application because it has no basis in law or in fact, or, alternatively to grant Roberts an opportunity to respond to the allegations made against her.

RESPONSE OF PHOENIX

1) Roberts was not tendered as an expert in any of the proceedings below, she was only offered as a lay witness. (Timmons agrees, Roberts was not designated as an expert witness).

2) Hight argues that it is improper for Timmons to discuss Phoenix's Motion for Sanctions because that matter is not before the court.

3) Hight argues that ALJ Decker properly relied on the *Samedan* case, supra, because it discusses how traversing a theory midway through litigation is detrimental and prejudicial to a party and causes substantial injustice. Furthermore, the *Samedan* case stands for the proposition that a substituted applicant steps into the shoes of the prior applicant. Here, Wrotenbery/Substitute Applicant steps into Mitchell/Applicant's shoes. So, when Wrotenbery/Substitute Applicant takes a position that is contrary to Mitchell/Applicant, she is changing positions.

4) Staff argues that pursuant to OCC-OAC 165:5-21-5(c)(2) the applicant can dismiss the application at any time. This section also says that the affirmative relief sought by another party or someone else can't be dismissed. Phoenix sought affirmative relief.

5) Hight argues that Staff's exception to the ALJ attaching procedural due process rights to Phoenix is incredible. Hight argues that procedural due process should be afforded to anyone who comes into these courtrooms. Hight takes exception to Staff's argument that while Phoenix employees have due process rights before the Commission, the company does not. Hight argues that although the Commission must license individual consultants, it is companies like Phoenix that must hire the consultants. To say that these companies are not entitled to procedural due process is not fair.

6) Hight argues that Roberts was given an opportunity to speak, on the record, at the September 30, 2011 hearing. It was Phoenix, not Roberts, that was denied due process because Phoenix was not allowed to cross-examine Roberts after she made those statements. Additionally, at the hearing on

Phoenix's Motion to Settle Terms, Roberts and ALJ Norris were given an opportunity to make statements on the record. Phoenix was not allowed to cross-examine those statements.

FURTHER RESPONSE OF STAFF

1) Staff argues that although he was the one to file Mitchell/Applicant's application, he is not precluded from arguing that it should be dismissed.

FURTHER RESPONSE OF ROBERTS

1) Whether Roberts was an expert witness or a lay witness in the hearing, she is entitled to give her opinion about what she believed happened.

2) Timmons points out that at the April 22, 2013 hearing, before the transcript proceedings began, Roberts tried to clarify with ALJ Decker that he was incorrect in inferring that she accused Phoenix of any wrongdoing. ALJ Decker cut her off and proceeded with the hearing. So, to say that Roberts had an opportunity to defend herself is not accurate.

3) Again, Timmons points out that Phoenix's request for relief impacts Roberts' employment and her professional credibility. Phoenix's request for relief is also defamatory to Roberts, especially Phoenix's Motion for Sanctions.

FURTHER RESPONSE OF PHOENIX

1) Hight contends that Staff's argument that Phoenix was not a respondent is not completely accurate. Mitchell/Applicant's application, which Staff filed, asked Phoenix to respond. Phoenix responded at the request of Mitchell/Applicant and Staff. Furthermore, Phoenix filed an application for affirmative relief and Phoenix was never told that they could not because they were not a named respondent.

2) The rules leave Phoenix no option other than to file a response; there is no provision that allows Phoenix to file a cross application.

3) ALJ Decker spoke to this issue in his report. He identified Phoenix as a party of record and acknowledged that parties of record have a right to seek affirmative relief under the rules.

4) When Roberts testified to something that was admittedly her "belief", not her "knowledge", she was testifying outside the scope of her personal knowledge.

CONCLUSIONS

The Referee finds that the Report of the Administrative Law Judge should be affirmed.

1) Mitchell/Applicant filed this application in Cause PSD 201100034 to correct the record in Cause EN 201000122 pertaining to certain witness testimony and judicial statements. Phoenix sought the same relief in its request for affirmative relief. Neither Mitchell/Applicant nor Phoenix sought to deny the force and effect of final Order No. 581667 in Cause EN 201000122. Therefore, neither Mitchell/Applicant nor Phoenix's affirmative relief requested, constituted a "collateral attack" on Cause EN 201000122. See *Woods Petroleum Corporation v. Sledge*, 632 P.2d 393, 396 (Okl. 1981).

2) OCC-OAC 165:5-17-2 requires post-order relief to be sought by application if said relief is sought after ten days has elapsed following a Commission order. Application PSD 201100034 must be considered a proper application for post-order relief pursuant to OCC-OAC 165:5-17-2. Mitchell/Applicant pleaded for a hearing order in PSD 201100034 pursuant to 17 O.S. Section 306(22).

3) OCC-OAC 165:5-17-2 provides:

After 10 days: application.

(a) At any time subsequent to ten (10) days after entry of an order of the Commission, an application to vacate or modify the order, or for any other form of relief from the order, filed by any person, whether or not a party of record in the original cause, shall be treated as a separate cause, and shall be governed by rules applicable to the commencement of a cause. The application shall:

- (1) Identify the order sought to be modified or vacated.
- (2) State specifically the parts or provisions sought to be modified or vacated.
- (3) State specifically the modifications or vacations sought.
- (4) State specifically the grounds upon which such relief is sought.

(b) Notice of hearing of the application shall be served and published as required upon the commencement of the cause. The application shall be set for hearing before the Commission or Administrative Law Judge or Public Utility Referee, as provided in this Chapter as to the commencement of a cause.

4) Staff asserts that notice issued was insufficient in PSD 201100034. Staff asserts that OCC-OAC 165:5-17-2 requires notice to be served on all affected parties and that notice was not served on respondent tank owner and Oklahoma Corporation Commission witness, Terri Roberts. OCC-OAC Rule 165:5-17-2, as stated above, does not require notice to Roberts or to the respondent tank owners as the record correction sought in PSD 201100034 pertains solely to the performance of Phoenix pursuant to the PSTD rules. It was the negative inferences established in the EN 201000122 proceeding. There was no attempt to change the ultimate outcome of the order from Cause EN 201000122. Therefore, it was not necessary to notice Roberts or respondent tank owners as they were not impacted by the outcome of PSD 201100034. See *Forest Oil Corporation v. Corporation Commission of Oklahoma*, 807 P.2d 774 (Okl. 1990). In addition, Oklahoma Corporation Commission witness Terri Roberts waved any plaintiff objection to notice when she appeared on her own behalf at the entire hearing on the merits of Cause PSD 201100034. See *LaBellman v. Gleason and Sanders, Inc.*, 418 P.2d 949 (Okl. 1966).

5) Staff asserts that the ALJ erred in relying on *Samedan Oil Corporation v. Corporation Commission*, 755 P.2d 664 (Okl. 1988) where the Oklahoma Supreme Court held that it is not proper for a party to take inconsistent positions on material issues at different stages of a cause. Staff asserts that the *Samedan* case does not restrict Wrotenbery/Substitute Applicant's right to

dismiss. Wrottenbery/Substitute Applicant asserts that her change in position from that of her predecessor Mitchell/Applicant occurs "pre-order" and it is therefore allowable, whereas the change in position in the *Samedan* case occurred "post-order" and therefore was not allowed. ALJ Decker relied upon the *Samedan* case, among other authorities, as the reasoning in the *Samedan* court was the same as ALJ Decker used in the present case, i.e. it was improper for Wrottenbery/Substitute Applicant to take an inconsistent position from that of her predecessor more than 500 days after the hearing on the merits was concluded and the record in the cause was closed. The Oklahoma Supreme Court in the *Samedan* case, 755 P.2d at 664, states:

Samedan should not now be heard to present a theory or take a position that is new and different and obviously inconsistent with the one presented in earlier proceedings. Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited, acquiesced or tacitly conceded in, or to assume an inconsistent position from that taken in the trial court. *Union Texas Petroleum et al. v. Corp. Comm'n*, 651 P.2d 652 (Okla. 1981). As we recognized in *Union*, this is a well-settled rule which emanates from the very heart of the purpose served by an appeal. "To allow such a traverse in theory at the appellate level thwarts the very basis of the appellate process." *Union*, 651 P.2d at 664. Samedan is bound by the position it took in the proceedings culminating in the third unappealed order 259992 and will not permitted to take an inconsistent position on appeal. To hold otherwise would be an abuse and a manipulation of the judicial process.

In cause PSD 201100034, a full hearing on the merits occurred in which Mitchell/Applicant sought to correct a record that contained false testimony of an Oklahoma Corporation Commission PSD staff witness, testimony that was later adopted and repeated by the ALJ. The law of substitution of a party holds that the successor litigant steps into the shoes of the predecessor party. *Ramson v. Brennan*, 347 F.2d 513, at 516 (Ct.App. Tex. 1971). In the present case, Phoenix filed a response and a request for affirmative relief which certainly preserves its right to a fair resolution of the ultimate issue regarding the credibility and integrity of its actions in the EN 201000122 action/incident. The Referee agrees that Wrottenbery/Substitute Applicant's Motion to Dismiss is an inconsistent position of Wrottenbery/successor applicant and cannot be recommended.

6) Staff argues that Wrotenbery/Substitute Applicant has the right to dismiss under OCC-OAC 165:5-9-2(e) and OCC-OAC 165:5-21-5(c)(2)(A). The present cause PSD 201100034 was filed and is proceeding in accordance with the Oklahoma Corporation Commission's Rules of Practice for the PSTD docket, found at OCC-OAC 165:5-21-1 et seq. These specific rules governing practice concerning the PSTD docket also incorporate by reference certain enumerated general Rules of Practice found at various locations within the Oklahoma Corporation Commission's Rules of Practice. These specifically enumerated general rules do not include OCC-OAC 165:5-9-2, or any subsection thereof. OCC-OAC 165:5-21-5(c)(2)(A) provides:

The applicant may dismiss his application with or without prejudice at any time. The dismissal shall not dismiss the cause as to affirmative relief sought by any respondent.

Phoenix filed a response and request for affirmative relief on September 28, 2011. Phoenix's response adopted the requested relief of Mitchell/Applicant and also requested:

In addition, The Phoenix Group seeks an order for a public and written retraction of the defamatory and false statements made in Cause No. EN 201000122 and that that this written retraction be placed in the PSTD files and in the OCC court files pertaining to Cause No. EN 201000122; The Phoenix Group respectfully requests a public and written apology from the PSTD staff witness, from the Administrative Law Judge, and from the Oklahoma Corporation Commission; The Phoenix Group respectfully requests reimbursement for Mr. Hight's time and for counsel's time that was made necessary by Cause EN 201000122 in order to prepare for this hearing and for attending this hearing in Cause No. PSD 201000034 and that this reimbursement be deemed reasonable and necessary expenses related to correcting the record in Cause No. EN 201000122; and such other relief as the Commission deems appropriate.

Thus, Wrotenbery/Substitute Applicant is prevented by this section of the rule from dismissing Phoenix's affirmative request for relief that the corrections to the record be made.

7) Wrotenbery/Substitute Applicant alleges that ALJ Decker erred in determining that Phoenix was an environmental consultant licensee and entitled to the rights of such licensee.

8) The Phoenix Group is a business entity that performs consulting work pursuant to the statutes and rules governing underground storage tank environmental remediation. The Oklahoma Corporation Commission licenses the individuals who are employed by Phoenix to perform this consulting work as a "consultant licensee". When Phoenix's actions as a consulting entity were questioned by a staff witness in Cause EN 201000122, the allegations were against the licensed employees of Phoenix, who practice before the OCC and who in the course of their daily employment are in direct contact with the OCC as the licensing entity and as a regulatory authority over the tank owners who retain Phoenix to perform work on the tank owners' behalf.

9) The Referee agrees with the analysis of ALJ Decker when he states in his Report of the Administrative Law Judge on page 32 that it is "axiomatic that license holders are to be afforded due process protections in state administrative agency proceedings pursuant to the 14th amendment of the U.S. constitution." Due process protection should be afforded to Phoenix as well as to its license holder employees/"consultant licensees". In *Wolfenbarger v. Hennessee*, 520 P.2d 809 (Okl. 1974), the Supreme Court stated:

The constitutional guaranty of due process of law applies to administrative as well as judicial proceedings where such proceedings are quasi-judicial in nature. *Neeley v. Board of Trustees, Police & and F. Retire. Sys.*, 205 Kan. 780, 473 P.2d 72, 75 (1970). The due process clauses of the State and Federal Constitutions afford protection against arbitrary and unreasonable administrative actions. *State v. Parham*, 412 P.2d 142, 154 (Okl. 1966).

Where the ordinance prescribes a particular method of procedure for the revocation of a license it must be followed. In the absence of such a provision, there must be substantial compliance with the fundamental rules of substantial justice and fair play. In a proceeding for revocation of a license the complainant must definitely set forth the nature of the charge and be sufficiently explicit to advise a person charged of the particular kind of misconduct which it is proposed to prove against him. *Klafter v. State Board of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193 (1913).

* * *

An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be full, fair and adequate; right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. There must be adequate notice of issues, and the issues must be clearly defined in order that an administrative hearing is fair. All parties must be apprised of the charges so they may test, explain or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence. See *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed 2d 287, 300, 73 C.J.S. Public Administrative Bodies and Procedure, § 132, p. 456.

The instant dispute arises from an enforcement action filed by Cause EN 201000122, Order No. 581667 (December 30, 20100, for penalty assessment, stemming from alleged violations of the Oklahoma Corporation Commission PSTD's rules pertaining to a regulated facility operated by Ashraf Chowdhury, and Farhat Chowdhury denoted the "Moore Superette" located in Moore, Oklahoma. Phoenix was named as the "consultant" in the application and was provided notice of the enforcement hearing, but Phoenix was neither represented or present at the hearing. In the course of the proceeding, the concept was developed that the "consultant" identified as Phoenix was believed by Staff to have been the source of certain recommendations given to the operator regarding the preparation of required reports, which resulted in false information about volt meter related rectifier readings being provided to the PSTD. In actuality, the operator Chowdhury had received advice about preparation of the erroneous reports from another business that assisted the tank owner with compliance measures. The present application seeks review and correction of the record in EN 201000122. The present application does not request a modification or vacation of a Commission order, however, the status of PSTD as both the enforcement and licensing agency impacting the legal standing of Phoenix should result in the due process requirement that the OCC should provide a remedy to Phoenix afforded through application, hearing and order to rectify the negative inferences established in the EN 201000122.

The Referee agrees with ALJ Decker that a due process remedy should be afforded Phoenix through the instant application and said application should not be dismissed.

10) Wrottenbery/Substitute Applicant argues that this cause should have been dismissed pursuant to OCC-OAC 165:5-21-5(c)(2)(D)(vii), which provides,

in part, for dismissal of the cause for failure to submit a proposed order in a timely manner. Staff alleges that "it became apparent that Phoenix would not accept an agreed upon order which did not specifically criticize Commission personnel by name." See Brief in Support of Exceptions to the Report of the ALJ filed by Staff on July 31, 2013, page 11. Phoenix however alleges that it was Staff who adamantly opposed any settlement offer that included the "complete summary of the proceedings in the cause, as set forth in one version of a mutually prepared and proposed order by OCC counsel Southwick and by TPG [Phoenix] counsel Hight, be used as a basis for summary of the proceedings in a final order in this cause. It was the OCC office of General Counsel and Southwick's superiors, not TPG [Phoenix] who repeatedly and adamantly objected to this version of a proposed order." ALJ Decker agreed with Phoenix that it was best to include the "complete summary as set forth in Phoenix's Motion to Settle Terms, pages 17-25, "to explain the nature of the controversy." See Interested Party, the Phoenix's Group Response to Substitute Applicant Lori Wrotenbery's Brief in Support of Written Exceptions to the Report of the Administrative Law Judge in Response to Motion to Dismiss and Motion to Strike Notice of Withdrawal of Application and Authority in Support filed August 5, 2013, page 23. See also Report of the ALJ in Response to Motion to Dismiss and Motion to Strike Notice of Withdrawal of Application dated Jun 17, 2013, pages 6-7, footnote 4. The Appellate Referee agrees with ALJ Decker that the Motion to Dismiss should be denied because the Staff's contention that Phoenix's complaint constitutes an improper application for sanctions against Oklahoma Corporation Commission personnel should be rejected. The present cause was filed by Mitchell/Applicant to correct the record and the affirmative relief sought by Phoenix is the same. Oklahoma Corporation Commission's staff members who participated in the hearing in EN 201000122 are granted judicial and witness immunity from any damage claims arising from statements in the course of judicial proceedings. See *Hammett v. Hunter*, 117 P.2d 511 (Okl. 1941). *Kirschstein v. Haynes*, 788 P.2d 941 (Okl. 1990),

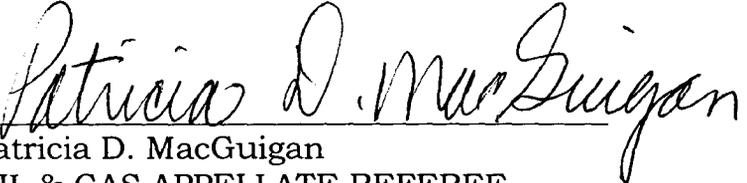
11) The affirmative relief requested by Phoenix and argued on June 4, 2013 in the course of the Motion to Dismiss proceeding concerned the awarding of attorney fees and costs associated with participation of Phoenix in the proceedings in PSD 201100034.

12) ALJ Decker in his Report of the ALJ recommends denying Phoenix's prayer for attorney fees and costs. The Appellate Referee agrees with ALJ Decker's decision as the Petroleum Storage Tank Release and Indemnity Program statutes do not allow for recovery of attorney fees except in the case of disallowance of a claim. 17 O.S. Section 356 (L.); 17 O.S. Section 356, I (5). L.(5) Phoenix argued on June 4, 2013, during the Motion to Dismiss hearing that the Staff's actions and ensuing delays created by the lack of negotiations between itself and the OCC's attorneys to gain a final order in PSD 201100034 and the Staff's change of position in an attempt to bring a Motion to Dismiss

the PSD 201100034 application constituted oppressive behavior by Staff. Phoenix cites the case of *City National Bank v. Owens*, 565 P.2d 4 (Okl. 1977) for the proposition that the Oklahoma Corporation should invoke inherent equitable power to award attorney fees and costs because of the Staff's oppressive behavior. The Appellate Referee agrees with the determination of ALJ Decker that there was "no oppression or retaliatory motives in the Staff's positions". See Report of the ALJ, page 36.

13) For the above stated reasons the Appellate Referee would affirm the Report of the ALJ issued by ALJ Decker on June 17, 2013.

RESPECTFULLY SUBMITTED THIS 27th day of September, 2013.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Douglas
Commissioner Anthony
Commissioner Murphy
Jim Hamilton
Michael Decker, ALJ/Director
Jeffery Southwick
Yasodhara Mitty Means
Aletia Haynes-Timmons
Terri Roberts
ALJ Michael Norris
Jana Harris Hight
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