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

RATEPAYERS' UPDATE TO INITIAL BRIEF FILING

Ratepayers realized that following their Initial Brief Filing, an oversight was made when uploading the correct document to the interchange. Ratepayers attached an incorrect document, accordingly Ratepayers have amended the document to reflect the Ratepayers' Initial Brief.

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 30, 2021

/s/ Kathryn E. Allen

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RATEPAYERS APPEAL OF THE BEFORE THE.STATE.OFFICE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

RATEPAYERS' INITIAL BRIEF

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

Date: December 30, 2021

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TO THE HONORABLE CHRISTIAAN SIANO AND DANIEL WISEMAN, ADMINISTRATIVE LAW JUDGES:

THE REPRESENTATIVES OF THE RATEPAYERS OF WINDERMERE OAKS WATER SUPPLY CORPORATION ("Ratepayers") file this their Initial Brief and would show as follows.

I. INTRODUCTION/SUMMARY

Ratepayers have learned far more than they ever expected they might about the hows and whys of utility ratemaking. They have come to appreciate that the design and implementation of just and reasonable rates is indeed both an art and a science; it requires education, training and expertise they do not pretend to possess. The Company's representatives who testified in this appeal are no more qualified than Ratepayers. The "expert" they proffered knew little or nothing about the circumstances of the Board's rate decision. However, well-qualified experts, including Mr. Filarowicz, Ms. Gilford and Mr. Mendoza, testified to the frailties of the Board's 2020 base rate increase. In a collaborative effort, those experts developed and recommended new base rates for the Company's water and wastewater services that meet applicable requirements. Ratepayers do not belabor those efforts here.

The experts observed, however, that this appeal proceeding presents issues that cannot necessarily be resolved by reference to the standards and practices they typically apply. As they point out, this is not a rate case and the Company is not a typical retail public utility. Ratepayers are long-time member-customers of the Company; they know how the Company should be operated and they know how the Company has been operated. They -- and their pocketbooks -- experienced from the proverbial front row a rate increase their common sense told them could not possibly pass regulatory muster. To the extent those matters bear on the Issues to be Addressed set forth in the Preliminary Order of July 16, 2020, this Initial Brief is furnished to address them.

II. THE COMMISSION MUST SET NEW BASE RATES (Issues 4 and 5).

A. Section 13.043(j) does not require a threshold determination concerning the appealed rates.

Ratepayers are mindful of the decision in *Tex. Water Comm'n v. City of Ft. Worth*, 875 S.W.2d 332 (Tex. App. – Austin 1994). There, the court construed the statute in an effort to avoid a constitutional challenge to the Commission's exercise of jurisdiction over contractual rates. Moreover, freely-negotiated contractual rates and "filed rates" are presumed to be just and reasonable. Accordingly, Federal Power Act §206, on which the *Ft. Worth* court relied, expressly requires a hearing and a threshold finding that contractual or "filed" rates under review are unjust, unreasonable, unduly discriminatory or preferential.

Water Code Section 13.043(j), on the other hand, contains no such requirement. The Legislature's recent amendment[1] to that statute makes clear that Subsection (j) is not intended to create a jurisdictional hurdle for ratepayers who are entitled to appeal, but to ensure that the Commission has full regulatory authority over the rates appealed. Moreover, unlike contractual rates or rates that have been approved by the Commission, there is no presumption of validity for rate increases implemented by a water supply corporation and no public policy or other justification for requiring a threshold determination to the contrary.

B. If a threshold determination were required, a finding that the 2020 rates are unjust, unreasonable, unduly discriminatory or preferential is warranted.

1. The 2020 rates are unreasonable and unjust.

The goal of the ratemaking process is to allow the utility to recover total revenues equal to its cost of service. *Oncor Elec. Delivery Co. LLC v. Public Utility Comm'n,* 406 S.W.3d 253, 263 (Tex. App. – Austin 2013) (citations omitted). Because a nonprofit water supply corporation is

[1] See H.B. 3689.

not a "utility," however, there is no legal requirement that such a corporation be allowed to recover its cost of service from ratepayers.

Not all expenses that are incurred by a utility in providing service will necessarily be categorized as reasonable operating expenses for ratemaking purposes. *Pub. Util. Comm'n of Texas v. Houston Lighting & Power Co.*, 748 S.W.2d 439, 441 (Tex. 1987). A rate cannot be deemed just and reasonable unless the utility was prudent in incurring the operating expenses it seeks to pass through to consumers. *Gulf States Utilities Co. v. Public Utility Comm'n,* 841 S.W.2d 459, 466 (Tex. App. – Austin 1992, no pet.). Under traditional analysis, "to recover costs in rates, a utility may show either that its decisionmaking process was prudent, or that the same decision is in the select range of options that would have resulted had prudent decisionmaking been employed." *Id.* at 475-6.

It is undisputed that the Legal Costs have nothing at all to do with the Company's provision of water and wastewater services.[2] Neither the Legal Costs nor the rate increase approved to fund them enhanced the level or quality of services.[3]

It is also undisputed that the Company incurred the Legal Costs as a result of a conscious decision and action by the Board to use Company resources to prevent themselves and certain former directors from being held personally liable for the financial consequences of their alleged misconduct.[4] The Board obligated the Company to pay whatever amounts are billed by the lawyers for as long as necessary to prevent the members from prevailing and has no idea how much that might turn out to be.[5] Those expenditures provide no benefit to the ratepayers. To the

[2] Burris at 53:9 – 54:3; 71:18 – 72:9.
[3] Nelson at 208:5-17.
[4] Gimenez at 371:19-24.
[5] Gimenez at 274:23 – 275:4.

contrary, all of the Legal Costs have been devoted to preventing the recovery of the Company's property or the value of that property for the benefit of the ratepayers.[6]

As a matter of public policy, the Company is prohibited by statute from purchasing insurance or self-insuring for the type of misconduct alleged in the member lawsuits without the approval of the members of the Company.[7] The Board's approval of the Legal Costs and of the rate increase to fund them has the same effect and is likewise contrary to public policy.

At the hearing, Mr. Gimenez claimed that the Company has taken a "neutral stance" on the outcome of the Double F litigation.[8] Accordingly, five hundred thousand dollars of the ratepayers' money has been spent for the Company to take a "neutral stance" in the litigation.[9] Mr. Gimenez also claimed the Company prevailed in the lawsuit it filed against the Attorney General, but there is no evidence of that. He claims that after the Company spent thousands of dollars and won the case, the Board turned around and put the materials on the Company's website. These expenditures are imprudent by any standard.

2. The 2020 rates are unduly preferential and discriminatory.

The evidence shows that while all customers are required to pay the increased rates, only the customers who are defendants in the member lawsuits receive the benefit. Moreover, while the expenditures that prompted the rate increase were necessary (if at all) because of the acts and omissions of certain readily identifiable customers, all customers have been required to subsidize them.

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[6] Gimenez at 297:17-23.
[7] Section 8.151(c), Tex. Bus. Org. Code.
[8] Gimenez at 298:8-11.
[9] Gimenez at 299:7-11.

The Company's tariff requires that all services the Company provides that are outside the normal scope of utility operations shall be charged to the recipient based on the cost of providing such service.[10] The Company's provision of legal services for customers who are defendants in member lawsuits clearly is outside the normal scope of utility operations. The Company's failure to charge those customers with the cost of providing such service is a violation of its tariff.

III. THE COMPANY'S APPEAL CASE EXPENSES SHOULD NOT BE PASSED ON TO THE RATEPAYERS.

A. Ms. Guilford applied the wrong standard.

As Ms. Gilford made clear in her testimony, her recommendation regarding the Company's appeal case expenses is based on regulations and standards that do not apply here.[11] Those standards apply in circumstances where the utility's participation in the process provides substantial benefits to the ratepayers and serves the public interest.[12] This appeal proceeding only benefits the ratepayers if they prevail and the rates are reduced. The Company's effort is to oppose that result.[13]

B. The Company has abused the appeal process.

Much like the utility in *Industrial Utilities Service v. TNRCC,* 947 S.W.2d 712 (Tex. App. – Austin 1977), here the Board has abused the appeal process.

First, the Board never intended to implement a rate increase designed to recover a calculated revenue requirement within a specified amount of time.[14] The Board intended to raise rates enough to generate cash flow stream that could be used indefinitely to fund some sort of payment plan with

[10] WOWSC-12 at p. 46, paragraph 27.
[11] Gilford at 475-6.
[12] Gilford at 477 – 480.
[13] Gilford at 488-9.
[14] Nelson at 198:1-21.

the law firms. The Board chose January 1, 2019 – December 31, 2019 as the test period. The Board chose all of the cost information that was plugged into the TRWA model to generate a revenue requirement.[15] It is apparent from the TRWA worksheet (Attachment MN-2) that the Board chose not to make adjustments to test year costs for "known and measurable changes," chose not to include all of the legal costs the Company had incurred during the test period, chose not to include any cash funded capital expenses, chose not to include any cost over its debt service, chose not to include any addition to reserves and chose not to develop separate revenue requirements for water and sewer. Mr. Mendoza confirmed that the Board chose to use the rate designed to recover only the fixed cost portion of the TRWA revenue requirement.

The Board did those things because the revenue requirement was irrelevant. There was no intention, then or now, to design rates using a proper "cash needs" methodology.

Now, the Board complains that it cannot fund capital improvements. The Board complains that it cannot recover the variable cost portion of the TRWA revenue requirement. The Board complains that it will have no reserves. Yet the Board itself orchestrated all those things at the time it approved the rate increase. And it did so for the purpose of surreptitiously raising revenue in a manner it is not authorized to do.

During this entire time and at the time the rate increase was approved, the Lloyd Gosselink firm was serving as the Company's general counsel and was being paid handsomely for its work. The Lloyd Gosselink lawyers are experts in rate matters. They should have taken steps then to ensure that the proper rate methodology and cost information was being applied. Had they done so, this appeal might well have been avoided entirely.

[15] Burris at 77:5-16.

To compound the abuse, the Board delayed until the eve of the hearing to provide accurate information about historical costs and other important information. The Board then presented an "expert" who knew nothing about the rate design the Board claimed to have relied upon and nothing about the components of cost that were included.

The Board should not be rewarded for such behavior. None of its appeal case costs benefit the ratepayers.

Respectfully Submitted,

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