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**SOAH DOCKET NO. 473-20-4071.WS
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RATEPAYERS APPEAL OF THE	§	BEFORE THE STATE OFFICE
DECISION BY WINDERMERE OAKS	§	
WATER SUPPLY CORPORATION TO	§	OF
CHANGE WATER AND SEWER	§	
RATES	§	ADMINISTRATIVE HEARINGS

**RATEPAYERS' RESPONSE TO WINDERMERE OAKS WATER SUPPLY
CORPORATIONS' OBJECTIONS AND MOTION TO STRIKE SUPPLEMENTAL
DIRECT TESTIMONY AND EXHIBITS OF ROBERT GAINES**

COMES NOW The Ratepayers' Representatives ("Ratepayers'"), and files this Response to Windermere Oaks Water Supply Corporation's ("Windermere") Objections and Motion to Strike Supplemental Direct Testimony of Robert Gaines and respectfully show as follows:

I. INTRODUCTION

Ratepayers filed Supplemental Direct Testimony of Robert Gaines on December 1, 2022, pursuant to SOAH Order No. 23 Memorializing the Prehearing Conference and Adopting Agreed Procedural Schedule ("Order No. 23"). On December 2, 2022, Ratepayers filed a Motion for an Extension of Time and on December 12, 2022, SOAH filed Order No. 26, Denying Ratepayer's Motion to Extend Time and determined Ratepayers' Supplemental Testimony was untimely filed. Following the Administrative Law Judges (ALJ's) finding that Ratepayers' Supplemental Testimony was untimely filed, on December 15, 2022, Windermere filed its Objections and Motion to Strike the Supplemental Direct Testimony of Robert Gaines. Because the procedural schedule in Order No. 23 did not provide a deadline for responding to Objections to Supplemental Testimony and because the Public Utility Commission Offices were closed December 21, 2022 – December 23, 2022 and December 26, 2022 – December 27, 2022, Ratepayers' response is timely filed within

five working days of receipt of Windermere's Objections and Motion to Strike Robert Gaines Supplemental Testimony under 16 Tex. Admin. Code § 22.78(a) (2019) (providing that, unless otherwise specified, a responsive pleading shall be filed by a party within five working days after receipt of the filing).

II. RESPONSE TO OBJECTION AND MOTION TO STRIKE

Mr. Gaines is qualified to offer his opinion testimony on the issues he addresses. Those issues concern financial reporting and expense allocation in rate design. Mr. Gaines is a Certified Public Accountant (CPA) and auditor with over thirty years' experience reporting and auditing financial information for entities like Windermere. This experience includes the inclusion of expense and other financial information for rate making purposes. These are clearly included within the issues to be addressed in this proceeding. See Commission's Preliminary Order¹ of July 16, 2020, issues four through eight and in the June 30, 2022, Commissioner's Remand Order² at p. 6 - 7. None of Windermere's remaining challenges is meritorious.

III. ARGUMENT

TRE 401, 402 and 403

Page 6, lines 81-83 and Page 7, 108-113

Mr. Gaines explains at page 7, lines 101-113, cash-basis accounting can be problematic for a utility such as Windermere because it does not accurately reflect the results of operations for any given period. For example, cash-basis accounting reports amount the utility chooses to disburse for a given line item, rather than the amount of expense incurred for that line item, The former is

¹ See Preliminary Order https://interchange.puc.texas.gov/Documents/50788_18_1075795.PDF

² See Remand Order https://interchange.puc.texas.gov/Documents/50788_205_1219028.PDF

not the cost of service, therefor it is not useful for purposes of developing a rate within a range of reasonable values. Windermere itself acknowledges that the ALJs must evaluate “whether allowing recovery of all expenses included in the proposed revenue requirement” will result in just and reasonable rates. Mr. Gaines’ testimony is clearly relevant to such evaluation.

Mr. Gaines further provides in his testimony his experience of identifying typical fixed and variable cost and identifies potential issues when using the cash basis accounting when expenses fluctuate from year to year. Courts have consistently held, the threshold for relevant evidence is a low bar, and relevant evidence "is evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." ³ Typically the rule adopts a liberal as opposed to restrictive approach to the question of relevancy.

Page 8, lines 116-129

Windermere objects to Mr. Gaines’s testimony relevant to the potential issues with Windermere’s financial reporting, specifically to outstanding incurred debt at the end of the year. Mr. Gaines’s opinion is because Windermere only reports payments made this can influence a rate design, particularly using inaccurate financials necessary to operate the utility and forecast expenses, which will prove to be unreliable for rate analysis purpose. For example, Windermere has reported four different legal amounts necessary for recovery though the appeal rates; \$171,337 in TRWA Rate Design; \$240,000 a year reflected in Mike Nelson’s Testimony; \$166,583.48 for

³ Id

legal and \$1,685.00 for accounting as stated on the Jan. 10, 2020, financials ending December 31, 2019.

Page 9, lines 139-145

Mr. Gaines provides testimony here that the legal fees have put Windermere in a position of growing concerns and questions the expenditures to be not ordinary and necessary. Once again, as a CPA with thirty years of professional experience working with water utilities and consulting on ordinary and necessary expenses to maintain the operations of the utility, Mr. Gaines's opinion is relevant to the financial condition of Windermere and does have the tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

TRE 702

To claim an objection Under TRE 702 Windermere asserts that Mr. Gaines's testimony is unreliable. Once again, Mr. Gaines has over thirty years' experience reporting and auditing financial information for entities like Windermere. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." ⁴ Mr. Gaines was furnished with and reviewed documents which are all part of the record this included Joe Gimenez's Rebuttal Testimony. His opinion is only unreliable if it is contrary to actual, undisputed facts.⁵

⁴ See Tex. R. Evid. 702

⁵ Caffee Ribs, Inc. v. State, 487 S.W.3d 137, 144 (Tex. 2016)

In Gaines's description of past actions of Windermere Board Members he offers an opinion that the actions can be considered "nefarious acts". The definition provided by Windemere is not limited to a Merriam-Webster's Dictionary.⁶ There is no conjecture by Mr. Gaines. The record clearly proves that Windermere has had an unfavorable ruling by a court that they violated the Texas Open Meetings Act.⁷ There are additional definitions of "nefarious actions" besides Windermere's which include related terms such as outrageous, shocking, egregious and neglecting to fail to do something, to leave out, omit through carelessness⁸. Clearly it can be proven Windermere's agenda to sell a land asset to Ms. Dana Martin, a sitting director at the time in December of 2015 lacked sufficiency. This is not conjecture but a fact.⁹

As professional CPA for more than thirty years clearly Mr. Gaines is an expert who can offer an opinion when a utility such as Windermere does not identify accurate financial data from year to year this results in an inaccurate representation of debts of the utility. For example, Windermere may be budgeting each year \$240,000 in legal expenses, however in Windemere's answer to Staff's RFI on legal expenses incurred, the amounts incurred exceed the amounts budgeted therefore misrepresents the actual legal debt incurred each year beginning in 2019 through 2021 financials.

⁶ See Windermere Oaks Water Supply Corporation's Objections And Motion To Strike The Supplemental Direct Testimony Of Robert Gaines, p. 5, footnote 26

⁷ See Gimenez Rebuttal Testimony Attachment JG-21 Page 7 of 57 "this Court found that the notice for the December 2015 meeting at which the Original Transaction was authorized violated TOMA because the subject of the prospective sale was not included in the published notice of the meeting."

⁸ See <https://legaldictionary.lawin.org/nefarious/Nefarious> | Free Online Dictionary of Law Terms and Legal Definitions (lawin.org)

⁹ See Gimenez Rebuttal Testimony Attachment JG-21 Page 7 of 57 "this Court found that the notice for the December 2015 meeting at which the Original Transaction was authorized violated TOMA because the subject of the prospective sale was not included in the published notice of the meeting."

IV. CONCLUSION AND PRAYER

For the above reasons, the Ratepayers request the ALJs to overrule Windemere's Objections to the Direct Testimony of Robert Gaines and deny Windermere's motion to strike his testimony; and to grant the Ratepayers' such other relief to which it is 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 December 29, 2022.

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