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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' RESPONSE TO MOTION TO ADMIT EVIDENCE

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 Response to the WOWSC's Motion to Admit Evidence filed May 25, 2022 and would show as follows.

1. The proffered evidence of Windermere's expenses incurred in connection with this proceeding is irrelevant (and thus inadmissible) because the Commission has no authority to award them. If the ALJs are correct that the Commission has no jurisdiction or authority to proceed under Section 13.043(e), then the Commission has no jurisdiction or authority to make a discretionary award of appeal cases expenses to Windermere or to consider evidence of expenses incurred by the retail public utility in the appeal proceedings. Section 13.043(j), which the ALJs say is the operative provision here, does not authorize the Commission to award or allow recovery of the utility's appeal case expenses, nor does it authorize the Commission to consider evidence of expenses incurred by the retail public utility in the appeal proceedings. Accordingly, the proffered evidence is not relevant.

2. Alternatively, the proffered evidence is irrelevant (and thus inadmissible) because they are not recoverable. Windermere has failed to prove that its "defense" of this appeal, and the

expense incurred in that effort, is reasonable or necessary.[1] To the contrary, the evidence conclusively establishes that Windermere's expenditures incurred to defend the appealed rates were not reasonably or prudently incurred.[2] First, Windermere's own evidence establishes that the appealed rates were not designed with any accepted methodology and were not intended to recoup an allowable revenue requirement. Instead, the Board backed into those rates based on an ad hoc calculation of the incremental amount Windermere would need to collect from each customer with metered service to generate a desired amount of additional monthly excess revenue indefinitely.[3] Second, Windermere's own evidence establishes that Windermere's outside legal fees are not the type of expense that is recoverable through rates – particularly not through the rates of a cooperative utility. Windermere admits the legal expenses are not costs of service; indeed, they have absolutely nothing to do with providing water and wastewater service to Windermere's customers.[4] The legal expenses are anything but fixed or recurring costs; the evidence conclusively establishes the legal expenses the directors intended to procure for themselves and their friends with the excess revenue from the rate increase were unknown, completely unpredictable, unlimited and have varied widely in amount from month to month.[5] Windermere's evidence further establishes that the Board neither intended nor expected to recover

[1] See, e.g., *Industrial Util. Service, Inc. v. Texas Nat. Res. Conservation. Com'n*, 947 S.W.2d 712, 716-7 (Tex. App. Austin 1997, writ denied) (expenses incurred in connection with utility's sham surcharge request were unreasonable, unnecessary and not in the public interest in their entirety, therefore evidence on the amount of such expenses was irrelevant).

[2] It is clear from Ms. Mauldin's testimony that all of the work and charges she is sponsoring were dedicated to defending the rates the Board approved and implemented in 2020 and seeks to continue charging. She views this proceeding as a "rate case" in which the Board seeks approval for its ad hoc rates and describes the entirety of the work as legal services "in connection with WOWSC's proposed rate increase." Fourth Supplemental Direct Testimony of Jamie L. Mauldin at 004, lines 4-6 & 18-21; 005, lines 7-13; and 006, lines 5-7. To the extent any portion of Windermere's appeal case expenses are attributable to other efforts, Windermere had the burden to segregate its expenses accordingly and to provide proof in support thereof. Ms. Mauldin's testimony does not segregate expenses by issue or provide any such proof.

[3] Tr. Day 1, 205, 5-23 (Nelson Cross)(Dec. 1, 2022)

[4] Tr. Day 1, 206, 6-19 (Nelson Cross)(Dec. 1, 2022)

[5] Tr. Day 2, 192, 7-24 (Nelson Cross)(Dec. 1, 2022)

sufficient excess revenue to pay the outside legal expenses. Instead, the Board intended to generate enough excess revenue to pay the monthly amount required to keep their legal services coming and to have Windermere accrue corporate debt for the balance. Windermere's representatives testified they have done just exactly what they intended, and that Windermere has hundreds of thousands of dollars in unreported law firm debt to show for it.[6] Third, this record is wholly devoid of evidence that any outside legal services were ever actually provided in exchange for the money Windermere paid the lawyers. The record is likewise devoid of competent evidence (i.e., from a qualified witness) that the services described in the invoices (even had they been rendered) were necessary or that the amounts billed were reasonable.[7] Just as Industrial Utilities had no good faith basis to incur expense for an unwanted and unwarranted surcharge request, here the Board and its highly skilled and experienced counsel had no good faith basis upon which to incur corporate expense to "defend" the appealed rates. None of the expense for this effort is reasonable, necessary or in the public interest, therefore evidence as to the amount the Board nonetheless caused Windermere to incur is irrelevant and inadmissible.

3. The proffered evidence is irrelevant (and thus inadmissible) because Windermere has failed to prove its appeal case expenditures are in the public interest. Ms. Mauldin's testimony does not address the "public interest" requirement at all. The testimony of PUC Staff that Windermere's customers receive absolutely no benefit from these expenditures is clear and unequivocal, and it is unrebutted.[8] As discussed above, Windermere's own evidence establishes

[6] Tr. Day 2, 259, 17-25, 260, 1-25, 261, 1-21, and 262, 14-22 (Gimenez Cross)(Dec. 2, 2022)

[7] None of Windermere's hearing representatives was an attorney or had any legal training. Windermere did not present evidence from even one of the many Lloyd Gosselink attorneys whose names appear on the invoices or from any other qualified witness.

[8] See Hearing Testimony of PUC Staff Witness Maxine Gilford, Tr. at 494, ll. 11-24. While PUC Staff initially recommended recovery of some amount of appeal case expenses, Ms. Gilford made clear in hearing testimony that she has no experience with this type of proceeding [Tr. at 474, ll. 7-13; Tr. at 492, ll. 15-24], she knows Rule 24.101 is the rule that applies in this proceeding but did not apply that rule in her analysis [Tr. at 495, ll. 24-5 – 496, ll. 1-23]

that the Board and its counsel knew or should have known that Windermere had no basis upon which to "defend" the appealed rates, thus it was not in the public interest to spend almost $400,000 (or more) of the customers' money in that effort. More to the present point, the evidence also establishes that Windermere and its counsel were not candid with the tribunal or compliant with their obligations in discovery.[9] As a result, countless hours were wasted to discover and analyze information that was wholly irrelevant. Ratepayers (and perhaps PUC Staff as well) were deprived of a fair opportunity to have meaningful discovery of relevant information and to properly prepare for the hearing. Whether Windermere and its counsel intentionally misrepresented the facts or simply disregarded their duties to the tribunal and the other parties, the expenses incurred in that effort are not in the public interest.

4. The proffered evidence is inadmissible because it is irrelevant and unreliable opinion testimony. To be relevant, an expert's opinion must be based on the facts; to be reliable, the opinion must be based on sound reasoning and methodology. *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex.2009). Unreliable expert testimony is legally no evidence. *Weingarten Realty Investors v. Harris Cnty. Appraisal Dist.*, 93 S.W.3d 280, 285 (Tex. App. -

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and has no idea what standards should be applied to evaluate a request for appeal case expenses under Section 13.043(e) [Tr. at 497, ll. 12-17].

[9] As Ratepayers have briefed previously, until the first day of the hearing Windermere's entire case was predicated on the central premise that the appealed rates were determined by TRWA using a cash-needs methodology to recoup a calculated revenue requirement that included, *inter alia,* $173,000 in legal fees reflected on invoices Windermere provided. Accordingly, discovery and hearing preparation focused almost exclusively on the TRWA rate analysis Windermere claimed was used and the components of its calculated revenue requirement. It was not until Mike Nelson testified on the first day of the hearing that anyone other than the Board was made aware the appealed rates were <u>not</u> determined by TRWA, were <u>not</u> determined using a cash needs methodology, and were <u>not</u> designed to recoup any calculated revenue requirement (and certainly not the $173,000 in legal fees used in the TRWA analysis). Nelson revealed for the first time on December 1, 2021 that the Board itself calculated the rate increase by backing into the base charge that would generate the additional monthly cash flow it needed to fund an arrangement with the lawyers to provide themselves with future legal services that would be unlimited in amount and indefinite in duration. The chicanery may have been noticed by PUC Staff, but Ratepayers had no idea they had been duped until Nelson testified. Even PUC Staff, however, did not review the legal expenses that were intended to be and were paid with revenue from the rate increase because they were not included in the TRWA model. See, e.g., Hearing testimony of PUC Staff Witness Maxine Gilford, Tr. at 487, ll. 1-12.

Houston [14th Dist.] 2002, no pet.). Ms. Mauldin's testimony fails both tests. First, Ms. Mauldin fails to apply the proper standards and methodology for calculating a reasonable fee. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019) (the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts). To the extent Ms. Mauldin articulates any rationale for her opinions concerning what is "reasonable," she refers without explanation or support to what she believes might be considered "reasonable" in rate cases. A rate case is a dramatically different type of proceeding with different substantive and procedural requirements. Ms. Mauldin's assumption that the type, level and intensity of effort are the same for a rate case as for a rate appeal is unsupported and contrary to known facts. That is particularly so with an appeal in which the Commission declines to fix just and reasonable rates. Ms. Mauldin's reliance on the award in *Ratepayers Appeal of Decision by Bear Creek Special Utility District to Change Rates,*[10] makes her opinions even more unreliable. In *Bear Creek*, the utility did not waste its customers resources trying to defend appealed rates it knew were flawed. Instead, the utility performed a cost-of-service study and recommended the Commission adopt new rates based on that cost-of-service study.[11] In *Bear Creek,* the Commission did in fact engage in a *de novo* rate proceeding that was facilitated by the utility's efforts and expenditures. The Commission set just and reasonable rates and ordered refunds to customers who had been overcharged.[12] The circumstances that justified the award in *Bear Creek* are completely absent here; indeed, here just the opposite has happened. Ms. Mauldin's reliance on *Bear Creek* renders her opinions unsound, unreliable and inadmissible.

[10] Docket No. 49351, Order on Rehearing (Nov. 19, 2021), hereinafter the "Bear Creek Order."
[11] Bear Creek Order at 5
[12] Bear Creek Order at 10; Findings of Fact 54 - 55B; and Conclusions of Law 9 – 13 & 19.

5. The proferred evidence is inadmissible because Ms. Mauldin's testimony is conclusory and fails to provide sufficient detail to determine whether the expenses are reasonable, necessary and in the public interest. Her statements are merely *ipse dixit*. She refers to the "complexity of the case,"[13] but fails identifies any "complexity." She states that "novel, difficult, and complex issues have continued to arise throughout this proceeding,"[14] but cannot identify even one. Her affidavit testimony fails even to identify any specific issue in the case, or the charges reasonably associated with that issue. She states without explanation or support that "[t]he expenses charged were associated with the review and defense of the Rate Appeal and were necessary to advise WOWSC and to accomplish tasks in the rate proceeding."[15] She concludes, also without explanation, that "[t]he fees and expenses were necessary and for the legal representation of the WOWSC."[16] She states that expenses of $386,117.08 here are "comparable" to the expenses awarded in *Bear Creek* but makes no effort to explain the basis for her conclusion. As discussed above, there is no basis for such a conclusion. She states that WOWSC "has had to engage in significant motion practice throughout this appeal,"[17] but fails to identify any motions of significance or to explain the impact, if any, she believes this has had on Windermere expenses. She states that "NewGen's expenses of $12,327.50, as of the date of filing, is reasonable,"[18] but fails even to summarize what NewGen did or to explain how she believes that contributed to Windermere's case. Conclusory opinion testimony is not relevant because it does not tend to make the existence of material facts more probable or less probable. *Cent. Appraisal Dist. of Taylor Cty. v. W. AH 406, Ltd.*, 372 S.W.3d 672, 687 (Tex. App. – Eastland 2012, pet. denied). General,

[13] Fourth Supplemental Direct Testimony of Jamie L. Mauldin at 007, ll. 11-13.
[14] Id. at 007, ll. 20.
[15] Id. at 006, ll. 2-4.
[16] Id. at 006, ll. 7-8.
[17] Id. at 007, ll. 20-22.
[18] Id. at 009, ll. 7-8

conclusory testimony devoid of any real substance will not support a fee award. *Rohrmoos Venture*, 578 S.W.3d at 501. Ms. Mauldin's testimony is that and nothing more.

6. The invoices attached to Ms. Mauldin's testimony are hearsay and are not admissible. As and to the extent they are not offered for the truth of the matter asserted, they are irrelevant and are not admissible.

7. Evidence of expenses pertaining to Grant Rabon is irrelevant and incompetent. Ms. Mauldin's testimony is conclusory and fails to provide sufficient detail to determine whether the expenses of Mr. Rabon's engagement are reasonable, necessary and in the public interest. The invoice attached is hearsay and therefore is not admissible. Even if it were admissible, the invoice fails to provide sufficient detail to determine whether the expenses of Mr. Rabon's engagement are reasonable, necessary and in the public interest.

8. The record in this proceeding clearly establishes that the expenses for Mr. Rabon's engagement are not reasonable, necessary or in the public interest. Mr. Rabon presumably is qualified to render opinions concerning the TRWA rate model, including its methodology and the components of its revenue requirement. However, Mr. Rabon was not presented to provide opinion testimony on these or other matters within his expertise. Instead, Mr. Rabon was engaged to present testimony outside his expertise and about which he had no knowledge or information.[19] Mr. Rabon clearly is neither qualified nor sufficiently informed to render the opinion that Windermere's expenses for outside legal costs are allowable in rates, yet that is the primary issue Windermere's counsel presented him to address. Mr. Rabon's "opinion" is not credible because it is based not on what he knows about Windermere's outside legal costs or the matters to which

[19] Tr. Day 2, 428-431, ll. 1-25 and 432, ll. 1-6 (Rabon Cross)(Dec. 2, 2022)

[20] *Id*

they pertain, but on the fact that he doesn't know anything at all about them.[21] Likewise, Mr. Rabon clearly is not qualified to render opinions about Windermere's "legal duties," the other issue on which he was presented. Mr. Rabon's "opinion" is not credible because it is contrary to law and completely unsupported. Mr. Rabon's engagement was a waste of resources that by all outward appearances was completely intentional. Those expenses are not recoverable at all, therefore evidence as to the amount of such expenses is irrelevant.

9. While not strictly speaking an evidentiary objection concerning the admissibility of Windermere's evidence, Ratepayers wish to make clear that the consideration of any testimony and related evidence that is or has been admitted without affording them an opportunity to cross-examine the witness(es) and to present their own evidence in rebuttal violates their right to due process and their right to cross-examination and rebuttal set forth in Rules §22.203(b)(7) and §22.225(b). SOAH Order No. 15 established December 30, 2021 as the deadline for a "rate case expense update" and January 25, 2022 as the deadline for a "response to rate case expense update," but did not provide for discovery, cross-examination or the presentation of rebuttal evidence. No opportunity for discovery, cross-examination or presentation of rebuttal evidence has since been afforded. Accordingly, any consideration of the Third or Fourth Supplemental Direct Testimony of Jamie L. Mauldin would violate Ratepayers' rights.

10. Order No. 15 did not authorize any further "rate case expense update," therefore the Fourth Supplemental Direct Testimony of Jamie L. Mauldin cannot be allowed. Ratepayers have not been afforded any opportunity for discovery, cross-examination or presentation of rebuttal evidence. Accordingly, any consideration of the Fourth Supplemental Direct Testimony of Jamie L. Mauldin, should such filing be allowed, would violate Ratepayers' rights.

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[21] *Id*

WHEREFORE, Ratepayer Representatives respectfully request that the Motion to Admit Evidence be denied, and that they receive such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

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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 June 2, 2022.

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