



OPEN MEETING COVER SHEET

DRAFT PRELIMINARY ORDER

MEETING DATE: July 16, 2020

DATE DELIVERED: July 9, 2020

AGENDA ITEM NO.: 5

CAPTION: Docket No. 50788; SOAH Docket No. 473-20-4071.WS – Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates

DESCRIPTION: Draft Preliminary Order

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Governor

Public Utility Commission of Texas

TO: Chairman DeAnn T. Walker
Commissioner Arthur C. D'Andrea
Commissioner Shelly Botkin

All Parties of Record

FROM: Lavang Zehawi
Commission Advising

RE: *Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates*, Docket No. 50788, SOAH Docket No. 473-20-4071.WS, Draft Preliminary Order, July 16, 2020 Open Meeting, Item No. 5.

DATE: July 9, 2020

Please find enclosed the draft preliminary order filed by Commission Advising in the above-referenced docket. The Commission will consider this draft preliminary order at the July 16, 2020 open meeting. Parties shall not file responses or comments addressing this draft preliminary order.

Any modifications to the draft preliminary order that are proposed by one or more Commissioners will be filed simultaneously prior to the consideration of the matter at the July 16, 2020 open meeting.

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PUC DOCKET NO. 50788
SOAH DOCKET NO. 473-20-4071.WS

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|------------------------------------|---|----------------------------------|
| RATEPAYERS APPEAL OF THE | § | PUBLIC UTILITY COMMISSION |
| DECISION BY WINDERMERE OAKS | § | |
| WATER SUPPLY CORPORATION TO | § | OF TEXAS |
| CHANGE WATER AND SEWER | § | |
| RATES | § | |

DRAFT PRELIMINARY ORDER

Ratepayers of the Windermere Oaks Water Supply Corporation filed a petition under Texas Water Code (TWC) § 13.043(b) appealing the decision by Windermere Oaks Water Supply Corporation to change its water and sewer rates. This preliminary order identifies the issues that must be addressed and that shall not be addressed.

Windermere Oaks provides water and sewer services under water service area certificate of convenience and necessity (CCN) number 12011 and sewer service area CCN number 20662, which are both located in Spicewood, Texas. The petitioning ratepayers filed their petition on April 27, 2020 and an amended petition on April 30, 2020. According to the petition, Windermere Oaks serves at least 250 ratepayers, and 52 ratepayers signed the petition. Petitioners contend that the increases in retail water and sewer rates effective March 23, 2020 are excessive. Specifically, the changes in rates include a base-rate increase for water service of a 5/8" x 3/4" meter from a previous rate of \$50.95 per month to a new rate of \$90.39 per month, and a base-rate increase for sewer service of a 5/8" x 3/4" meter from a previous rate of \$40.12 per month to a new rate of \$66.41 per month.¹ Petitioners assert that the new water and sewer rates represent a 71% increase in base rates.²

Petitioners assert that the board of directors of Windermere Oaks justified legal expenditures as the exclusive reason for the rate increases.³ Petitioners argue that Windermere Oaks increased rates due to its mismanagement of system finances and wasteful legal expenditures;

¹ First Amended Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates at 1–2, 5–6 (April 30, 2020).

² *Id.* at 1.

³ *Id.* at 2.

not allocating funds properly to reserve accounts; and negligence in selling valuable real estate assets below market value and in refusing to sell current real estate assets to offset corporate debt or legal fees or supplement income for capital improvements.⁴ Petitioners request the Commission to review if the rate increases, including water fees, sewer fees, stand-by fees, membership fees, and equity buy-in fees, are just and reasonable.⁵

On May 27, 2020, Windermere Oaks responded that the March 23, 2020 rate increases are just and reasonable. Windermere Oaks contends it increased rates due to litigation brought against Windermere Oaks by a small subset of petitioners over a sale of real property in 2016, as the litigation threatened Windermere Oaks's financial health.⁶ Windermere Oaks asserts that the amount of the rate increases were determined through a rate analysis of all operating expenses, which included \$169,000 in legal fees.⁷ Additionally, Windermere Oaks asserts that the petitioners' appeal should proceed solely on the issues of whether the March 23, 2020 rate increases, which accounted for the legal fees Windermere Oaks has incurred to date and budgeted to incur in defending lawsuits, were just and reasonable.⁸ Furthermore, Windermere Oaks requests the Commission to evaluate additional fees incurred by Windermere Oaks in defending this rate appeal pursuant to 16 Texas Administrative Code (TAC) § 24.101(e).

On June 17, 2020, Commission Staff filed its response to Order No. 2 in which Commission Staff recommended that the application be deemed administratively complete in accordance with TWC §§ 13.043(b) and (c) and 16 TAC § 24.101(b). In its response, Commission Staff further recommended that this proceeding be referred to the State Office of Administrative Hearings (SOAH). In Order No. 3 filed on June 23, 2020, the administrative law judge (ALJ) found the petition administratively complete. The Commission referred this proceeding to SOAH on June 23, 2020.

⁴ *Id.* at 2–3.

⁵ *Id.* at 3, 8–16.

⁶ Windermere Oaks Water Supply Corporation's First Response to Order No. 1 at 1–2 (May 27, 2020).

⁷ *Id.* at 2.

⁸ *Id.* at 4.

Petitioners and Windermere Oaks were directed, and Commission Staff and other interested persons were allowed, to file by July 1, 2020 a list of issues to be addressed in the docket and also identify any issues not to be addressed and any threshold legal or policy issues that should be addressed. Windermere Oaks and Commission Staff each timely filed a list of issues. Petitioners filed a list of issues on July 2, 2020.

I. Issues to be Addressed

The Commission must provide to the ALJ a list of issues or areas to be addressed in any proceeding referred to SOAH.⁹ After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this docket:

1. Did the petition appealing the rate change by Windermere Oaks follow the requirements of TWC § 13.043(b), (c), and (d); 16 TAC § 24.101(b), (c), and (d); and 16 TAC § 24.103(a) and (b)?
 - a. Was the petition filed within 90 days after the effective date of the rate change as required by TWC § 13.043(c) and 16 TAC § 24.101(b)?
 - b. What number of ratepayers had their rates changed and were eligible to appeal the rate change in accordance with TWC § 13.043(b)(3) and (d) and 16 TAC § 24.101(c) and (d)?
 - c. Did the lesser of 10,000 or 10% of those ratepayers file valid protests to the rate change in accordance with TWC § 13.043(c); and 16 TAC §§ 24.101(b) and 24.103(a) and (b)?
2. Did Windermere Oaks provide written notice of the hearing to all affected customers as required by 16 TAC § 24.101(c)(6)?
3. Should the Commission establish or approve interim rates under TWC § 13.043(h) and 16 TAC § 24.101(e)(6) and (h) to be in effect until a final decision is made?

⁹ Tex. Gov't Code § 2003.049(e).

4. Do the retail water and sewer rates being charged to petitioners by Windermere Oaks fulfill the requirements of TWC § 13.043(j)¹⁰ and 16 TAC § 24.101(i)? In addressing this question, evaluate the following:
 - a. Are the rates just and reasonable?
 - b. Are the rates unreasonably preferential, prejudicial, or discriminatory?
 - c. Are the rates sufficient, equitable, and consistent in application to each class of customers?
5. If the rates being charged to petitioners by Windermere Oaks meet the requirements of TWC § 13.043(j), must this appeal be dismissed?¹¹

If the rates being charged to petitioners by Windermere Oaks do not meet the requirements of TWC § 13.043(j), address the following issues:

6. What information was available to Windermere Oaks at the time it made its decision to increase the water and sewer utility service rates under TWC § 13.043(e)?
7. Considering only the information available to Windermere Oaks at the time of its decision, what are the just and reasonable rates for Windermere Oaks's customers that are sufficient, equitable, and consistent in application to each customer class and that are not unreasonably preferential, prejudicial, or discriminatory under TWC § 13.043(e) and (j) and 16 TAC § 24.101(e) and (i)?
 - a. What is the appropriate methodology to determine just and reasonable rates for Windermere Oaks's customers?
 - b. What is the revenue requirement that would give Windermere Oaks sufficient funds to provide adequate retail water and sewer service to petitioners?

¹⁰ See TWC § 13.043(j); see also *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 335–36 (Tex. App.—Austin 1994) (applying TWC § 13.043(j) in an appeal under § 13.043(f)).

¹¹ See *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994). In the *Fort Worth* case, the Austin Court of Appeals found that “the Commission made no finding as to the reasonableness of rates . . . , which is the initial inquiry under § 13.043(j) defining the scope of agency review.” *Id.* at 335. The Court ruled that the scope of appellate review under § 13.043(f) requires an initial determination under § 13.043(j). *Id.* at 336. However, the TWC does not limit the application of subsection (j) to appeals under § 13.043(f). Therefore, the same initial inquiry under subsection (j) must be made in this appeal under § 13.043(b) before the Commission can reset rates.

- c. What is the appropriate allocation of the revenue to customer classes?
- d. What is the appropriate design of rates for each class to recover Windermere Oaks's revenue requirement?
8. Were Windermere Oaks's outside legal expenses related to defending civil suits included in the rates appealed? If so, what amount of outside legal expenses was included in the rates appealed?
9. What are the reasonable expenses incurred by Windermere Oaks in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(2) and (5)?
 - a. Should the Commission allow recovery of these reasonable expenses?
 - b. If so, what is the appropriate recovery mechanism?
10. What is the appropriate effective date of the rates fixed by the Commission in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(3)?
11. If the Commission establishes rates different from the rates set by Windermere Oaks, should the Commission order refunds or allow surcharges to recover lost revenues under TWC § 13.043(e) and 16 TAC § 24.101(e)(4)? If so, what is the appropriate amount and over what period should the refund or surcharge be in place?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket. The Commission may identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Texas Government Code § 2003.049(e).

II. Issues Not to be Addressed

The Commission identifies the following issue that need not be addressed in this proceeding for the reasons stated.

1. *Whether the stand-by fees, membership fees, and equity-buy in fees charged by Windermere Oaks are subject to appeal under TWC § 13.043 and 16 TAC § 24.101.*

Petitioners assert that the stand-by fees, membership fees, and equity buy-in fees charged by Windermere Oaks are not just and reasonable.¹² Under TWC § 13.043(g) and 16 TAC § 24.101(g), *an applicant for service* from a water supply or sewer service corporation may appeal to the Commission a decision of the water supply or sewer service corporation affecting the amount to be paid to obtain service other than the regular membership or tap fees. However, the question of whether the stand-by fees, membership fees, and equity-buy in fees charged by Windermere Oaks are subject to appeal under TWC § 13.043(g) is not relevant in this proceeding because petitioners have not established they are applicants for service. Furthermore, even if petitioners had established they are applicants for service from Windermere Oaks, petitioners' assertions regarding stand-by fees, membership fees, and equity buy-in fees appear to be associated with regular membership fees, which are not subject to appeal under Section 13.043(g).

III. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the SOAH ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

¹² First Amended Ratepayers Appeal at 3, 8–16.

Signed at Austin, Texas the _____ day of July 2020.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER