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| RATEPAYERS APPEAL OF THE | § | BEFORE THE STATE OFFICE |
| DECISION BY WINDERMERE | § | |
| OAKS WATER SUPPLY | § | OF |
| CORPORATION TO CHANGE | § | |
| WATER AND SEWER RATES | § | ADMINISTRATIVE HEARINGS |

**RATEPAYERS’ RESPONSE TO COMMISSION STAFF’S
MOTION TO ADOPT THE TESTIMONY OF
MAXINE GILFORD**

**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 Response to Commission Staff’s Motion to Adopt the Testimony of Maxine Gilford and would show as follows:

1. Ratepayers received Commission Staff’s Motion to Adopt the Testimony of Maxine Gilford (“Motion”) on January 10, 2023. Pursuant to Rules §§ 22.4(a), 22.77(b) and 22.78(a), the deadline for response to such Motion is January 18, 2023. Therefore, this pleading is timely filed.

2. The Motion seeks leave for Commission Staff member Anna Givens to adopt the pre-filed direct testimony of Maxine Gilford filed on May 5, 2021 (“Testimony”). The impact of Ms. Givens’ “adoption” of the Testimony is not entirely clear to Ratepayers, nor can they ascertain with certainty whether they are required to make objections at this time. This Response is filed from an abundance of caution and to avoid any suggestion that they have waived the matters set forth herein.

3. The Testimony includes a recommendation that the Commission allow recovery of rate-case expenses in the amount of \$148,747.12.¹ In her capacity as a financial analyst, Ms. Gilford was qualified to testify as to the public interest aspect of Windermere’s request,² and Ratepayers have assumed her testimony was offered for that purpose. However, Ms. Gilford was

¹ Testimony at p. 18, lines 1-3.

² See, e.g., Proposal for Decision, *Application of SJWTX, Inc. dba Canyon Lake Water Service Co. to Change Water Rates*, TCEQ Docket No. 2010-1841-UCR, Dec. 3, 2012, 2012 WL 6449153 at *49-50.

not qualified to opine as to the reasonableness or necessity of the legal services or the charges by reference to the standards set forth in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) or pursuant to the lodestar method approved in *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012), and she did not purport to do so. It does not appear from the Motion that Ms. Givens is qualified to opine as to those matters.

4. Further, in her hearing testimony, Ms. Gilford acknowledged that while she has considerable experience with *rate-case expenses* awarded in rate cases under 16 TAC §24.44, she has no experience with *appeal-case expenses* governed by Section 13.043.³ Ms. Gilford is aware of the rule (24.101) that applies to rate appeals, nevertheless she elected to apply the rule that applies exclusively in rate cases and has no application to nonprofit water supply corporations.⁴ Ms. Gilford further acknowledged she does not know what standards the Commission applies in making decisions whether to award expenses in a rate appeal.⁵ Accordingly, in light of such hearing testimony the recommendation that the Commission award \$148,747.12 in expenses is unreliable. The Motion does not furnish any basis upon which to conclude that this recommendation would somehow become reliable if adopted by Ms. Givens.

5. Ms. Gilford also acknowledged in her hearing testimony that she could not identify any activity of Windermere or its attorneys in connection with this appeal proceeding that she believes has provided any benefit of the company's ratepayers.⁶ Since an award of appeal case expenses would not serve the public interest, the recommendation that the Commission award \$148,747.12 in expenses is unreliable. The Motion does not furnish any basis upon which to conclude that this recommendation would somehow become reliable if adopted by Ms. Givens.

6. The Testimony also includes recommendations concerning the recovery of appeal case expenses -- should the Commission allow any recovery -- through a surcharge or an assessment.⁷ In her hearing testimony, however, Ms. Gilford acknowledged that Windermere cannot impose a surcharge.⁸ The suggestion that such expenses might be recoverable from the ratepayers through an assessment under the tariff is rendered unreliable by Ms. Gilford's unrebutted testimony that none of Windermere's appeal case expenses provide any benefit to its

³ Transcript, Day 3 (Dec. 3, 2021), p. 473, lines 22-25, p. 474, lines 7-13, pp. 474, line 24 – 475, line 7.

⁴ Transcript, Day 3 (Dec. 3, 2021), p. 495, line 16 – p. 496, line 23.

⁵ Transcript, Day 3 (Dec. 3, 2021), p. 497, lines 12-17.

⁶ Transcript, Day 3 (Dec. 3, 2021), p. 489, lines 6-15 and p. 494, lines 20-24.

⁷ Testimony at p. 18, lines 4-23.

⁸ Transcript, Day 3 (Dec. 3, 2021), p. 529, lines 5-20.

ratepayers.⁹ Moreover, it is undisputed that Windermere’s bylaws – which are a contract with its member/customers¹⁰ – do not authorize any assessment or “true up.” For the Commission to authorize either a surcharge or an assessment would constitute an impermissible impairment of such private contract.¹¹

7. Finally, any opinion suggesting that Windermere should recover its expenses in this appeal, in whole or in part, is unreliable because it disregards Windermere’s lack of candor in this proceeding.¹² From the time this appeal was filed, throughout the hearing and briefing, and until very recently, Windermere portrayed that the issue in this appeal was the inclusion of \$171,337 in outside legal costs in the appealed rates, based on year-end data from the 2019 test year.¹³ This defined the scope of discovery, the parties’ hearing presentations, post-hearing briefing and the PFD and exceptions. Mike Nelson testified to the contrary during the hearing, but the ALJs apparently disbelieved him or simply chose to disregard his testimony.

8. In its responses to Staff’s Eighth RFI made on January 9, 2023, Windermere admitted for the first time the appealed rates were not designed to recover \$171,337 in outside legal costs or any other expenses for the test year (as it had long insisted) or \$250,000 additional revenue to fund some sort of “minimum payment plan” to keep the lawyers engaged.¹⁴ To the contrary, Windermere now portrays that the appealed rates were designed to recover total projected expenses as reflected on its 2020 budget.¹⁵ This is an entirely new rate design theory based on an entirely new dataset. This revelation renders virtually useless all of the work (and expense) incurred by all parties in this appeal.

9. Even without knowing of this revelation, Ms. Gilford could not identify a single benefit to the ratepayers from the company’s expenditures on this appeal case. In light of Windermere’s lack of candor, and the substantial waste of resources that has resulted from it, any opinion recommending that Windermere be allowed to recover the costs for this appeal from its

⁹ It appears Ms. Givens also acknowledges that Windermere is required to expend its revenues solely for the benefit of its ratepayers. See Supplemental Direct Testimony of Anna Givens (Jan. 10, 2023) at p. 7, lines 12-19.

¹⁰ See, e.g., *High Road on Dawson v. Benevolent and Protective Order of Elks*, 608 S.W.3d 869, 880 (Tex. App. – Houston [1st Dist.] 2020, pet. denied) and cases cited therein.

¹¹ See, e.g., *Texas Water Com’n v. City of Ft. Worth*, 875 S.W.2d 332, 335 (Tex. App. – Austin 1994, writ denied).

¹² See, e.g., An Order, Granting the Ratepayers’ Appeal of the Retail Water Rates of North San Saba Water Supply Corporation, TCEQ Docket No. 2008-1481-UCR, SOAH Docket No. 582-09-0660, June 7, 2010, Findings of Fact No. 12 & 14.

¹³ The ALJs acknowledged as much during the hearing. See, e.g., Transcript, Day 3 (Dec. 3, 2021), p. 529, lines 21-25.

¹⁴ WOWSC’s Response to Staff’s Eighth RFI, Staff 8-8 and 8-9.

¹⁵ WOWSC’s Response to Staff 8-8.

ratepayers is unreliable and inadmissible.

10. Ratepayers reserve their right to make further objections in the event leave is sought for the adoption of testimony other than the Testimony and/or Ms. Givens provides supplemental testimony regarding these matters.

WHEREFORE, premises considered, Ratepayers respectfully request that the Motion be denied as to the foregoing portions of the Testimony, that such portions be stricken from the record, 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 January 18, 2023.

/s/ Kathryn E. Allen

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