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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
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**WINDERMERE OAKS WATER SUPPLY CORPORATION’S
OBJECTIONS AND MOTION TO STRIKE THE SUPPLEMENTAL DIRECT
TESTIMONY OF KATHRYN E. ALLEN**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Windermere Oaks Water Supply Corporation (WOWSC) files these Objections and Motion to Strike the Supplemental Direct Testimony of Kathryn E. Allen as untimely, seeking to strike the supplemental direct testimony submitted by Ratepayer Representatives (Ratepayers) in this Docket. In the alternative, WOWSC objects and moves to strike portions of the Supplemental Direct Testimony of Kathryn E. Allen on the evidentiary objections below.

I. PROCEDURAL HISTORY AND MOTION TO STRIKE FOR UNTIMELINESS

On December 1, 2022, Ratepayers filed their Supplemental Direct Testimony of Kathryn Allen (Ms. Allen’s Supplemental Direct Testimony).¹ Pursuant to SOAH Order No. 23, the deadline to file objections to Ratepayers’ supplemental direct testimony is December 15, 2022.² Therefore, these Objections are timely filed.

On December 12, 2022, the Administrative Law Judges (ALJs) found Ratepayers’ Supplemental Testimony untimely.³ However, the ALJs did not strike Ratepayers Supplemental Direct Testimony. As a precaution, if Ratepayers seek to admit this testimony into evidence, WOWSC objects and moves to strike Ratepayers’ Supplemental Testimony based on untimeliness. Additionally, and in the alternative, WOWSC objects and moves to strike portions of Ms. Allen’s Supplemental Direct Testimony on the evidentiary objections below.

¹ Supplemental Direct Testimony of Kathryn Allen (Dec. 1, 2022) (Allen Supplemental Direct).

² SOAH Order No. 23 – Memorializing Prehearing Conference; Adopting Procedural Schedule (Sept. 26, 2022).

³ SOAH Order No. 26 – Denying Motion to Extend Time to File (Dec. 12, 2022).

II. INTRODUCTION

If the ALJs determine that Ms. Allen’s Supplemental Direct Testimony is expert testimony, WOWSC generally objects to the testimony as irrelevant and unreliable. In the alternative, if the ALJs determine that Ms. Allen’s Supplemental Direct Testimony is lay opinion testimony, WOWSC generally objects to the testimony as irrelevant, speculative due to a lack of personal knowledge, and inadmissible hearsay.

In its Order Remanding Proceeding on June 30, 2022, the Public Utility Commission of Texas (Commission) instructed the State Office of Administrative Hearings (SOAH) to evaluate “whether allowing recovery of all expenses included in the proposed revenue requirement, including the \$171,337 in legal expenses, will result in just and reasonable rates.”⁴ Nothing in Ms. Allen’s testimony will help SOAH decide this issue. Rather, Ms. Allen’s testimony is Ratepayers’ latest attempt to improperly impose post-hoc judgments on WOWSC’s legal decisions related to Cause No. 48292.⁵ But in Cause No. 48292, the jury recently returned its verdict and vindicated WOWSC’s legal decisions related to Cause No. 48292.⁶ Specifically, the jury awarded the Plaintiffs, after years of litigation and hundreds of thousands of legal costs, a mere \$70,000.⁷ Nevertheless, despite this small judgment, Ms. Allen implies that WOWSC acted imprudently by retaining counsel to defend itself.⁸ Her testimony focuses on extraneous details related to outside litigation and speculates on the outcome of hypothetical lawsuits. Therefore, as detailed below, Ms. Allen’s Supplemental Direct Testimony should be excluded.

III. DISCUSSION

Pursuant to 16 TAC § 22.221, in a contested case hearing SOAH must apply “the Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas” and exclude “irrelevant, immaterial, or unduly repetitious evidence.”⁹ Rule 401 of the Texas Rules of Civil Evidence (TRE) provides that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in

⁴ Order Remanding Proceeding at 7 (Jun. 30, 2022).

⁵ Allen Supplemental Direct Testimony.

⁶ *See id.* at Exhibit 1.

⁷ *Id.*

⁸ *See id.* at 7:8-15.

⁹ 16 TAC § 22.221.

determining the action.”¹⁰ Under TRE Rule 402, all other evidence is inadmissible unless statute, the TRE, or the U.S. or Texas Constitution provides otherwise.¹¹

A. EXPERT TESTIMONY OBJECTIONS

Pursuant to Rule 702, a witness “who is qualified as an expert by knowledge, skill, experience, or education” may offer opinion testimony if the expert’s specialized knowledge will assist the ALJs “determine a fact in issue.”¹² Texas courts admit expert opinion testimony only if “(1) the expert is qualified and (2) the testimony is relevant and based on a reliable foundation.”¹³

1. Unqualified to Provide Expert Testimony – TRE 702

WOWSC objects to Ms. Allen’s Supplemental Direct Testimony because Ratepayers fails to provide Ms. Allen’s qualifications to serve as an expert witness in a rate case proceeding. To testify as an expert, the witness must “possess special knowledge as to the very matter on which he [or she] proposes to give an opinion.”¹⁴ Moreover, the offering party bears the burden to show that the witness is qualified as an expert.¹⁵

Ratepayers has failed to meet its burden and establish that Ms. Allen is qualified as an expert under Rule 702. Ms. Allen merely provides that she is a licensed attorney.¹⁶ She does not offer relevant education, experience, or other “special knowledge” that qualifies her to provide expert testimony in a rate proceeding before the Commission. Thus, Ms. Allen’s Supplemental Direct Testimony should be reviewed as lay witness testimony, rather than expert testimony. If SOAH determines that Ms. Allen’s Supplemental Direct Testimony is expert testimony, WOWSC generally objects to the testimony as irrelevant to issues in this rate appeal and unreliable.

2. Irrelevant—TRE 401 and 402

WOWSC objects to the portions of Ms. Allen’s Supplemental Direct Testimony and that is irrelevant, pursuant to TRE 401 and 402. As discussed above, the Commission instructed SOAH

¹⁰ Tex. R. Evid. Rule 401

¹¹ Tex. R. Evid. Rule 402.

¹² Tex. R. Evid. Rule 702.

¹³ *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

¹⁴ *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

¹⁵ *Id.*

¹⁶ Allen Supplemental Direct Testimony at 3:4.

to evaluate “whether allowing recovery of all expenses included in the proposed revenue requirement, including the \$171,337 in legal expenses, will result in just and reasonable rates.”¹⁷ Thus, the only relevant legal costs to this proceeding are the \$171,337 in rates—those that were paid in 2019. Nevertheless, Ratepayers apparently considers this rate appeal an appropriate venue to review, in great detail, a jury verdict and the court’s possible judgement in Cause No. 48292.¹⁸ Specifically, in an attempt to characterize the jury verdict as evidence of WOWSC’s alleged imprudent legal strategy, Ms. Allen details individual charges against former WOWSC director Dana Martin and Friendship Homes & Hangars, LLC.¹⁹ She even reviews the conduct of Ms. Martin, a defendant unrelated to this rate appeal, alleging a “continuous pattern of deception” and other misbehavior.²⁰

Details regarding these individual charges are far too attenuated to have “any tendency” to make more or less probable “a fact of consequence” that would assist the ALJ’s determine whether WOWSC’s inclusion of 2019 legal fees in its rates was reasonable.²¹ The defendants’ alleged misbehavior does not relate to a “fact at issue” in this rate appeal and, therefore, is wholly irrelevant. Similarly, possible court judgments in Cause No. 48292 have no bearing on the 2019 rates at issue and certainly do not assist the ALJs determine whether WOWSC’s 2019 rates are reasonable.

Accordingly, WOWSC objects to and moves to strike the following portions of Ms. Allen’s Supplemental Direct testimony in accordance with TRE 401 and 402:

- Page 4, lines 5-21.
- Page 5, lines 1-24.
- Page 6, 1 through line 17, “members.”
- Page 7, line 23, beginning with “In the final analysis” through line 24.
- Page 8, lines 1-2.

¹⁷ Order Remanding Proceeding at 7 (Jun. 30, 2022).

¹⁸ Allen Supplemental Direct Testimony at 4-6, Exhibit 1.

¹⁹ *Id.*

²⁰ *Id.* at 5:18-24.

²¹ Tex. R. Evid. Rule 401.

3. Unreliable—TRE 702

WOWSC generally objects to Ms. Allen’s Supplemental Direct Testimony as unreliable because it is based on misstatements of fact and law. To assess an expert’s reliability, Texas courts determine whether there is “simply too great an analytical gap between the data and the opinion proffered[.]”²² Analytical gaps may include instances where the expert “assume[s] facts that vary materially from the facts in the record” and, therefore, bases testimony on an unreliable foundation.²³

Throughout her testimony, Ms. Allen reaches legal conclusions based on gross misstatements of facts and law. She testifies to what she believes is the proper remedy in Cause No. 48292, although the court in that proceeding has already dismissed her assertions and found that the statutory claims brought by the plaintiffs do not provide any mechanism for her proposed relief.²⁴ Ms. Allen further makes false assertions of evidentiary rulings that she believes affected the jury verdict in Cause No. 48292.²⁵ Finally, she concludes that, if WOWSC had pursued alternative litigation strategies, Cause No. 48292 “would have proceeded to trial quickly and efficiently.”²⁶ Ms. Allen provides no legal or evidentiary support for any of these assertions, but rather assumes facts that “vary materially from the facts in the record.”²⁷ Therefore, her expert testimony is not based on a reliable foundation and should be excluded.

Accordingly, WOWSC objects to and moves to strike the following portions of Kathryn E. Allen’s Supplemental Direct testimony in accordance with TRE 702:

- Page 5, lines 7-24
- Page 6, lines 1-6
- Page 6, line 22 beginning with “Had the” through line 24.
- Page 7, lines 1-24.

²² *Gammill*, 972 S.W.2d at 726 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

²³ *GUI*, 464 S.W.3d at 349.

²⁴ *Compare* Allen Supplemental Direct Testimony at 5:7-15, *with* Exhibit 1.

²⁵ *Id.* at 5:15-24, 6:1-6.

²⁶ *Id.* at 7:1-2.

²⁷ *GUI*, 464 S.W.3d at 349.

B. LAY WITNESS TESTIMONY OBJECTIONS

If SOAH determines that Ms. Allen's Supplemental Direct Testimony is lay opinion testimony, WOWSC generally objects to the testimony as irrelevant, speculative due to a lack of personal knowledge, and inadmissible hearsay. TRE 701 limits all opinion testimony to testimony that is "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony or to determining a fact in issue."²⁸ Moreover, a lay witness may only testify to a topic if "the witness has personal knowledge of the matter."²⁹ Thus, if the lay witness simply speculates and, therefore, fails to establish a personal perception and knowledge upon which the testimony is based, the testimony must be excluded.³⁰ Finally, unless Texas statute or other TRE rules provide otherwise, Rule 802 excludes all hearsay, defined as a statement that "the declarant does not make while testifying at the current trial or hearing...offer[ed] in evidence to prove the truth of the matter asserted in the statement."³¹

1. Irrelevant – TRE 401 and 402

For the same reasons discussed above, WOWSC objects to the portions of Ms. Allen's Supplemental Direct Testimony that are irrelevant, pursuant to TRE 401 and 402.³² Accordingly, WOWSC objects to and moves to strike the following portions of Kathryn E. Allen's Supplemental Direct testimony in accordance with TRE 402:

- Page 4, lines 5-21.
- Page 5, lines 1-24.
- Page 6, 1 through line 17, "members."
- Page 7, line 23, beginning with "In the final analysis" through line 24.
- Page 8, lines 1-2.

2. Need for Personal Knowledge – TRE 602

WOWSC objects to the portions of Ms. Allen's Supplemental Direct Testimony for which she has not laid the foundation for her personal knowledge, pursuant to TRE 602.

²⁸ Tex. R. Evid. Rule 701.

²⁹ Tex. R. Evid. Rule 602.

³⁰ *Bigby v. State*, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994).

³¹ Tex. R. Evid Rules 801(d), 802.

³² *Infra* at § III(A)(1).

Ms. Allen has not laid the requisite foundation for personal knowledge of the WOWSC Board's internal deliberations, or any other WOWSC Board matter outside of her intermittent role as counsel for Ratepayers in matters outside the scope of this proceeding. Because Ms. Allen was not counsel to the Board, her testimony describes actions taken by the Board based on speculation and information that she obtained secondhand or thirdhand.³³ Further, her testimony improperly speculates on proper remedies the court should grant in Cause No. 48292 and the litigation's outcome if WOWSC had refrained from defending itself.³⁴ Finally, in her testimony, Ms. Allen appears to air her grievances regarding the jury verdict and, without any basis or personal knowledge, alleges various procedural issues from Cause No. 48292.³⁵ Therefore, Ms. Allen has not provided sufficient evidence that she has personal knowledge of several events to which she testifies.

Accordingly, WOWSC objects to and moves to strike the following portions of Kathryn E. Allen's Supplemental Direct testimony in accordance with TRE 602:

- Page 5, lines 7-8.
- Page 5, line 12 beginning with "Thus, in the event" through 24.
- Page 6, lines 1-6.
- Page 6, line 17 beginning with "That is" through 18, "July 9, 2018."
- Page 6, line 22 beginning with "Had the 2019 water board" through 24.
- Page 7, line 1 through 8, "of court."
- Page 7, lines 18 beginning with "They pulled" through 22, "by the board itself."

3. Inadmissible Hearsay – TRE 801(d) and 802

WOWSC objects to the portions of Ms. Allen's Supplemental Direct Testimony and that consists of inadmissible hearsay pursuant to TRE 801(d) and 802.

Ms. Allen often testifies to matters for which she does not attempt to provide a foundation. She routinely offers conclusory statements, based on the statements of declarants made outside the evidence of this proceeding, for the truth of the matter asserted. Each reference to statements made

³³ See, e.g., Allen Supplemental Direct Testimony at 7:18-22.

³⁴ *Id.* at 5:12-15, 6:22-24, 7:1-6.

³⁵ *Id.* at 5:15-24, 6:1-6.

by any declarant outside of this proceeding, descriptions of their experiences, and measures taken by them, all constitute inadmissible hearsay.

Accordingly, WOWSC objects to and moves to strike the following portions of Ms. Allen's Supplemental Direct Testimony in accordance with TRE 801(d) and 802:

- Page 6, line 17 beginning with "That is" through 18, "July 9, 2018."
- Page 7, line 6 beginning with "Instead" through 16, "desired to do."
- Page 7, line 18 "They pulled" through 21, "credit on that effort."

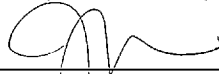
IV. CONCLUSION

For the foregoing reasons, WOWSC respectfully requests that the ALJs strike the Supplemental Direct Testimony as untimely, or in the alternative, sustain its objections to portions of the Supplemental Direct Testimony of Kathryn E. Allen, and that its motion to strike such testimony and exhibits be granted. WOWSC further requests that it be granted all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on December 15, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.



JAMIE L. MAULDIN

1 CAUSE NO. 48292

2 RENE FFRENCH, JOHN RICHARD) IN THE DISTRICT COURT
3 DIAL, AND STUART BRUCE)
4 SORGEN,)
5 Intervenor Plaintiffs,)
6 VS.) BURNET COUNTY, TEXAS
7 FRIENDSHIP HOMES &)
8 HANGARS, LLC, WINDERMERE)
9 OAKS WATER SUPPLY)
10 CORPORATION AND ITS)
11 DIRECTORS WILLIAM EARNEST,)
THOMAS MICHAEL MADDEN,)
DANA MARTIN, ROBERT)
MEBANE, PATRICK MULLIGAN,)
JOE GIMENEZ, MIKE NELSON,)
AND DOROTHY TAYLOR)
12 Defendants.) 33RD JUDICIAL DISTRICT

13 -----
14 PRETRIAL HEARING
15 -----
16

17 On the 23rd day of August, 2022, the following
18 proceedings came on to be heard in the above-entitled
19 and numbered cause before the Honorable Margaret G.
20 Mirabal, Judge presiding, held in Burnet, Texas,
21 Burnet County, Texas;

22 Proceedings reported by machine shorthand.
23
24
25

A P P E A R A N C E S

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1 acts of directors under 20.00(c)(2) has no limitation
2 on remedy and that plaintiffs are entitled to seek to
3 unwind fully-performed transactions that allegedly
4 and properly benefited the directors who acted with
5 knowing involvement and participation by the
6 transferees and the ability to recover damages.

7 Implied in that ruling was the ultra
8 vires acts of the corporation and any claim on that
9 under 20.002(c)(1) to enjoin or set aside the
10 transfer by a member, plaintiffs don't have a right
11 to enjoin a corporation because the transaction was
12 completed. And the Court cannot order the
13 corporation to set aside through a suit by the
14 members.

15 That ruling specifically acknowledged a
16 right to try to unwind the transaction because of a
17 suit against the directors individually, but implied
18 in that ruling was that the corporation could not be
19 ordered and enjoined because it was a completed
20 transaction. And we'll talk about that further, but
21 the case law -- that's what the case law is under
22 20.002(c)(1).

23 On May 3rd, 2021, the Court entered an
24 order granting summary judgment to all the directors
25 except Director Dana Martin. And the ruling was that

1 Now, it's an interesting issue that --
2 and you can't enjoin the -- because that's a
3 completed act, but the continuing payment, could they
4 be enjoined, how that's affected by the Court's
5 ruling that the board members did not -- are not
6 personally liable for having entered that contract is
7 under the allegations of the petition, and,
8 therefore, the corporation would not be individually
9 liable. But you're not seeking damages; you're
10 seeking an injunction from an ongoing continuing act.

11 I'm going to leave that for another
12 time, the injunction issue for uncompleted payments
13 of -- okay. That's just a -- okay. Give me one
14 second.

15 MR. DE LA FUENTE: Do we --

16 THE COURT: Go ahead.

17 MR. DE LA FUENTE: -- understand,
18 Your Honor, by your statement -- and I do just ask
19 for clarity on the record -- that as to the 20.002
20 claim against the corporation for the completed
21 transaction, as Your Honor said, that being moot
22 because it's been completed, that is a
23 non-jurisdictional claim?

24 THE COURT: A non-jurisdictional claim.

25 MR. DE LA FUENTE: It is moot because

1 the transaction has been completed, you defer to the
2 case law on that, the TOMA Integrity Law --

3 THE COURT: Yes. I am saying that -- I
4 am -- if you want to word it a little differently,
5 the rulings of the Court in the -- up to now
6 impliedly and now expressly are that claims against
7 the corporation to convey the property -- to get the
8 property back, that claim against the corporation is
9 denied.

10 Claims against the corporation for
11 liability for all of the acts that are in the third
12 amended petition that were alleged as to improper
13 actions of the board because the board has a -- each
14 director personally has received a summary judgment
15 of no liability as to all those actions, the ruling
16 of the Court is the corporation therefore, because it
17 acts through the board, is not liable for those
18 actions.

19 And that would include entering into the
20 contract for the paying the attorneys' fees because
21 that was part of the summary judgment.

22 I am leaving on -- only because under
23 20.001(c)(1), the plaintiff says members can seek to
24 enjoin future actions -- meaning to continue to pay
25 attorneys' fees, but that's based on the contract the