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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 ROBERT GAINES**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Windermere Oaks Water Supply Corporation (WOWSC) files these Objections and Motion to Strike the Supplemental Direct Testimony of Robert Gaines 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 Robert Gaines on the evidentiary objections below.

I. PROCEDURAL HISTORY AND MOTION TO STRIKE FOR UNTIMELINESS

On December 1, 2022, Ratepayers filed their Representative Robert Gaines' Supplemental Direct Testimony (Mr. Gaines' Supplemental Direct Testimony).¹ Pursuant to State Office of Administrative Hearings (SOAH) Order No. 23, the deadline to file objections to Ratepayers' supplemental direct testimony is December 15, 2022.² Thus, 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 to and moves to strike Ratepayers' Supplemental Testimony based on untimeliness. Additionally, and in the alternative, WOWSC objects and moves to strike portions of Mr. Gaines' Supplemental Direct Testimony on the evidentiary objections below.

¹ Supplemental Direct Testimony of Robert Gaines (Dec. 1, 2022) (Gaines Supplemental Direct Testimony).

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) (SOAH Order 26).

II. INTRODUCTION

WOWSC generally objects to Mr. Gaines' Supplemental Direct Testimony because it is irrelevant, confuses the issues, misleads the ALJs, and is unreliable expert testimony based on misstatements of fact. SOAH should therefore strike the portions of Mr. Gaines' Supplemental Direct Testimony detailed below.

In its Order Remanding Proceeding on June 30, 2022, the Public Utility Commission of Texas (Commission) instructed 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 As such, Ratepayers employed expert witness Robert Gaines to review "various year-end financial statements of [WOWSC]" and "various provisions of the Windermere Tariff."⁵ But as detailed below, Mr. Gaines failed to articulate his findings in a comprehensible manner and, moreover, impermissibly based his findings on assumptions of fact. His expert testimony is convoluted and, at times, nearly impossible to understand. In several instances, it is composed of erratic, incomplete notes rather than legible opinion.⁶ The filing of such incoherent testimony is highly inappropriate and arguably amounts to violations of the Texas Rules of Professional Conduct and Commission rules.⁷

Ratepayers has recently demonstrated a pattern of incomprehensible and untimely filings.⁸ SOAH acknowledged this troubling pattern in Order No. 25 and, accordingly, rejected Ratepayers' and Staff's Motion to Reconsider Evidentiary Rulings.⁹ WOWSC, after each disorganized and poorly cited filing, must expend needless time and resources to decipher Ratepayers' scattered

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

⁵ Gaines Supplemental Direct Testimony at 3.

⁶ *Id.* at 7, 9 (stating "[a]ccrual is only the accounting properly to use to report an accurate report of the operations on annual basis," "[w]hen doing ratemaking and generating a revenue requirement difficulty to have a reliable rate design why you rely on fictitious numbers," "[a]uditors growing concerns issues what does that mean," and "[a]lways say these statements present (don't understand what he is saying) sitting on big pile of legal bills and decide to pay 25% that is what they pay").

⁷ Tex. R. Prof. Cond. Rule 1.01, Comment 6 (providing that "[a] lawyer should act with competence, commitment and dedication to the interest of the client...and pursue a matter on behalf of a client with reasonable diligence"); 16 TAC § 22.3 (stating that "[p]rofessional representatives shall observe and practice the standard of ethical and professional conduct prescribed for their professions").

⁸ *See, e.g.*, Ratepayer's and Staff's Amended Agreed Motion for Reconsideration of Evidentiary Ruling (Oct. 17, 2022); SOAH Order No. 26 (Dec. 12, 2022).

⁹ SOAH Order No. 25 – Ruling on Motion to Reconsider Evidentiary Rulings and Motion to Strike (Nov. 14, 2022).

assertions. This directly contradicts Ratepayers’ duty to avoid “unreasonably increas[ing] the costs or other burdens of the case” and is particularly concerning in a rate appeal—such as this proceeding—that focuses solely on the necessity and reasonableness of legal fees.¹⁰ Therefore, for the reasons detailed below, Mr. Gaines’ 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 [TRE] as applied in nonjury civil cases in the courts of Texas” and exclude “irrelevant, immaterial, or unduly repetitious evidence.”¹¹ TRE Rule 702 defines expert testimony as opinions based on the witness’s “skill, experience, training, or education.”¹² Importantly, however, experts may only offer opinion testimony if the testimony is relevant and based on a reliable foundation.¹³

A. Relevance – TRE 401, 402, and 403

WOWSC objects to the portions of Mr. Gaines’ Supplemental Direct Testimony that are irrelevant, confuse the issues, and mislead the ALJs. Pursuant to TRE 401, “evidence 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 determining the action.”¹⁴ Under TRE 402, all other evidence is inadmissible unless statute, the TRE, or the U.S. or Texas Constitution provides otherwise.¹⁵ Furthermore, under TRE 403, the ALJs “may exclude relevant evidence if its probative value is substantially outweighed by a danger of...confusing the issues [or] misleading the jury.”¹⁶

The majority of Mr. Gaines’ testimony is nearly illegible. In places it is impossible to understand and, therefore, does not assist the ALJs determine whether WOWSC’s 2019 rates are reasonable. As such, it does not make a fact of consequence in this proceeding “more or less

¹⁰ Tex. R. Prof. Cond. Rule 3.02.

¹¹ 16 TAC § 22.221.

¹² Tex. R. Evid. Rule 702.

¹³ *Gharda USA, Inc. v. Control Sols, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015).

¹⁴ Tex. R. Evid. Rule 401.

¹⁵ Tex. R. Evid. Rule 402

¹⁶ Tex. R. Evid. Rule 403.

probable” and should be excluded under TRE 402 as irrelevant.¹⁷ Moreover, because the testimony is erratic and incomprehensible, it is subject to a number of interpretations. Thus, its probative value is “substantially outweighed by a danger of... confusing the issues [or] misleading the [ALJs].”¹⁸ Therefore, even if the ALJs find that Mr. Gaines’ testimony is relevant, it should be excluded under TRE 403.

Accordingly, WOWSC objects to and moves to strike the following portions of Robert Gaines’ Supplemental Direct Testimony in accordance with TRE 401, 402, and 403:

- Page 6, lines 81-83.
- Page 7, lines 108-113.
- Page 8, lines 116-129.
- Page 9, lines 139-145.

1. Unreliable – TRE 702

WOWSC generally objects to Mr. Gaines’ Supplemental Direct Testimony as unreliable. 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.”¹⁹ 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[.]”²⁰ 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.²¹ Put differently, “expert opinions must be supported by facts in evidence, not conjecture.”²²

To support his expert opinion, Mr. Gaines alleges that WOWSC directors committed “nefarious actions” and “nefarious activities.”²³ As a preliminary matter, it is highly inappropriate for Mr. Gaines to testify, in the capacity of Certified Public Accountant (CPA), that WOWSC

¹⁷ Tex. R. Evid. Rules 401, 402.

¹⁸ Tex. R. Evid. Rule 403.

¹⁹ *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

²⁰ *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

²¹ *GUI*, 464 S.W.3d at 349.

²² *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003).

²³ Gaines Supplemental Direct Testimony at 8:134-136, 9:144-145.

directors acted “nefariously.”²⁴ For this reason alone, his opinion testimony based on the alleged “nefarious actions” of WOWSC should be excluded.²⁵

Moreover, Mr. Gaines’ accusation that WOWSC directors were “nefarious” is impermissibly based on conjecture, rather than facts in the record. Webster’s Dictionary defines “nefarious” as “flagrantly wicked or impious.”²⁶ The assertion that an entity is “flagrantly wicked” is inherently subjective and conjectural. Moreover, because there is nothing in the record that could reasonably support a finding that WOWSC directors are “flagrantly wicked” or acted as such, Mr. Gaines impermissibly “assume[s] facts that vary materially from the facts in the record.”²⁷

Accordingly, WOWSC objects to and moves to strike the following portions of Mr. Gaines’ Supplemental Direct Testimony in accordance with TRE 702:

- Page 8, line 134 beginning with “These do not appear” through line 136.
- Page 9, lines 137-138.
- Page 9, line 144 beginning with “Nefarious activities” through line 145.

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 Robert Gaines, and that its motion to strike such testimony be granted. WOWSC further requests that it be granted all other relief to which it is entitled.

²⁴ *Id.* at 3:4-12.

²⁵ *See Gammill*, 972 S.W.2d at 718 (providing that the party offering the expert testimony bears the burden to show that the expert is qualified under Rule 702).

²⁶ *Nefarious*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/nefarious> (accessed Dec. 13, 2022).

²⁷ *GUI*, 464 S.W.3d at 349.

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