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<b>RATEPAYERS APPEAL OF THE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>DECISION BY WINDERMERE OAKS</b>	§	
<b>WATER SUPPLY CORPORATION TO</b>	§	<b>OF</b>
<b>CHANGE WATER AND SEWER</b>	§	
<b>RATES</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**REQUEST FOR INTERIM RELIEF PENDING  
COMMISSION’S RESOLUTION OF RATEPAYER APPEAL**

COME NOW the Ratepayers of Windermere Oaks Water Supply Corporation (“Company”) with this Request for Interim Relief Pending the Commission’s Resolution of this Ratepayer Appeal and would show as follows:

Summary

This is a ratepayer appeal of an increase in the base rates for water and wastewater service approved and implemented by the Company’s Board in March 2020. Pursuant to Section 13.043(b)(1), Tex. Water Code, the Commission has jurisdiction and authority to set rates that are higher, lower or the same as the rates the Board set, to set the effective date for those rates, to require refunds to customers, to authorize additional charges and to implement other remedial measures, all as the Commission sees fit.

By the Board’s own admission, its policies and practices (both before and after this appeal was filed) have already jeopardized the Company’s financial capacity to implement lower rates, refunds and other orders that are clearly within the Commission’s authority to enter in this proceeding. Of greater concern, it appears that even after the 2020 rate increase the Company has been and remains in a negative cash flow position with considerable unreported debt. The Board’s representatives have made clear that, if left to its own devices, the Board will continue indefinitely the policies and practices that appear to have already incapacitated the Company.

Ratepayers do not pretend to know what orders the Commission might enter at the conclusion of this appeal proceeding. Their Board has assured them, however, that unless someone steps in now the Company will not have the wherewithal to effectuate many orders that the Commission has authority to enter. Indeed, by the time this proceeding is concluded, the Company may not have the wherewithal to operate at all. Without belittling what an overall disaster this would be for the members/customers who depend on the Company for services, it most certainly would render meaningless both the Commission's exercise of jurisdiction in this matter and the considerable investment of time and resources for this proceeding.

Ratepayers believe it is in the best interests of the Company and its members/customers for the Commission to keep all of its regulatory options open while it considers and determines what should be done here. To do so requires prompt interim action. This Request seeks exactly that.

### Background

In the aftermath of a 2016 sale of surplus land to a sitting director, members challenged the legality of the Board's actions, sought to restore the land to the Company and exercised statutory rights to receive information about the Board's activities. Claiming that the Company had a "legal duty" to prevent the directors from being held liable for actions taken in that capacity, the Board engaged two law firms and directed them to oppose the members' efforts. The Board agreed that the Company would pay all the legal fees the law firms charged.<sup>1</sup>

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<sup>1</sup> Whether these legal expenses are "allowable" for rate making purposes is at issue in the appeal proceeding but is not at issue for purposes of this request. Without regard to whether these expenses are "allowable," Company revenues have been used to pay some of them and the Board apparently has obligated the Company to pay the rest. The Board's mismanagement of these costs – whether "allowable" or not -- has resulted in serious and potentially irreversible financial consequences for the Company and its members/customers and has jeopardized the effectiveness of orders that might be entered in this proceeding.

The Company's actual cost for legal services for 2019 was approximately \$290,000. That is far more than the \$166,000 figure the Board had previously sponsored and translates to 63% of this small private utility's aggregate costs for 2019. Legal fees for 2019 could not be paid in full and the Company remained indebted for them at the beginning of 2020. The law firms continued to send monthly invoices for work done in 2020 and thereafter. The Board obligated the Company for all those fees. All the revenue generated by the 2020 rate increase was used to pay these legal costs but was not sufficient to pay them all and the Company's debt to the law firms increased each month. The Company's law firm debt has never been reflected on any of its financial reports and was not included for purposes of designing the Board's 2020 rate increase. The Company's law firm debt may have been as high as \$500,000 at the end of 2020.

The law firms have continued to invoice for work done in 2021 in connection with several matters, including the ongoing Double F litigation to recover Company land and to hold directors liable, the directors' lawsuit against the E&O insurer to recover benefits they claim are owed to them as "insureds," and the Company's opposition in this ratepayer appeal. Further, the Company characterizes as "legal" expenses amounts paid to nonlawyers, including the amounts Board President Joe Gimenez every month for being the Company's Public Information Officer. Since the Company's law firm debt is not reported on its financials, the current balance cannot be ascertained from those records. Neither of the Board's hearing representatives knew the balance due on the Company's law firm debt as of the time of the recent hearing.

According to Board President Gimenez, the Company's directors claim the Board has "no choice" but to approve the unlimited legal spending and the accrual of unlimited law firm debt by which they provide themselves with legal representation. By the directors' own admission, these approvals are not based upon any exercise of good judgment or any reasonable evaluation of

available resources. According to Mr. Gimenez, these approvals are driven by the Board's policy decision that "Directors should not be personally liable for lawsuits brought against them" and by the nonlawyer directors' insistence that the Company has a *legal duty* "to protect its volunteer board members and directors against personal liability for actions taken in their roles [as directors]." <sup>2</sup> The Board's self-imagined "legal duty" to use Company resources to prevent themselves from being held responsible for their acts and omissions has caused the Company's legal expenses to achieve a position of top priority over all other Company expenses. The Board's hearing representatives made clear that the Company will continue these policies and practices going forward, and certainly throughout the pendency of this appeal.

The amounts already at issue in this appeal are very substantial, particularly for a 271-member cooperative utility in Spicewood, Texas. The Board's legal costs are approaching \$1 million and have constituted more than 50% of the Company's total annual expenses for each of the past several years. The 2020 rate increase was not designed to recover these legal costs and the additional revenue the rate increase generated has not been sufficient to pay more than a fraction of them. The Company's institutional lender will not allow the Board to use loan proceeds to pay these legal costs. The only other readily available pool of resources is needed for the purpose of providing water and wastewater services.<sup>3</sup>

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<sup>2</sup> Ratepayers consider this to be egregious Board misconduct, but that need not be decided for present purposes. These Board policies, practices and decision criteria have had enormous financial impact on the Company, to the point the Company is no longer capable of effectuating Commission orders that might be entered in this appeal. At the least, the circumstances warrant an independent review of these Board policies, practices and decision criteria by a qualified supervisor who is not involved with the underlying disputes or personalities and is not personally benefitted by the Company's legal expenditures.

<sup>3</sup> The Company still owns 6.19 acres of surplus property in the Spicewood Airport that, according to the Board's appraiser, was worth over \$700,000 in 2016. Until 2014, the Company's wastewater treatment plant was operated there. It remains to be determined whether the Board is permitted to liquidate the Company's surplus real property to pay the directors' legal costs and that matter need not be determined now. The point here is simply that the considerable value of that surplus property is not available in the near term because the Board has failed to take the steps to make it so.

Request For Interim Relief Pending the Commission's Orders in this Proceeding

Ratepayers did not choose to receive utility service from a private water supply and sewer service company run by a "volunteer Board" comprised of people who claim their primary duties are to themselves, with the Company and the members/customers a distant second. Ratepayers are members/customers because they need potable water and sewer service, and the Commission has placed this particular form of retail public utility in a monopolistic position in the place where they live. The Company's members/customers have the same financial stake in their utility systems, facilities and operations as any outside investor in any IOU, and then some, though the members/customers are involuntary stakeholders. In lieu of a guaranteed return on investment, the members/customers have statutory and other guarantees that the nonprofit corporation in control of their investment will use it exclusively for their benefit, and -- provided they pay all rates and charges required of them -- will operate it to provide them with continuous and adequate water and wastewater service.

The Company's members/customers have paid the full amount of all increased rates and other charges their Board has demanded of them. Their utility should be financially strong, sustainable and able to provide them with services and also to comply with lawful Commission orders. That does not appear to be the case at this point. For the reasons outlined above, the situation is likely to get worse, rather than better, during the pendency of this appeal.

To have the Company call a halt to its financial transactions pending the Commission's issuance of orders in this appeal is not a viable option, and such a drastic step should not be required.<sup>4</sup> Interim oversight and independent supervisory control over the Board's policies,

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<sup>4</sup> That said, Ratepayers certainly cannot rule out that a receiver may be required. These circumstances are egregious, and neither the Company's actual financial position nor what may be required to restore it to health are known at this time.

practices and decision-making, on the other hand, is a reasonable and conservative approach in these circumstances. This would allow the Company (and the Board) to continue to operate within its governing documents and its existing organizational structure, while also facilitating the implementation of corrective and remedial measures needed to restore the Company's financial integrity and ability to effectuate any order the Commission might enter in this proceeding and to keep it intact until orders are entered.<sup>5</sup> It is axiomatic that the Board is not going to take these steps on its own. A qualified and disinterested Commission appointee with supervisory authority over the Board during the pendency of this appeal will be required.

At a minimum, the Board supervisor should be given supervisory authority over all Board decisions impacting the Company's financial condition. The Board supervisor should be directed to perform (or commission) an independent audit of the Company's books and records.<sup>6</sup> The Board supervisor should be directed to make an evaluation of (i) the Company's current financial condition, (ii) Board policies, practices and decision criteria that determine the Company's financial transactions, (iii) the Company's capacity and financial wherewithal to fully effectuate the range of Commission orders that may be entered in this appeal and (iv) other matters the Commission deems necessary or appropriate. The Board supervisor should be directed to identify and promptly implement corrective or remedial measures necessary (i) to bring the Company into compliance with its governing documents and tariff, (ii) to restore/rehabilitate the Company's financial integrity and wherewithal to provide services to the members/customers in compliance

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<sup>5</sup> Ratepayers analogize this request to an application for preliminary injunctive relief to prevent the destruction of the subject matter of pending litigation. See *In re 1707 New York Ave., LLC*, 2014 WL 4946976, at \*1 (Tex. App. – Ft. Worth 2014) (orig. proceeding) (prevention of demolition of building at issue warranted to protect court's jurisdiction over subject matter) and *In re Teague*, 2006 WL 302123, at \*1 (Tex. App. – Ft. Worth 2006) (orig. proceeding) (“It is well settled that an appellate court is authorized to protect its jurisdiction by preserving the subject matter of the appeal in order to make its decrees effective.”).

<sup>6</sup> So far as Ratepayers are aware, there has not been an independent audit of the Company's books and records for many years.

with Commission orders that may be entered in this proceeding (iii) to preserve the Company's financial health and wherewithal during the pendency of this appeal, (iv) to protect the members/customers from further loss or prejudice and (v) for any other purpose the Commission deems necessary or appropriate.

In light of the Board's insistence that the Company could not effectuate a refund order if the Commission entered one, the Board supervisor should be directed to determine whether the Company should be required to furnish and keep in force for the duration of this appeal proceeding a bond<sup>7</sup> for the protection of members/customers who may be entitled to a refund. In that regard, the Board supervisor should be directed to ascertain from the Company's books and records the amount of additional revenue, on a monthly basis, that the Company has collected as a result of the 2020 rate increase and that the Company will in all likelihood collect during the pendency of this appeal.

In light of the Board's insistence that the Company would be jeopardized if the Commission concludes the full amount of the Company's appeal case expenses cannot be passed on to the members/customers, the Board supervisor should be directed to determine whether the Company should be required to furnish and keep in force for the duration of this appeal proceeding a bond for the protection of members/customers, who may be entitled to such a determination. In that regard, the Board supervisor should be directed to ascertain an adequate bond amount.

The Company's total cost to provide legal services for directors is staggering. The Board insists the Company will be jeopardized if it does not collect from someone the full amount of that cost. In the event the Commission determines that the provision of legal services for

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<sup>7</sup> Ratepayers analogize this to the bond a Class A utility must provide under Section 13.187(i), Tex. Water Code, if it wishes to implement rates that are under Commission scrutiny.



directors is part of the legitimate business of a water supply and sewer service cooperative and that the costs at issue here are eligible to be passed on to any customers, the Commission would have authority to create a separate class of customers (for discussion purposes, the “Director Class”) that includes only the directors for whom the Company provided legal services and to pass on the Company’s cost to provide such services only to the members of the Director Class through increased rates or other charges. The Board supervisor should be directed to evaluate the need to require directors who may be included in the Director Class to provide bonds and keep them in force for the duration of this appeal, such bonds to be in an amount adequate to ensure that each potential member of the Director Class can and will pay all special rates or other charges required for the Company to recover all of its costs.

Prayer

Ratepayers respectfully request that the Commission order the above-described interim relief and/or such other relief as the Commission determines is appropriate in these circumstances to preserve the subject matter of its jurisdiction and to protect the effectiveness of orders it is authorized to enter in the proceeding.

Respectfully Submitted,

THE LAW OFFICE OF KATHRYN E. ALLEN,  
PLLC  
114 W. 7th St., Suite 1100  
Austin, Texas 78701  
(512) 495-1400 telephone  
(512) 499-0094 fax

/s/ Kathryn E. Allen

Kathryn E. Allen  
State Bar ID No. 01043100  
*kallen@keallenlaw.com*

Attorneys for Ratepayers

Certificate of Service

I hereby certify that, unless otherwise ordered by the Presiding Officer, notice of this filing was provided to all parties of record via electronic mail on December 11, 2021.

/s/ Kathryn E. Allen