Filing Receipt

Received - 2023-03-01 01:45:08 PM
Control Number - 50788
ItemNumber - 304

SOAH DOCKET NO. 473-20-4071.WS
PUC DOCKET NO. 50788

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 OBJECTIONS TO RATEPAYERS' EIGHTH REQUEST FOR INFORMATION (*Including Motion to Exclude Evidence or, Alternatively, to Compel a Complete Response*)

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

THE REPRESENTATIVES OF THE RATEPAYERS OF WINDERMERE OAKS WATER SUPPLY CORPORATION ("Ratepayers") file this Response (Including Motion to Exclude Evidence or, Alternatively, to Compel a Complete Response) to the Objections of Windermere Oaks Water Supply Corporation ("Windermere") to Ratepayers' Eighth Request for Information and would show as follows.

1. Ratepayers received Windermere's Objections to Ratepayers' Eighth Request for Information ("Objections") on February 28, 2023. Pursuant to SOAH Order No. 23, motions to compel as to discovery on rebuttal testimony must be filed within two (2) business days of the objections. This response and incorporated motion is timely filed.

Overview of the Requested Discovery

Windermere now suggests that the company is entitled to recover from its ratepayers for whatever financial obligations its board of directors has authorized or allowed simply because it is a nonprofit corporation without shareholders. [1] In his supplemental rebuttal

[1] See, e.g., WOWSC response to Ratepayers' Amended 6-9(d).

testimony referenced in Ratepayers' 8-51A – E and 8-54A - B, Mr. Nelson opines that because of Windermere's "corporate structure," the Commission must force Windermere's ratepayers to fund a corporate bailout in circumstances where it would do just the opposite with the ratepayers of an IOU.

Ratepayers are at a loss to understand any legal or factual basis for Mr. Nelson's opinion testimony. Unlike the governing documents of most for-profit utility corporations, Windermere's "corporate structure" strictly prohibits the company from using its revenue (or its credit) to pay (or to incur) expenses other than the reasonable and prudent costs of providing water and wastewater service.[2] The "corporate structure" also prohibits Windermere's board of directors from voting to approve unlimited expenditures of corporate funds and credit to provide themselves with legal services for which they would otherwise have to pay out of pocket.[3] Had Windermere's "corporate structure" been observed by its board, neither Windermere's financial stability nor its performance of its loan covenants would be in jeopardy. Even more to the point, it is well-accepted that the Commission has only limited authority to abrogate the private contract between the company and its members in connection with a rate-setting.[4] The Commission has not foreshadowed in its Preliminary Order that it intends to attempt to exercise such authority here.

Likewise, the Commission does not appear to have distinguished utilities without shareholders from other types of utilities for rate-setting purposes. To the contrary, by Texas

---

[2] See Windermere's articles of incorporation (art. 6) and its bylaws (art. 5, §3), both of which provide that "[t]he Corporation shall have no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue Code 501(c)(12)(A)."

[3] See bylaws, art. 8, §18, which prohibits a director from voting on any matter in which they may have a pecuniary interest.

[4] *Tex. Water Comm'n v. City of Fort Worth,* 875 S.W.2d 332,336 (Tex. App. – Austin 1994, writ denied).

statute all rates charged by any utility within the Commission's jurisdiction must be just and reasonable. The Commission has made clear that the same legal standard applies to all types of utilities.[5] Just and reasonable rates (i) provide revenue equal to the utility's cost of providing service and recover costs from ratepayers equitably, (ii) recover only the reasonable and necessary expenses of providing utility service, and (iii) collect only expenses actually realized or which can be anticipated with reasonable certainty.[6] These requirements (and ratepayer protections) apply whether Windermere has shareholders or it does not. In light of the statutory mandate and the constitutional guarantee of equal protection, this makes perfect sense. The Commission may have authority to require Windermere's ratepayers to take service from the "corporate structure" of a nonprofit corporation rather than from an IOU, but the Commission cannot impose special financial burdens on them simply because they do so.

Finally, as a matter of "corporate structure," it would be more than unusual that the shareholders of a for-profit utility corporation are legally responsible for the organization's liabilities. To the contrary, one of the well-accepted advantages of the "corporate structure" is that it shields the investors from liability for corporate obligations.[7] By statute, the members of a nonprofit corporation have even greater immunity from liability for corporate obligations than do shareholders of a for-profit entity.[8] In the exercise of its rate-setting function, the

---

[5] Order on Appeal of SOAH Order No. 17, Petition of Paloma Lake Municipal Utility District No. 1 et al. Appealing the Ratemaking Actions of the City of Round Rock in Travis and Williamson Counties, Docket 48836, pp. 3-4.
[6] *Id.*
[7] See, e.g., *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) ("A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's contractual obligations."); see also Tex. Bus. Orgs. Code Ann. §§ 21.223 and 21.225. Section 21.225 provides an exception to the limitation on liability where the shareholders have expressly assumed or agreed to be personally liable.
[8] Tex. Bus. Orgs. Code Ann. §22.152.

Commission does not have authority to saddle Windermere's ratepayers with liabilities for which they have statutory immunity.

Having said that, just because all available information suggests Mr. Nelson has engaged in rank and uneducated speculation does not *necessarily* mean he has. That is where discovery comes in – to prevent trial by ambush and to enable the parties to properly prepare for the hearing. Ratepayers have availed themselves of applicable discovery procedures. They are entitled to have discovery of the basis, if any, for Mr. Nelson's testimony.

If Mr. Nelson's opinions are supported by objective, verifiable information and/or applicable legal authority, Windermere should be able to respond to these requests without difficulty. If not, then Windermere needs to stop cluttering the record with nonsense or to be called on such nonsense. Either way, Ratepayers are entitled to the requested information to afford them an opportunity to effectively cross-examine Mr. Nelson or any other witness who expresses similar opinions. As and to the extent Windermere fails to timely disclose responsive information, the automatic exclusion of Rule 193.6 will apply to prevent Windermere from offering any such evidence at trial.

Meritless Objections

A. Reasonable Particularity.

Each of the disputed requests references the testimony as to which inquiry is made and describes with specificity the information or materials requested. By way of illustration:

- Ratepayers' 8-51A references Mr. Nelson's testimony that "in contrast to IOUs, WOWSC does not have investors to satisfy WOWSC's legal debt and loan covenants." Ratepayers' 8-51A seeks the identity of each IOU Mr. Nelson attempts to "contrast." If there is an answer to that request, Mr. Nelson knows it better than anyone.

- Ratepayers' 8-51B seeks the governing documents for each identified IOU.

- Ratepayers' 8-51C seeks an admission that the Commission has no authority to require (or to permit the utility to charge and collect from) ratepayers of the identified IOUs to pay rates that are not just and reasonable.

- Ratepayers' 8-51D, which is to be answered only if 8-51C is denied, seeks discovery of Commission decisions and other legal authority (if any) suggesting that the Commission has authority to require (or to permit the utility to charge and collect from) ratepayers of the identified IOUs to pay rates that are not just and reasonable.

- Ratepayers' 8-51E is a follow up to Ratepayers' 8-51D and seeks discovery of each Commission order requiring (or permitting the utility to charge and collect from) ratepayers any IOUs rates that are not just and reasonable.

- Ratepayers' 8-54A references Mr. Nelson's testimony that Windermere's "corporate structure," and in particular the fact that it has no shareholders who might elect to pay (or bear the loss for) disallowed expenses, is "relevant" to the issues in this proceeding. The request seeks to have Windermere identify Commission precedent (if any exists) suggesting that a utility can charge rates that are not just and reasonable if and to the extent necessary to ensure that all of its vendors/suppliers/contract get paid, even those whose expenses are not reasonable and prudent.

- Ratepayers' 8-54B is a follow up request. It seeks to have Windermere identify Commission precedent (if any exists) suggesting that any of the factors Mr. Nelson claims are "relevant" have actually been determined to be relevant in any prior proceeding.

Each of the disputed requests is painstakingly clear and specific. If and to the extent responsive information and/or materials are reasonably available to Windermere or its very capable and experienced attorneys, Windermere had a duty to provide them within the time allowed.

B. Documents Available from an Alternative Source.

Pursuant to Rule §22.144(c)(2)(E), where a request seeks information or materials that are available from local public records or other existing records, a party may respond by identifying such records with particularity and with sufficient detail to permit the requesting party to locate them. Neither this Rule nor any other permits a general reference to the

"public record" or any other records. It certainly does not permit a general reference to records the responding party itself admits are not readily available.[9]

Windermere has not identified any available materials and therefore failed to comply with the requirements of the Rule allowing it to provide responsive information in that manner. Further, Windermere itself states "[t]hese documents are not readily available."[10]

C. Undue Burden and Expense/Proportionality.

It is axiomatic that Windermere cannot expect to sponsor sweeping opinion testimony on a pivotal issue in the proceeding without being prepared to provide the basis (if there is any) for such testimony upon proper request. That is not "undue burden." Ratepayers have made proper requests and they were entitled to compliant responses within the time allowed.

Based on Windermere's Objections, it appears Mr. Nelson had no basis for his testimony when he gave it. Windermere states that *"[a]t the time of Ratepayers' request*, WOWSC had not obtained . . . IOUs' documentation relating to shareholder/investor responsibility for IOUs' debt, loan covenants, expenses, or other obligations."[11] Windermere claims that Mr. Nelson's testimony "does not actually state that IOUs regulated by the commission have had costs disallowed that its shareholders have borne."[12] With all due respect, the time for Mr. Nelson (or Windermere's counsel) to have done the due diligence work was *before* Mr. Nelson filed his testimony. In the presence of a proper discovery request, Windermere is not at liberty to ambush Ratepayers with an "errata" filed the day before the hearing that purports to include supporting information.

---

[9] See, e.g., Objections at p. 4 – "These documents are not readily available . . .."
[10] Objections at p. 6.
[11] Objections at p. 5.
[12] Objections at p. 4.

Proportionality is not implicated here. It is hard to imagine a matter of more immediate importance to Windermere's ratepayers than the utility's financial stability. By all outward appearances (and all available information), the decisions and practices of Windermere's board have created a conflict between Windermere's duties to its ratepayers, on the one hand, and its financial stability or its ability to meet its lender's requirements, on the other hand. Windermere's recent rebuttal testimony makes clear that Windermere's financial predicament has worsened with the passage of time.[13]

Mr. Nelson opines that differences in "corporate structure" compel the Commission to require Windermere's ratepayers to bear the financial consequences of the board's mismanagement, even though well-settled rate-setting principles prohibit the Commission from requiring the ratepayers of an IOU to bear those same consequences. If that were true, it could be outcome determinative.

Ratepayers' discovery is not directed to "every IOU in the country, or even world."[14] Ratepayers have propounded narrowly tailored requests for relevant information about the IOUs (if any) Mr. Nelson claims to be opining about and other IOUs (if any) that are similarly situated. The denial of discovery of such matters would constitute an abuse of

---

[13] Ratepayers have done everything within their power to call Windermere's precarious financial circumstances to the attention of the ALJs while there might still have been a chance to remedy them. For example, on December 11, 2021 Ratepayers filed their Request for Interim Relief Pending Commission's Resolution of Ratepayer Appeal. Ratepayers sought interim relief to curb, or at least exercise oversight over, the reckless and unauthorized spending practices that had brought the utility to the brink of financial disaster even then. By order dated December 20, 2021, the ALJs concluded the Commission had no authority to grant the requested relief. Since then, Windermere has spent more than $350,000 in revenues to pay outside legal costs that have nothing to do with providing water and wastewater services and have provided no benefit to any of its ratepayers aside from the handful of director defendants seeking to avoid personal exposure in the Double F lawsuit. As best we can tell, Windermere has also incurred more than $800,000 in additional legal debt that it lacks the wherewithal to pay. If the board has its way, this debt will burden Windermere's current and future ratepayers for years to come.

[14] Objections at 3.

discretion. *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 251 (Tex. 2021) (denial of K & L Auto's targeted discovery requests was an abuse of discretion).

D. Lack of possession, custody or control of responsive materials.

Of the disputed discovery requests, only Ratepayers' 8-51B requests the production of documents. Based on Windermere's Objections, it seems clear that Mr. Nelson did not gather (in hard copy, electronic copy or otherwise), and therefore did not bother to review, the governing documents, shareholder agreements or guarantee agreements (if any) or other similar documents related to any IOU in connection with his opinion testimony. If he had, he surely would not have discarded them. Ratepayers acknowledge that Windermere cannot produce materials that Mr. Nelson has never had or reviewed. That said, Mr. Nelson certainly cannot provide reliable opinion testimony in those circumstances.

All of the other requests seek information. Windermere was obligated to furnish all responsive information known or reasonably available to the company or its attorneys and to have done so within the time allowed under SOAH Order No. 23.

E. Legal Conclusion.

Windermere objects to Ratepayers' 8-51C on the grounds that it requests a legal conclusion. That objection is without merit.

Windermere appears to contends that the Commission has authority to require (or to permit) its ratepayers to pay rates that are not just and reasonable if the additional revenue is needed to pay or perform corporate obligations. In light of Mr. Nelson's referenced testimony, Ratepayers sought through discovery to confirm whether Windermere contends the Commission has authority to impose such a requirement[15] on the ratepayers of an IOU.

[15] I.e., the requirement to pay rates that are not just and reasonable due to exigent circumstances.

This is not a request for a legal conclusion. It is a request for the testifying witness's perceptions and contentions pertaining to a fundamental aspect of his opinion testimony.[16] As such, this request is not objectionable.[17]

WHEREFORE, premises considered, Ratepayers respectfully request that Windermere's objections be overruled and that Windermere be required to make a complete response or that Windermere's evidence on these matters be excluded pursuant to the automatic provisions of Rule 193.6, and that they be awarded the relief requested above and such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

THE LAW OFFICE OF KATHRYN E. ALLEN, PLLC
114 W. 7th St., Suite 1100
Austin, Texas 78701
(512) 495-1400 telephone
(512) 499-0094 fax

/s/ Kathryn E. Allen
Kathryn E. Allen
State Bar ID No. 01043100
kallen@keallenlaw.com

Attorneys for Ratepayers

[16] See, e.g., *Shell Oil Co. v. Waxler*, 652 S.W.2d 454, 459 (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.) (questions regarding Shell's obligation to provide a safe workplace and/or what Shell could have required Brown & Root to do about rectifying a dangerous condition were probative of the witness's perception of his own job responsibilities and thus were not objectionable).

[17] As and to the extent the ALJs conclude that Ratepayers' 8-51C was not phrased clearly in this regard, Ratepayers hereby agree to restate the request as follows: Admit that Windermere does not contend the Commission has authority to require (or permit) the ratepayers of the IOUs identified in response to Ratepayers' 8-51A to pay rates that are not just and reasonable."

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 March 1, 2023.

/s/ Kathryn E. Allen
Kathryn E. Allen
State Bar ID No. 01043100
kallen@keallenlaw.com

Attorneys for Ratepayers