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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**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

RATEPAYERS' REPLY TO EXCEPTIONS FILED BY COMMISSION STAFF

Respectfully Submitted,

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Date: May 25, 2022

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 May 25, 2022.

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I. INTRODUCTION

The Ratepayers of Windemere Oaks Water Supply Corporation (“Ratepayers”) file this reply to the exceptions filed by the Staff (“Staff”) of the Public Utility Commission of Texas (“Commission”) to the Proposal for Decision (“PFD”) issued by the honorable Administrative Law Judges (“ALJ”) of the State Office of Administrative Hearings (“SOAH”) on March 31, 2022. The Ratepayers timely file this reply pursuant to Commission’s procedural schedule.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No reply.

III. SCOPE OF REVIEW

Staff’s Exceptions fail to address that there is Commission precedent for the proposition that no threshold finding is required in ratepayer appeals involving non-contractual rates. For example, the Commission’s preliminary order did not require a threshold finding in *Ratepayers’ Appeal of the Decision by North San Saba Water Supply Corporation to Change Rates*, a ratepayer appeal that was filed years after the 1994 decision in *TWC v. Fort Worth*. No party argued that a threshold finding was required

and no one took exception to the absence of a threshold finding in the proposal for decision.¹ While no final order was issued in *San Saba* because the appeal was withdrawn on the basis of settlement, it is clear that no threshold finding was required or was considered necessary in that appeal. Likewise, the Commission did not require any threshold finding, or even provide for a threshold inquiry, in the other appeals cited by Ratepayers in footnote 23 of their Exceptions.² Ratepayers are not aware of any basis for distinguishing those appeals, in which the Commission did not require a threshold finding, from the instant appeal.

Further, the facts here make a more compelling demonstration of unreasonable preference, prejudice, or discrimination than those in the *Bear Creek* appeal. Contrary to Staff's conclusion that Windermere has "one class of customers", the evidence here established that Windermere has several different classes of ratepayers. "Customer class" is defined as "[a] group of customers with similar cost-of-service characteristics that take utility service under a single set of rates." Windermere's various categories of customer do not fall into the same class, as they do not have similar cost of service characteristics. Board President Joe Gimenez confirmed Windermere has at least three categories s of

¹ *Ratepayers' Appeal of the Decision by North San Saba Water Supply Corporation to Change Rates*, Docket No. 45283, Preliminary Order (Feb. 16, 2016); Commission Staff's Initial Brief (Nov. 3, 2016); North San Saba Water Supply Corporation's Initial Closing Brief (Nov. 4, 2016); North San Saba Water Supply Corporation's Reply Brief (Nov. 18, 2016); Commission Staff's Reply Brief (Nov. 18, 2016); Proposal for Decision (Jan. 17, 2017); North San Saba Water Supply Corporation's Exceptions to Proposal for Decision (Feb. 2, 2017); Commission Staff's Exceptions to the Proposal for Decision (Feb. 2, 2017); North San Saba WSC Reply to PUC Staff's Exceptions (Feb. 16, 2017); Commission Staff's Reply to the North San Saba Water Supply Corp Exceptions to the Proposal for Decision (Mar. 2, 2017).

² See, Preliminary Order in Docket No. 42915, *Ratepayers Appeal of the Decision by Becker-Jiba Water Supply Corporation to Change Water Rates in Kaufman County*; Preliminary Order in Docket No. 44210, *Ratepayers Appeal of the Decision by Birch Creek Recreation WSC to Change Rates*.

customers, including water and sewer customers, standby fee customers, and equity buy in customers.³

Only one category pays the higher rates. On cross examination, Windermere's Mike Nelson confirmed that the the full rate increase was assessed only to the first category of customers, who pay the monthly base charge for water and sewer.⁴ Standby Fee Customers and Equity Buy In Customers are not charged any portion of the increase⁵. Since it is undisputed the outside legal fees are not costs of service, there is no basis upon which to place the entire rate increase on only one category of customer.

Moreover, this record shows that even within the class of ratepayers who pay the increased rates, there is a dramatic difference between what some of those customers receive from Windermere as a result of the increase vis-à-vis all the others. Additionally, the evidence shows that Windermere allows multiple customers to receive service though a single meter with a single billing account. Clearly this practice violates Windermere's tariff⁶ which states that multiple users are required to have a master meter. As a result of this practice not all of Windermere's customers who receive metered service pay the increased rates. It has been twenty-six years since *City of Fort Worth* was decided, yet Ratepayers have not uncovered any appeal involving the rates of a water supply corporation in which the Commission has required a threshold finding of unreasonable preference, prejudice, or discrimination or has dismissed the appeal for lack of sufficient

³ Tr. Day 2 at 314, 2-14, (Gimenez Cross) (December 2, 2021).

⁴ Tr. Day 1 at 205, 5-19 (Nelson Cross)(December 1, 2021).

⁵ *Id.*

⁶ WOWSC Ex. 12 at pp. 7-8, paragraphs 11 – 12 and pp. 29-30, paragraph 25.

evidence. To the extent the Commission considers itself bound by its own precedent in this regard, then no threshold finding requirement should be imposed.

Moreover, the Commission's rules governing such appeals, promulgated well after *City of Forth Worth*, do not require a threshold finding or authorize dismissal of the appeal. The Austin court has since considered this question, which was not at issue in *City of Ft. Worth*, and has clarified that the Commission's authority to condition the exercise of its regulatory function is limited to cases involving contract rates. Neither Staff nor Windermere has articulated any basis upon which it would be a proper exercise of the Commission's authority to require a threshold finding here or to dismiss this appeal.

IV. BURDEN OF PROOF

No reply.

V. DISCUSSION

A. The Rate Decision

No reply.

B. Threshold Issue

Staff's position that the rates were increased to recover \$171,337 in legal fees is incorrect. Windermere's witness Mike Nelson stated unequivocally on cross examination that the board backed into the rate increase by calculating what it thought to be necessary to generate additional monthly cash flow to fund an agreement with two law firms regarding fees for services that had been rendered and fees for services that might be rendered in the future.⁷ Nelson testified that the law firms agreed to continue to provide

⁷ Tr. Day 1, 205, 5-23 (Nelson Cross)(December 1).

unlimited services indefinitely, in connection with whatever matters the board directed, provided Windermere paid a small portion of each monthly invoiced amount and accrued corporate debt for the unpaid balance.⁸ The \$171,337 figure for legal expenses wasn't even the total for the test period.⁹ Windermere carried over \$150,000 in unreported law firm debt to 2020, and continued to receive legal invoices in widely varying monthly amounts.

Windermere's claim prior to the hearing that the new rates were based on "*other information included 2019 year-end financials, the 2020 budget, recent legal invoices, and an updated guesstimate¹⁰ of legal costs for 2020*" simply is not true. The directors had no idea what legal services would be provided in 2020 or thereafter or how much legal fees would be even from one month to the next.¹¹

The hearing testimony of Windermere's representatives made it crystal clear that this was an ad hoc rate increase and intended to generate approximately \$20,000 in additional monthly cash flow so the board could keep their lawyers working indefinitely at Ratepayers' expense.

Further, the Preliminary Order issued No. 8, is specific to legal expenses to defend the civil suits.¹² Issue No. 8 states; "were Windermere Oaks outside legal expenses related to defending civil suits included in the rates appeal? If so, what amount of outside legal

⁸ *Id.*

⁹ Tr. Day 1, 198, 9-21 (Nelson Cross)(December 1).

¹⁰ Tr. Day 2, 274, 21-25 and 275, 1-7 (Gimenez Cross)(December 1).

¹¹ Gimenez at 274-5 & 353-4. Board Secretary-Treasurer Nelson admitted that the Board had no idea when it authorized this work how much the tab might ultimately be. Nelson at 226-7. The Board has no earthly idea of the amount it has obligated the company to pay each month until someone receives the monthly invoices. Nelson at 192.

¹² See Preliminary Order Issue No 8. (July 16, 2020).

expenses was included in the rates appealed?”¹³ Windermere’s representatives testified that Windermere has paid legal expenses – both in 2019 and thereafter with proceeds from the rate increase – not just for defense of civil lawsuits but also for at least three lawsuits the board initiated, including one seeking personal recoveries for the directors from Windermere’s insurer.¹⁴ The legal fees were not segregated by matter and cannot be segregated now.

Rate Case Expenses

1. Amount

Ratepayers disagree with Staff’s recommendation that Windermere partially recover the expense of this appeal. Staff itself agrees that Windermere’s appeal case expenses provide no benefit to its customers.¹⁵ Staff Witness Gilford testified that the customers would benefit from the appeal proceeding itself because it was the vehicle by which they would obtain just and reasonable rates.¹⁶ She acknowledges, however, that none of Windermere’s efforts, or the expense associated with those efforts, have been directed to that end.¹⁷

Furthermore, as Ms. Gilford agreed in cross examination, it is imperative that a utility provide accurate information at every stage of this proceeding,¹⁸ without which she cannot effectively do her job to represent the public interest¹⁹. The \$20,000 arrangement that was the catalyst by which the board backed into the newer rates was

¹³ *Id.*

¹⁴ Tr. Day 2 at 313, 23-25 and 314, 1-14 (Gimenz Cross)(December 2, 2021).

¹⁵ Tr. Day 3 at 484, 18-19 (Gilford Cross)(December 3, 2021).

¹⁶ Tr. Day 3 at 489, 5-15 (Gilford Cross)(December 3, 2021).

¹⁷ Tr. Day 3 at 484, 14-19 (Gilford Cross)(December 3, 2021).

¹⁸ *Id.*

¹⁹ *Id.*

never disclosed to Windermere's customers and was not properly disclosed to the Staff or the Ratepayers in this proceeding.

2. Recovery Mechanism

As stated above, Ratepayers firmly disagree with Windermere's recovery of rate appeal expenses or recovery of legal fees in any type of assessment or surcharge. Windermere is not authorized under its bylaws or its tariff to impose any surcharge. Its authority to make an assessment is limited, as set forth in its Tariff. Section 13.043 only authorizes a surcharge to recover lost revenues, i.e., revenues Windermere would have missed out on had its rates been too low. That is clearly not the case here.

VI. CONCLUSION

Except as provided herein, Ratepayers support Staff's conclusion.

Ratepayers note, in particular, that Staff has overlooked the fact that Windermere has unequivocally affirmed it has at least three classes of customers,²⁰ not all of which have been assessed legal expenses. To the extent a threshold finding is required, this differential treatment results in unreasonably preferential, prejudicial, and discriminatory rates.

VII. Rates Fixed De Novo

A. Base-Rate Revenue Requirement

No reply.

B. Rate Design

Ratepayers defer to the Section of Discussion for their comments.

C. Depreciation Expense

No reply.

²⁰ Tr. Day 2 at 241, 2-16 (Gimenez Cross)(December 2, 2021).

D. Refunds and Surcharges

As stated previously in the Section above discussing Rate Case Expenses, Ratepayers adamantly oppose any surcharge imposed on the Ratepayers for a number of reasons. First, the Preliminary Order in this case specifically stated that this proceeding was intended to examine only defensive legal expenses incorporated into the rates that are the subject of this appeal. As evidenced by the testimony of Joe Gimenez on cross examination, part of the 2019 legal expenses were related to a lawsuit filed against the Texas Attorney General as a “plaintiff.”²¹ Legal expenses related to lawsuits initiated by Windermere and are not intended to be included in this appeal which Ratepayers take to mean they are not be included in any rate.²² Second, Windermere does not have a mechanism in its Articles of Incorporation, Bylaws or Tariff which allows it to assess or impose upon the Ratepayers a surcharge. The only mechanism in the tariff which allows Windermere to recover any type of shortfall from the Ratepayers is through an assessment, which is included in the tariff, however, is not authorized under Windermere’s bylaws as explained by Joe Gimenez in his cross examination.²³ Ratepayers therefore question the legitimacy of the assessment provision in the tariff.

As explained earlier, Ratepayers take exception to any recovery of expenses in this docket. Windermere’s witness Mr. Nelson even admits that the Texas Rural Water Association rate design was really just a base line rate study which would provide them a gauge of how high they could go²⁴. The rate design provided to the Ratepayers and Staff

²¹ Tr. Day 2 at 313, 23-25 and at 314, 1-14 (Gimenez Cross)(December 2, 2021).

²² See https://interchange.puc.texas.gov/Documents/50788_18_1075795.PDF Item #8.

²³ Tr. Day 2 321, 10-25, Page 323, 1-25, Page 323 lines 1-25, 324, 1-25 and 325 1-11(Gimenez Cross)(December 2).

²⁴ Tr. Day 1, Page 199, lines 1-6 (Nelson Cross)(December 1) “*So, the concept was to look at 2019, right, use it in a rate study to understand how high we could increase rates and then see if we could meet the \$10,000 a month per law*”

in this case was merely sham rate design, intended to give the appearance that Windermere followed some form of standard rate design when in fact they calculated their own ad hoc rates. Mike Nelson confirmed this in his comments that the intention of the rate design was to recover additional monthly cash flow to pay \$10,000 to each of two law firms against much larger and wildly varying monthly invoiced amounts indefinitely.²⁵

firm. And so that's where we were able to do that, so at a lower amount than the TRWA analysis."

²⁵ Tr. Day 1, 199, 8-10 and 11 (Nelson Cross)(December 1).