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

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

**RATEPAYERS' PROPOSED FINDINGS OF FACT**  
**AND CONCLUSIONS OF LAW**

On December 6, 2021, the State Office of Administrative Hearings (SOAH) Administrative Law Judges filed SOAH Order No. 15, establishing a deadline of January 25, 2022 for the Ratepayers to file Post Hearing Reply Briefs and Proposed Findings of Fact and Conclusions of Law. Ratepayers timely filed their Post Hearing Reply Briefs and Proposed Findings of Fact and Conclusions of Law, however mistakenly attached the incorrect version of our Proposed Findings of Fact and Conclusions of Law filing. Respectfully, the Ratepayers resubmit the correct Proposed Findings of Fact and Conclusions of Law.

Respectfully Submitted,

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Date: January 26, 2022

## **PROPOSED FINDINGS OF FACT**

Ratepayers propose to include the following additional findings of fact:

1. The WOWSC did not give written notice to its customers of the hearing to be held on December 1 – 3, 2021, on a form prescribed by the Commission.
2. The WOWSC did not present evidence of any notice to its customers of the hearing to be held on December 1-3, 2021.
3. The WOWSC is a Texas corporation organized under Chapter 67, Tex. Water Code, and the Texas Non-Profit Business Corporation Act. Its sole purpose is to provide water supply, sewer service, or both to its members.
4. The WOWSC's governing documents require it to operate consistently with I.R.C. Section 501(c)(12)(A) and related federal regulations, rulings and procedures.
5. The WOWSC's governing documents prohibit it from engaging in activities or using assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative as recognized by Chapter 67 and I.R.C. 501(c)(12)(A).
6. The legitimate business of a water supply cooperative or sewer service cooperative as recognized by Chapter 67 and I.R.C. 501(c)(12)(A) is to operate and maintain member-owned assets to provide those members with water and wastewater service at or near cost.
7. The WOWSC is authorized to receive and use revenues only to the extent necessary (i) to pay the costs to provide water and wastewater services and (ii) to maintain a reasonable reserve fund for system maintenance, operation and replacements. The reserve fund may not exceed the reasonable needs of the WOWSC's legitimate business.
8. Excess revenues (i.e., revenues in excess of costs and any needed additions to reasonable reserves), if any, are overpayments. They belong to the members-customers who overpaid. Accordingly, excess revenues must be annually returned to, or credited to the accounts of, customers who have during the past year transacted business with the WOWSC, in direct proportion to the amount of business so transacted.
9. The implementation of rates or other charges intended or expected to generate excess revenue is not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative.
10. To receive water or wastewater service within the WOWSC's service area requires, among other things, that the customer acquire and maintain a membership in the company. Refusal or failure to pay rates and other charges demanded by the WOWSC is grounds for discontinuance of utility services and for cancellation of membership.

11. The WOWSC's governing documents provide that the affairs of the company are to be managed by the Board of Directors. The WOWSC's governing documents do not limit the statutory or common law duties of the Directors.
12. The WOWSC's governing documents do not require or permit either indemnification or advancement of defense costs to current or former directors who are made parties to litigation.
13. The WOWSC's governing documents do not authorize the imposition of a surcharge, assessment or other "true up" charge of any kind.
14. The WOWSC's Tariff requires that all services the WOWSC provides that are outside the normal scope of utility operations shall be charged to the recipient based on the cost of providing such service. Outside legal services are outside the normal scope of utility operations.
15. The WOWSC's governing documents require that the Board conduct the activities of the company in compliance with the Texas Open Meetings Act and the Texas Public Information Act.
16. All WOWSC Directors are required to complete training courses concerning compliance with TOMA and TPIA within the time allowed by statute. All applicants for WOWSC Director agree to complete the required training courses within the time allowed.
17. The WOWSC's Bylaws have always required that the Board adopt and maintain a conflict-of-interest policy. The WOWSC's first Conflict-of-Interest policy was adopted in 2019.
18. On December 19, 2015, the Board approved a contract to sell a portion of the WOWSC's surplus airport property to Dana Martin, who was then a sitting director, for \$203,000.00.
19. The notice for the Board's December 19, 2015 meeting did not include any item concerning the sale of surplus property. In December 2016, the WOWSC's general counsel furnished the Board with a lengthy memorandum confirming the Board had violated the Texas Open Meetings Act in connection with the Martin sale in numerous respects.
20. In late 2017, several WOWSC members formed an entity called TOMA Integrity, Inc., which filed suit ("TOMA Suit") in late 2017. The TOMA Suit alleged that the Board had approved the Martin sale in violation of the Texas Open Meetings Act. The TOMA plaintiff sought to void the Board's approval of the land transaction in an effort to recover the WOWSC's land for the benefit of the company. The TOMA Suit pertained to matters arising from the 2016 Martin transaction.
21. The WOWSC's insurer denied coverage and declined to defend or indemnify in the TOMA Suit based on exclusions pertaining to illegal acts and intentional misconduct.

22. When new directors, including one who was involved in the land deal, got on the Board, however, a reversal position was taken from the previous board and substantial company resources were used (and continue to be used) in an effort to prove otherwise even though they know it is not true.

23. The Board engaged attorneys to represent the WOWSC and directed them to oppose the relief requested by the plaintiff by whatever means the attorneys saw fit. The Board obligated the WOWSC to pay all the fees the attorneys billed.

24. By order dated July 28, 2018, the district court ruled that the Board had violated TOMA. The WOWSC did not take exception to that ruling.

25. As a result of the WOWSC's "victory" in the TOMA Suit, the WOWSC did not get its land back and former director Martin retained an estimated \$500,000 in value for which she paid nothing.

26. No depositions or other discovery were undertaken in the TOMA Suit. No work was required to be done in the TOMA Suit after the entry of final judgment other than briefing on appeal.

27. In July 2018, members filed suit ("Double F Suit") against Martin's single-asset company Friendship Homes and Hangars and the Burnet County Commissioner's Court seeking injunctive relief to prevent Martin from replatting the property into a number of smaller hangar lots. The Double F Suit involved the 2016 Martin transaction.

28. While both the TOMA Suit and the Double F Suit were pending, the WOWSC Board engaged an appraiser to prepare a forensic appraisal to ascertain whether and to what extent Martin received a benefit at the expense of the company. The forensic appraisal concluded that the property Martin received for \$203,000 had a fair market value of \$700,000 at the time of the transaction.

29. The Board acknowledged during its January 2019 open meeting that this disparity was too large to ignore. They further acknowledged their fiduciary duty to act on the information at hand and move forward to recover the property.

30. The Board authorized its attorneys to prepare and send a letter to Martin outlining her breaches of duty and intentional misconduct. The letter is in evidence as Gimenez Rebuttal Attachment JG-28.

31. Thereafter, new directors were elected. These included Bill Earnest, who was involved in the 2016 transaction. After the new directors joined the Board, no further steps were taken to recover the property from Martin.

32. In May 2019, the plaintiffs in the Double F Suit joined the WOWSC and the former directors involved in the Martin transaction as parties to the lawsuit. They sought no recovery

against the company's resources then, and never have. They sought to impose personal liability on the directors for damages to compensate the WOWSC for its loss from the transaction.

33. The WOWSC's insurer denied coverage and declined to defend or indemnify in the Double F Suit based on exclusions pertaining to illegal acts and intentional misconduct.

34. The director parties later filed suit against the WOWSC's insurer to recover insurance benefits to which they claim they are personally entitled. This lawsuit is a matter pertaining to the 2016 Martin transaction. The WOWSC has paid or incurred all of the legal fees for this lawsuit.

35. The Board engaged attorneys to represent the WOWSC and the director parties in the Double F Suit and directed them to oppose the recovery of the property and to prevent the director parties from being held liable for damages by whatever means the attorneys saw fit to. The Board obligated the WOWSC to pay all the fees the attorneys billed.

36. There was a mediation in the fall of 2019 between the WOWSC and Martin. The Double F plaintiffs were not notified of the mediation or invited to attend. In October 2019, the Board entered into a settlement with Martin pursuant to which they transferred an additional 0.5 acres of WOWSC land to Martin for no consideration.

37. The Double F Suit is pending. Neither Martin nor any of the director parties named in the order of partial summary judgment have been dismissed from the case.

38. The WOWSC filed two lawsuits against the Texas Attorney General in an effort to prevent disclosure of company records it was thought might prejudice the director parties' strategic position in the pending lawsuits. These two lawsuits were matters pertaining to the 2016 Martin transaction.

39. The WOWSC paid or incurred a total of \$260,301.48 for outside legal services for the director parties in 2019 prior to receipt of written undertakings and acknowledgements.

40. The WOWSC paid or incurred costs to furnish outside legal services to the director parties because they were named as parties in litigation alleging that they breached duties and engaged in illegal, unauthorized and fraudulent conduct in their capacities as directors.

41. The outside legal costs paid or incurred by the WOWSC provided a benefit to the director parties named in the lawsuits but did not benefit any other WOWSC ratepayers.

42. The 2020 rates required customers who received no outside legal services to subsidize the cost for outside legal services provided for the director parties.

43. The 2020 rates were not developed by TRWA.

44. The "cash needs" methodology is a methodology that will preserve the financial integrity of WOWSC.

45. PUC Staff's recommended rates were developed using a "cash needs" methodology.
46. The 2020 rates were not developed using the "cash needs" methodology or any other methodology that includes a revenue requirement.
47. The WOWSC was not obligated for additional debt service or to maintain any debt service coverage ratio at the time of the 2020 rate increase or at any time thereafter.
48. The 2020 rates did not include any additional debt service and did not provide any debt service coverage ratio.
49. At the time the Board approved the rate increase, the WOWSC had adequate cash reserves for capital expenditures and for maintenance contingencies.
50. The 2020 rates did not include any amount for an addition to reserves.
51. The 2020 rates did not include any amounts for known or anticipated cash-funded capital projects.
52. The information that was available to the Board at the time it approved the 2020 rate increase was that the WOWSC had no authority under its governing documents to levy a surcharge or to impose an assessment.
53. The WOWSC has never had authority under its governing documents to levy a surcharge or to impose an assessment.
54. PUC Staff member Maxine Gilford testified that the Commission cannot levy a surcharge in this appeal. There was no evidence to the contrary.
55. In late 2019 or early 2020, the Board, Lloyd Gosselink and Enoch Kever agreed to an arrangement whereby the attorneys would continue to provide such legal services as they saw fit to oppose the recovery of the land from Martin and to prevent the director parties from being held liable for damages, the WOWSC would continue to be obligated for the full amount of the legal fees the attorneys billed and the WOWSC would pay each firm a "minimum portion" in the amount of \$10,000 per month against the unpaid legal fees carried forward from 2019 and the legal fees invoiced each month thereafter, until all matters pertaining to the Martin transaction were finally resolved and all balances paid in full. This arrangement was never authorized by vote taken at a properly noticed open Board meeting.
56. The 2020 rate increase was designed to generate \$17,000 - \$18,000 in additional cash flow each month until all matters pertaining to the Martin transaction were finally resolved and all legal fee balances were paid in full for the purpose of funding the arrangement described above.

57. The WOWSC's general counsel Lloyd Gosselink was involved in the design and implementation of the 2020 rates. Lloyd Gosselink billed and collected legal fees for the work by its attorneys on the rate increase.

58. As of the end of 2019, the WOWSC was indebted to law firms for at least \$120,000 in unpaid fees for outside legal services for matters pertaining to 2016 Martin transaction. This debt was not authorized by vote taken at a duly noticed open Board meeting and was never reflected in the WOWSC's financial reports.

59. In 2020, the WOWSC became obligated to pay more than \$500,000 in outside legal costs for work done in matters pertaining to the Martin transaction.

60. The WOWSC paid no more than \$120,000 in 2020 against a balance of at least \$620,000 in unpaid outside legal costs. WOWSC remained indebted to the law firms for the unpaid balance. This debt was not authorized by vote taken at a duly noticed open Board meeting and was not reflected in the WOWSC's financial reports.

61. In 2021, the WOWSC continued to accrue debt to the law firms for unpaid fees invoiced for work on matters pertaining to the 2016 Martin transaction. The current amount of the WOWSC's law firm debt is unknown. This debt was not authorized by vote taken at a duly noticed open Board meeting and was not reflected in the WOWSC's financial reports.

62. The WOWSC representatives and their lawyers represented in filings and testimony in this appeal that TRWA determined the 2020 rates based on a systemwide revenue requirement of \$576,192 that included \$171,337 in outside legal costs for matters pertaining to the 2016 Martin transaction. That was not true and they were aware it was not true.

63. The outside legal costs are not costs incident to the operation of the WOWSC's system.

64. The WOWSC has no lost revenues that would be eligible for recovery through a surcharge, even if one were authorized or allowed.

65. The WOWSC has no losses or other expenses that are eligible for recovery through an assessment, even if one were authorized or allowed.

66. Since the 2020 rate increase became effective, the WOWSC has charged each water customer \$44.47 per month more than the PUC Staff's recommended rates.

67. Since the 2020 rate increase became effective, the WOWSC has charged each wastewater customer \$32.54 per month more than the PUC Staff's recommended rates.

68. None of the WOWSC's appeal case expenses provided a benefit to the WOWSC's ratepayers.

69. None of the activities of the WOWSC or its counsel in the appeal proceeding provided a benefit to the WOWSC's ratepayers or were in the ratepayers' best interests.



70. The WOWSC's appeal case expenses are not reasonable and were not prudently incurred.
71. None of the WOWSC's appeal case expenses are eligible to be passed on to the WOWSC's ratepayers in any form.
72. The WOWSC's financial integrity will be maintained if the PUC Staff's recommended rates are implemented as of March 20, 2020.
73. The WOWSC's financial integrity will be maintained if the excess revenue collected since the 2020 rates were implemented is refunded to the ratepayers.
74. The WOWSC will not suffer severe financial harm if the PUC Staff's recommended rates are implemented as of March 20, 2020.
75. The WOWSC will not suffer severe financial harm if the excess revenue collected since the 2020 rates were implemented is refunded to the ratepayers.

### **PROPOSED CONCLUSIONS OF LAW**

Ratepayers propose to include the following additional Conclusions of Law:

1. The outside legal costs cannot be passed on to ratepayers other than the director parties in the form of rates, surcharges, assessments or any other charge.
2. The WOWSC's debt to the law firms cannot be passed on to ratepayers other than the director parties in the form of rates, surcharges, assessments or any other charge.
3. The WOWSC has no powers other than those conferred in its governing documents, which are the articles of incorporation and the bylaws.
4. The WOWSC's bylaws constitute a contract between the corporation and its members.
5. The WOWSC was prohibited by its bylaws from collecting, appropriating or accumulating the additional revenue that was generated through the 2020 rate increase.
6. Pursuant to the bylaws, the WOWSC's customers own the additional revenue that was generated through the 2020 rate increase, each in proportion to the business such customer did with the WOWSC during 2020 and 2021.
7. The bylaws require the WOWSC to return to each customer the portion of additional revenue owned by that customer.

8. The bylaws do not confer upon the WOWSC the power to levy surcharges or to impose assessments.
9. The Commission has no authority to impair the parties' rights and obligations under the bylaws.
10. Section G, paragraph 27 of the WOWSC Tariff is mandatory and requires that the outside legal costs be charged to the director parties and to no other customers.
11. The 2020 rate increase was in violation of the WOWSC Tariff, Section G, paragraph 27.
12. In an appeal governed by § 13.043, Texas Water Code, the Commission shall hear the appeal *de novo* and shall fix the rates the governing body should have fixed.
13. The Commission does not have authority under § 13.043 to set surcharges the Board could not have set.
14. Rates at or below the rates recommended by PUC Staff in this proceeding are just and reasonable and are not unreasonably preferential, prejudicial or discriminatory.
15. The Commission has discretion to disallow recovery of appeal case expenses in their entirety.
16. Rule 24.44 is not applicable in an appeal under § 13.043. The Commission is not required to consider the criteria set forth in Rule 24.44.
17. The Commission is not required to allow recovery of appeal cases expenses even though some or all of those expenses meet the criteria set forth in Rule 24.44.
18. The Commission must disallow recovery of appeal case expenses unless it finds from a preponderance of the evidence that the participation of the company and its attorneys, consultants and others for which the expenses were incurred was reasonable, prudent and benefitted the ratepayers.
19. The Water Code does not require the Commission to fix overall revenues at a level that will preserve the financial integrity of a utility when its fiduciaries have irresponsibly managed its finances.