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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**

RATEPAYER REPRESENTATIVES' RESPONSE TO WINDERMERE OAKS WATER SUPPLY CORPORATION'S MOTION TO COMPEL

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 the Motion to Compel of Windermere Oaks Water Supply Corporation ("Windermere") and would show as follows:

1. Ratepayers received Windermere's Fourth Set of RFIs on January 18, 2023. Ratepayers filed their Objections to Windemere's RFI 4-1 through 4-3 and 4-5 ("Objections") on January 25, 2023. Ratepayers received Windermere's Motion to Compel on January 26, 2023. Pursuant to SOAH Order No. 23, responses to motions to compel are due within three business days of receipt of the motion to compel. Three business days from January 26, 2023 is Tuesday, January 31, 2023, therefore Ratepayers' Response is timely filed.

2. Ratepayers' Objections set forth in considerable detail the bases upon which the requested material and information is not discoverable and include citation to and analysis of applicable legal authorities. The contents of the Objections are carried forward, restated and incorporated herein fully by this reference. [1] Windermere's Motion fails to address any of the grounds or legal authorities set forth in the Objections. The Motion cites no bases or legal authority

[1] See Ratepayers Objections to Windermere's 4th RFI, PUC Docket 50788, SOAH Docket No. 473-20-4071.WS.

that would suggest the requested material and information is discoverable or that the Objections should be overruled.

3. Windermere has suggested that the information and materials reflecting the costs incurred by its opponents in some of the legal proceedings that may have been funded by the rate increase is discoverable on the grounds that it may "shed light" on the reasonableness and/or necessity of Windermere's expenses in those proceedings. Even if that were the applicable standard for evaluating "just and reasonable rates," which is what the Preliminary Order requires, the Texas Supreme Court has expressly and specifically rejected Windermere's contention. As set forth in the Objections, the Court has held that evidence of the expenses incurred by an opponent does not tend to prove or disprove whether the proponent's expenses are reasonable or necessary. Accordingly, discovery of information and materials concerning an opponent's litigation expenses is not allowed.[2] Windermere's Motion does not suggest otherwise.

4. As set forth in the Objections, these principles apply with particular force in this case. Windermere has admitted its litigation costs are not segregated by matter or proceeding and, because of its attorneys' time-keeping practices, cannot be so segregated. Accordingly, even if a matter-by-matter comparison of expenses incurred were probative (which the Texas Supreme Court has held it is not) such a comparison would not be possible here.

5. Windermere's Motion also fails to address Ratepayers' Objections based on the scope of Rule 192.7 or the Privileged and Confidential nature of the requested materials and information. Accordingly, Windermere's Motion presents no basis upon which to overrule Ratepayers' Objections.

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[2] See *In re Nat'l Lloyds Ins. Co.,* 532 S.W.3d 794, 810 (Tex. 2017), *In re Kuntz,* 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding) and other authorities cited in the Objections.

6. Likewise, Windermere's Motion does not address Ratepayers' proposal to provide a lodestar calculation concerning their reasonable and necessary expenses incurred in this rate appeal upon receipt of a stipulation that such expenses are recoverable.

7. From an abundance of caution, Ratepayers hereby restate their Objections in their entirety as follows:

WOWSC RFI 4-1

Beyond the scope of Rule 192.7:

a. This RFI seeks the production of information and materials of which Ratepayers do not have possession, custody or control, as defined by Rule 192.7. Rule 192.7 provides that possession, custody, or control of an item "means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item." Neither of Ratepayer Representatives has physical possession of the requested information or records.

b. To the extent responsive information or materials may exist for the brief period during which Patti Flunker was a named plaintiff in Cause No. 48292, she might arguably be entitled to access information and materials regarding the plaintiffs' attorneys' fees incurred during that limited time. The plaintiffs' prior counsel in that case has possession of any responsive information or materials that may exist. Further, such materials (if any exist) are privileged and confidential. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 804 (Tex. 2017). As only one of several plaintiffs/clients in the case, Ms. Flunker certainly does not have the legal right to produce even a limited amount of privileged information or materials. Accordingly, she does not have possession, custody or control of the requested information or materials. *In re Kuntz*, 124 S.W.3d 179, 184 (Tex. 2003) (orig. proceeding) (mere access to documents does not constitute possession if the person with access does not have a legal right to produce the relevant documents).

c. Neither of Ratepayer Representatives has physical possession or a superior right to possession of information or materials that are in the files of, and belong to, other clients of their counsel.

Privileged and Confidential

d. On its face, this request seeks information and materials that are privileged

attorney-client communications and/or work product and are confidential. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 804 (Tex. 2017). Neither the total costs incurred nor any supporting documentation has been shared with any third party. Pursuant to Rule §24.144(d)(3), Ratepayers object to the filing of an index describing each document subject to a claim of privilege, as would otherwise be required under subsection (d)(2), pending the ALJs' ruling on their relevance objections and determination whether any of the requested information or materials is within their possession, custody or control to produce.

Not Relevant/Any Marginal Relevance Outweighed (Rules 403 & 404)

e. Even if Ratepayer Representatives had possession, custody or control of unprivileged responsive information or materials, the same would not be discoverable on the additional grounds that they are not relevant to any issue in the Preliminary Order nor is their production likely to lead to the discovery of evidence that would be admissible in this proceeding. Even unprivileged information is not discoverable unless the information is relevant. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 808. Although the scope of discovery is broad, a request for information "must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Id.*

f. Windermere has sponsored at least three inconsistent positions concerning the outside legal costs it claims were included within the appealed rates, but neither Windermere nor anyone else has ever suggested that the appealed rates were designed to recover the legal fees and other expenses incurred by the plaintiffs to prosecute their claims in Cause No. 48292.

g. Contrary to counsel's suggestion in her January 25, 2023 email, the plaintiffs' litigation costs incurred in connection with Cause No. 48292 would not "shed light on" whether Windermere's legal expenditures meet the "just and reasonable" standards. As the Texas Supreme Court has made clear, neither the amount contracted for between a party and his attorney nor the amount incurred by a party for legal services constitute proof that the amount

sought by that party himself is reasonable and necessary. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487–88 (Tex. 2019) (citing *Arthur Andersen*, 945 S.W.2d at 818). Such information most certainly does not constitute evidence that an opponent's fees are reasonable and necessary for fee-shifting purposes, much less that Windermere's legal costs were reasonably or prudently incurred. The Texas Supreme Court squarely rejected that very argument in *National Lloyds*:

> [W]e hold that an opposing party's hourly rates, total amount billed, and total reimbursable expenses do not, in and of themselves, make it any more probable that a requesting party's attorney fees are reasonable and necessary, or not, which are the only facts "of consequence." This is so because an **opposing party's litigation expenditures are not ipso facto reasonable or necessary; indeed parties who are not seeking to shift responsibility for their fees may freely choose to spend more or less time or money than would be "reasonable" or "necessary" for parties who are.**
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> Despite superficial appeal, such "an apples-to-oranges comparison" is analytically faulty:
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> The most obvious flaw ... is that making such a comparison—where the benchmark for the award of plaintiff's attorney fees is "reasonableness"—would require the trial court to first determine whether the defendant's counsel billed a reasonable amount. Such a scheme does not make sense.
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> * * *
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> **Evidence of an opposing party's fees lacks genuine probative value as a comparator for a requesting party's fees** and, at best, would be merely cumulative or duplicative of other evidence directed to that inquiry. Concisely stated, two wrongs don't make a right, and proving two rights is unnecessary when the only fact of consequence is whether one is right.
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> This conclusion accords with both a literal and practical reading of the first and third *Arthur Andersen* factors, which the homeowners cite as supporting the trial court's discovery order. With regard to the first factor—which considers the time, labor, and skill required and the novelty and difficulty of the questions involved—there can be little dispute that **different motivations and different demands drive the time and labor spent, hourly rate charged, and skill required to defend litigation as compared to prosecuting a suit**. As to the third Arthur Andersen factor—the fee customarily charged in the locality for similar legal services—**opposing parties are not providing "similar legal services"** even in the same case, and the term "customarily" connotes a composite of fee information for the area rather than a single data point.
> Fundamentally, **the tasks and roles of counsel on opposite sides of a case and the interests of opposing parties are so distinct that no "logical comparability" exists with respect to their attorney fees and billing rates**.

In re Nat'l Lloyds Ins. Co., 532 S.W.3d at 810-11 (emphasis added). After an extensive discussion of the many reasons why such an "apples-to-oranges" comparison would have no probative value, the Court concluded that "we agree with those cases concluding such information is generally not discoverable and, in the ordinary case, 'patently irrelevant.'" *Id.* at 812–13.

h. The Court further held that discovery of another party's attorney-billing information should ordinarily be denied because any marginal "probative value is substantially outweighed by the danger of ... unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence" and "[w]hen requested information would manifestly foment these concerns and the probative value of the requested information is minimal, the discovery request is not "reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 813. As the Court expressly recognized, "there is a genuine threat that allowing such discovery would give rise to abusive discovery practices."

i. These principles are squarely applicable here. The plaintiffs' counsel and Windermere's counsel have not provided "similar legal services" in Cause No. 48292 by any stretch of the imagination. The plaintiffs in Cause No. 48292 have actively prosecuted affirmative claims for relief – ultimately including claims and extensive discovery against parties they never planned to join. They have been required to pursue those claims exclusively through the novel procedures set forth in Section 20.002. As a result, just to preserve the opportunity to try their claims against Martin and Friendship they have been required to fend off aggressive dilatory pleas and other legal maneuvering by opponents with an unlimited legal budget. Windermere, on the other hand, portrays that it (and its counsel) has taken a "neutral stance" in the litigation.

j. Further, Windermere does not even know how much Windermere itself has incurred for legal work in Cause No. 48292. As the ALJs will recall, Windermere has

acknowledged that its counsel's billing records do not accurately segregate the legal costs by matter and that its aggregate legal costs encompass a variety of other proceedings including Windermere's lawsuits against the Texas Attorney General. Indeed, Windermere's counsel does not even have a file named "Double F Lawsuit," "Cause No. 48292" or other similar identifier. Since Windermere does not know the amount of its own costs, the discovery of the plaintiffs' costs in Cause No. 48292 cannot possibly "shed light" on anything relevant in this proceeding.

k. Likewise, the "total legal expenses" incurred by the plaintiffs in Cause No. 48292 would not establish that even those costs are reasonable and necessary. That would require consideration of other data points (e.g., time records) that Windermere is prepared to exclude from its request and that would be exempt from discovery in any event. This is a collateral matter of which discovery is not permitted.

l. In part for the same reasons, the plaintiffs' litigation costs incurred to bring an action under § 20.002 certainly are not probative of the amount it might have cost Windermere to bring direct claims against Martin and Friendship had its board followed through on its general counsel's opinions expressed in the January 2019 demand letter. A direct action would not have been subject to jurisdictional challenges and other legal maneuvering, would not have required the joinder of other current and former directors and would not have been opposed by unlimited legal spending.

WOWSC 4-2

Beyond the scope of Rule 192.7:

a. This RFI seeks the production of information and materials of which Ratepayers do not have possession, custody or control, as defined by Rule 192.7. Rule 192.7 provides that possession, custody, or control of an item "means that the person either has

physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item."

b. Neither of Ratepayer Representatives has physical possession of the requested information or records.

c. Neither of Ratepayer Representatives is a member of TOMA Integrity or otherwise has a superior right to possession of the requested information or materials.

Privileged and Confidential

d. On its face, this request seeks production of information and materials that are privileged attorney-client communications and/or work product and are confidential. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 804 (Tex. 2017). Pursuant to Rule§24.144(d)(3), Ratepayers object to the filing of an index describing each document subject to a claim of privilege, as would otherwise be required under subsection (d)(2), pending the ALJs' ruling on their relevance objections and determination whether any of the requested information or materials is within their possession, custody or control to produce.

Not Relevant/Any Marginal Relevance Outweighed (Rules 403 & 404)

e. Even if Ratepayer Representatives had possession, custody or control of the requested information or materials, the same would not be discoverable on the additional grounds that they are not relevant to any issue in the Preliminary Order nor is their production likely to lead to the discovery of evidence that would be admissible in this proceeding. Even unprivileged information is not discoverable unless the information is relevant. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 808. Although the scope of discovery is broad, a request for information "must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Id.*

f. Windermere has sponsored at least three inconsistent positions concerning the outside legal costs it claims were included within the appealed rates, but neither Windermere nor anyone else has ever suggested that the appealed rates were designed to

recover the legal fees and other expenses incurred by the plaintiffs in the *TOMA Integrity* lawsuit.

g. Contrary to counsel's suggestion in her January 25, 2023 email, the plaintiffs' litigation costs incurred in connection with the *TOMA Integrity* litigation would not "shed light on" whether Windermere's legal expenditures meet the "just and reasonable" standards. As the Texas Supreme Court has made clear, neither the amount contracted for between a party and his attorney nor the amount incurred by a party for legal services constitute proof that the amount sought by that party himself is reasonable and necessary. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487–88 (Tex. 2019) (citing *Arthur Andersen*, 945 S.W.2d at 818). Such information most certainly does not constitute evidence that an opponent's fees are reasonable and necessary for fee- shifting purposes, much less that Windermere's legal costs were reasonably or prudently incurred. The Texas Supreme Court squarely rejected that very argument in *National Lloyds*:

> [W]e hold that an opposing party's hourly rates, total amount billed, and total reimbursable expenses do not, in and of themselves, make it any more probable that a requesting party's attorney fees are reasonable and necessary, or not, which are the only facts "of consequence." This is so because an **opposing party's litigation expenditures are not ipso facto reasonable or necessary; indeed parties who are not seeking to shift responsibility for their fees may freely choose to spend more or less time or money than would be "reasonable" or "necessary" for parties who are.**
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> Despite superficial appeal, such "an apples-to-oranges comparison" is analytically faulty:
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> The most obvious flaw ... is that making such a comparison—where the benchmark for the award of plaintiff's attorney fees is "reasonableness"—would require the trial court to first determine whether the defendant's counsel billed a reasonable amount. Such a scheme does not make sense.
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> **Evidence of an opposing party's fees lacks genuine probative value as a comparator for a requesting party's fees** and, at best, would be merely cumulative or duplicative of other evidence directed to that inquiry. Concisely stated, two wrongs don't make a right, and proving two rights is unnecessary when the only fact of consequence is whether one is right.

> This conclusion accords with both a literal and practical reading of the first and third *Arthur Andersen* factors, which the homeowners cite as supporting the trial court's discovery order. With regard to the first factor—which considers the time, labor, and skill required and the novelty and difficulty of the questions involved—there can be little dispute that **different motivations and different demands drive the time and labor spent, hourly rate charged, and skill required to defend litigation as compared to prosecuting a suit**. As to the third Arthur Andersen factor—the fee customarily charged in the locality for similar legal services—**opposing parties are not providing "similar legal services"** even in the same case, and the term "customarily" connotes a composite of fee information for the area rather than a single data point.
> Fundamentally, **the tasks and roles of counsel on opposite sides of a case and the interests of opposing parties are so distinct that no "logical comparability" exists with respect to their attorney fees and billing rates**.

In re Nat'l Lloyds Ins. Co., 532 S.W.3d at 810-11 (emphasis added). After an extensive discussion of the many reasons why such an "apples-to-oranges" comparison would have no probative value, the Court concluded that "we agree with those cases concluding such information is generally not discoverable and, in the ordinary case, 'patently irrelevant.'" *Id.* at 812–13.

h. The Court further held that discovery of another party's attorney-billing information should ordinarily be denied because any marginal "probative value is substantially outweighed by the danger of ... unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence" and "[w]hen requested information would manifestly foment these concerns and the probative value of the requested information is minimal, the discovery request is not "reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 813. As the Court expressly recognized, "there is a genuine threat that allowing such discovery would give rise to abusive discovery practices."

i. These principles are squarely applicable here. The plaintiffs' counsel and Windermere's counsel did not provide "similar legal services" in in the *TOMA Integrity* litigation by any stretch of the imagination. The plaintiffs there actively prosecuted affirmative claims for relief under the Texas Open Meetings Act. Windermere, on the other

hand, concealed most of the TOMA violations it was aware of and deflected others with false information about its financial circumstances.

j. Further, Windermere does not even know how cost much Windermere itself incurred for legal work in the *TOMA Integrity* litigation. As the ALJs will recall, Windermere has acknowledged that its counsel's billing records do not accurately segregate the legal costs by lawsuit or matter and that its aggregate legal costs encompass a variety of other proceedings including Windermere's lawsuits against the Texas Attorney General. Since Windermere does not know the amount of its own costs for the *TOMA Integrity* lawsuit, the discovery of the plaintiffs' costs cannot possibly "shed light" on anything relevant in this proceeding.

k. Likewise, the "total legal expenses" incurred by the plaintiffs in the TOMA Integrity litigation would not establish that those costs are reasonable and necessary. That would require consideration of other data points (e.g., time records) that Windermere is prepared to exclude from its request and that would be exempt from discovery in any event. This is a collateral matter of which discovery is not permitted.

WOWSC 4-3:

Privileged and Confidential

a. On its face, this request seeks disclosure of information and materials that constitute attorney-client communications and work product. As and to the extent responsive information and materials exist, they are privileged. Pursuant to Rule §24.144(d)(3), Ratepayers object to the filing of an index describing each document subject to a claim of privilege, as would otherwise be required under subsection (d)(2), pending the ALJs' ruling on their relevance objections.

Not Relevant / Any Marginal Relevance Outweighed (Rules 403 & 404)

b. The requested information is not discoverable on the additional grounds that

it is not relevant to any issue in the Preliminary Order nor is its disclosure likely to lead to the discovery of evidence that would be admissible in this proceeding. Even unprivileged information is not discoverable unless the information is relevant. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 808. Although the scope of discovery is broad, a request for information "must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Id.*

c. Windermere has sponsored at least three inconsistent positions concerning the outside legal costs it claims were included within the appealed rates, but neither Windermere nor anyone else has ever suggested that the appealed rates were designed to recover the legal fees and other expenses incurred by Ratepayers in this appeal.

d. Contrary to counsel's suggestion in her January 25, 2023 email, Ratepayer Representatives' costs in this rate appeal are not probative of whether the legal costs included in the appealed rates meet the applicable standards or whether Windermere's legal costs for this appeal should be borne by the ratepayers. The legal authorities and analysis on which this objection is based are set forth above and are incorporated here fully by this reference.[1]

e. That said, if Windermere is prepared to reimburse the reasonable and necessary costs for bringing this rate appeal, then Ratepayer Representatives will furnish a lodestar calculation based on the requested information and materials and applicable law.

WOWSC RFI 4-5

Privileged and Confidential

a. Ratepayers understand this request to encompass work performed by Ratepayer Representatives and/or by counsel's support staff, as no one else has provided the "legal work" described. No "supporting documentation" exists, however the requested compilation of time and tasks performed would require the disclosure of work product. *In*

re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 804 (Tex. 2017). Pursuant to Rule §24.144(d)(3), Ratepayers object to the filing of an index describing each document subject to a claim of privilege, as would otherwise be required under subsection (d)(2), pending the ALJs' ruling on their relevance objections.

Not Relevant/Any Marginal Relevance Outweighed (Rules 403 & 404)

b. The requested information is not discoverable on the additional grounds that it is not relevant to any issue in the Preliminary Order nor is its disclosure likely to lead to the discovery of evidence that would be admissible in this proceeding. Even unprivileged information is not discoverable unless the information is relevant. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 808. Although the scope of discovery is broad, a request for information "must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Id.*

f. Windermere has sponsored at least three inconsistent positions concerning the outside legal costs it claims were included within the appealed rates, but neither Windermere nor anyone else has ever suggested that the appealed rates were designed to recover for legal work performed by non-lawyers at the request of Ratepayers in this appeal.

g. Contrary to counsel's suggestion in her January 25, 2023 email, the time and type of legal work performed by non-lawyers at Ratepayers' request for purposes of this rate appeal are not probative of whether the legal costs included in the appealed rates meet the applicable standards or whether Windermere's legal costs for this appeal should be borne by the ratepayers. The legal authorities and analysis on which this objection is based are set forth above and are incorporated here fully by this reference.[2] That said, if Windermere is prepared to reimburse the reasonable and necessary costs for bringing this rate appeal, then Ratepayer Representatives will furnish a lodestar calculation based on the requested information and materials and applicable law.

WHEREFORE, PREMISES CONSIDERED, Ratepayers request that Windemere's Motion to Compel Ratepayers' to Respond to Windermere's Fourth Requestion for Information, RFI 4-1 through 4-3 and RFI 4-5 be DENIED, that their Objections be SUSTAINED in all respects, and that Ratepayers be granted such other and further relief to which they may be entitled.

[2] See paragraphs 3(e) - (l) and 4(e)-(k).

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 31, 2023.

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