



## Filing Receipt

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

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**BEFORE THE STATE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**WINDERMERE OAKS WATER SUPPLY CORPORATION’S RESPONSE  
TO RATEPAYER REPRESENTATIVES’ OBJECTIONS AND MOTION TO STRIKE  
SUPPLEMENTAL REBUTTAL TESTIMONY OF MIKE NESLON**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Windermere Oaks Water Supply Corporation (WOWSC or Corporation) files this response to Ratepayer Representatives’ (Ratepayers) Objections and Motion to Strike Supplemental Rebuttal Testimony of Mike Nelson (WOWSC’s Response) and in support respectfully shows the following:

**I. PROCEDURAL BACKGROUND**

WOWSC filed the Supplemental Rebuttal Testimony of Mike Nelson (Nelson’s Supplemental Rebuttal) on February 10, 2023.<sup>1</sup> Ratepayers filed its Objections to Supplemental Rebuttal Testimony of Mike Nelson and Motion to Strike (Ratepayers’ Motion) on March 3, 2023.<sup>2</sup> Pursuant to State Office of Administrative Hearing (SOAH) Order No. 23, responses to objections to WOWSC’s supplemental rebuttal testimony are due March 10, 2023.<sup>3</sup> Therefore, this Response is timely filed.

**II. INTRODUCTION**

Ratepayers’ Motion is littered with gross misstatements of law and fact.<sup>4</sup> It repeats Ratepayers’ baseless allegations related to discovery—an issue that is entirely irrelevant to

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<sup>1</sup> Supplemental Rebuttal Testimony of Mike Nelson (Feb. 10, 2023) (Nelson Supplemental Rebuttal).

<sup>2</sup> Ratepayer Representatives’ (Ratepayers) Objections to Supplemental Rebuttal Testimony of Mike Nelson and Motion to Strike (Mar. 3, 2023) (Ratepayers’ Motion).

<sup>3</sup> SOAH Order No. 23 – Memorializing Prehearing Conference; Adopting Procedural Schedule at 3 (Sept. 26, 2022)

<sup>4</sup> *See, e.g.*, Ratepayers’ Motion at 2 (asserting that “[b]efore a cash-basis utility can set (or defend) new rates, it must first determine a reasonable revenue requirement” when cited case law provides that “[b]efore the *Commission* can design new rates, it must first determine a reasonable revenue requirement for [the cash-basis utility in question]”); Ratepayers’ Motion at 4 (falsely claiming that “the Commission is not required to fix a utility’s overall revenues at a level that will preserve the financial integrity of a utility”); Ratepayers’ Motion at 5 (falsely asserting that “[f]rom the beginning of this proceeding, Windermere has portrayed that the appealed rates were developed by TRWA”);

Nelson’s Supplemental Rebuttal—to distract from its otherwise meritless objections.<sup>5</sup> And because nearly half of Ratepayers’ Motion misrepresents “[p]ertinent [p]rocedural [h]istory” and attempts to apply Texas utility law, it effectively amounts to briefing that, again, is irrelevant to Nelson’s Supplemental Rebuttal.<sup>6</sup> Objections to testimony is not an appropriate time and forum to argue the merits of the case. Therefore, WOWSC does not address these contentions in this Response.

### III. DISCUSSION

In its Order Remanding Proceeding, the Public Utility Commission of Texas (Commission) instructed SOAH, when it reviews WOWSC’s rates, “to address all of the standards prescribed under [Tex. Water Code] § 13.043(j).”<sup>7</sup> Tex. Water Code § 13.043(j) provides that:

“the utility commission shall ensure that every appealed rate is just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers. The utility commission shall use a methodology that preserves the financial integrity of the retail public utility.”<sup>8</sup>

As such, the Order Remanding Proceeding instructs SOAH to “evaluat[e] whether allowing recovery of all expenses included in the proposed revenue requirement, including \$171,337 in legal expenses, will result in just and reasonable rates.”<sup>9</sup>

Accordingly, Anna Givens filed Supplemental Direct Testimony on behalf of Commission Staff regarding Windermere’s “cost of service and revenue requirements for the purpose of determining [] just and reasonable rates.”<sup>10</sup> Specifically, Ms. Givens recommended that the Commission remove \$171,337 worth of outside legal fees from WOWSC’s revenue requirement.<sup>11</sup> To support this assertion, Ms. Givens adopted the Direct Testimony of Maxine Gilford, which previously asserted that WOWSC failed to show that the legal fees were just and reasonable

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Ratepayers’ Motion at 6 (falsely stating that “Windermere did not disclose that Windermere itself...based the appealed rates on budgeted cost data for 2020 and not on the 2019 data for paid costs Windermere had produced”).

<sup>5</sup> Ratepayers’ Motion at 6, 7-8, 9-10.

<sup>6</sup> *Id.* at 2-4, 5-8.

<sup>7</sup> Order Remanding Proceeding at 7 (Jun. 30, 2022).

<sup>8</sup> Tex. Water Code § 13.043(j).

<sup>9</sup> Order Remanding Proceeding at 7 (Jun. 30, 2022).

<sup>10</sup> Supplemental Direct Testimony of Anna Givens at 4 (Jan. 10, 2023) (Givens’ Supplemental Direct).

<sup>11</sup> *Id.* at 6.

expenses that WOWSC may recover through rates.<sup>12</sup> Stephen Mendoza also filed Supplemental Direct Testimony on behalf of Commission Staff regarding “cost allocation and rate design issues for water and wastewater service provided to the ratepayers of Windermere Oaks Water Service Corporation (WOWSC).”<sup>13</sup>

In response to Givens’ and Mendoza’s Supplemental Direct, Nelson’s Supplemental Rebuttal details the impact of Staff’s proposed rates on WOWSC’s ability to maintain operations and provide adequate water and wastewater services. Therefore, in accordance with the Order Remanding Proceeding, it directly addresses “the standards prescribed under [Tex. Water Code] § 13.043(j),” which as discussed above, instruct the Commission to set rates that “preserve the financial integrity of the utility.”<sup>14</sup>

Nevertheless, in an attempt to issue broad evidentiary objections, Ratepayers misapplies the Texas Rules of Evidence and the Texas Water Code. It fails to apply specific evidentiary rules to its objections, but rather relies on misstatements of law and factual disagreements. Rather than make improper objections, Ratepayers should address any disagreement with Nelson’s Supplemental Rebuttal through cross-examination at the hearing on the merits and in post-hearing briefing. But again, it files meritless and contentious pleadings and forces WOWSC to expend additional resources to respond. As such, WOWSC respectfully requests that the Administrative Law Judges (ALJs) deny Ratepayers’ Motion in its entirety.

#### **A. RESPONSE TO RATEPAYERS’ MISTATEMENTS OF LAW AND FACT**

Ratepayers’ misstatements of law and fact are generally irrelevant to Nelson’s Supplemental Rebuttal. Nevertheless, WOWSC addresses the misrepresentations in turn below:

##### **1. Ratepayers’ Misstatements of Law**

<b>Ratepayers’ Assertion</b>	<b>Cited Law</b>	<b>Ratepayers’ Misstatement</b>
“Before a cash-basis utility can set (or defend) new rates, it must first determine a	Ratepayers cites to <i>Bear Creek</i> , which provides that “[b]efore the <i>Commission</i> can design new rates, <i>it</i> must first determine a reasonable	Ratepayers misconstrues <i>Bear Creek</i> . In contrast to Ratepayers’ assertion, the Commission must determine a reasonable revenue

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<sup>12</sup> Commission Staff’s Motion to Adopt the Testimony of Maxine Gilford (Jan. 10, 2023); Direct Testimony of Maxine Gilford at 6-7 (May 5, 2021).

<sup>13</sup> Supplemental Direct Testimony of Stephen J. Mendoza at 4 (Jan. 10, 2023) (Mendoza Supplemental Direct).

<sup>14</sup> Order Remanding Proceeding at 7 (Jun. 30, 2022); Tex. Water Code § 13.043(j).

reasonable revenue requirement.” <sup>15</sup>	revenue requirement for Bear Creek SUD.” <sup>16</sup>	requirement, not the cash-basis utility.
“It is acknowledged the legal expenses are not costs of providing water and sewer service to Windermere’s ratepayers.” <sup>17</sup>	Ratepayers does not cite to the record or any legal authority to support this assertion.	<p>In response to Ratepayers’ 4-11, WOWSC cited to Black’s Law Dictionary and provided that because “[l]egal services benefit all customers as a General and Administrative cost of the business,” costs for outside legal services are costs of service.<sup>18</sup></p> <p>Thus, it is not generally acknowledged that “legal expenses are not costs of providing water and sewer service.” Ratepayers therefore must support its assertion with legal authority or facts in the record.</p>
“Pursuant to Rule 193.6, Windermere’s failure to make complete and timely responses to Ratepayers’ discovery requests on the exact subject matter of the Nelson Testimony triggers mandatory exclusion of such Testimony.” <sup>19</sup>	Texas Rules of Civil Procedure Rule 193.6 provides that “[a] party who fails to make, amend, or supplement a discovery response, including a required disclosure, in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to make, amend, or	<p>WOWSC maintains that it has not violated any discovery procedures.<sup>21</sup></p> <p>However, for purposes of this specific statement, Rule 193.6 does not trigger “mandatory exclusion”; rather, exclusion is at the court’s discretion. Moreover, the rule does not broadly exclude all evidence “on the exact subject matter” of evidence that was improperly withheld. Rather, the rule narrowly excludes only “the material or</p>

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<sup>15</sup> Ratepayers’ Motion at 2.

<sup>16</sup> *Ratepayers Appeal of the Decision by Bear Creek Special Utility District to Change Rates*, PUC Docket No. 49531, Order on Rehearing at \*3, 2021 WL 5632279 (Nov. 19, 2021) (emphasis added).

<sup>17</sup> Ratepayers’ Motion at 9.

<sup>18</sup> WOWSC’s Response to Ratepayers’ RFI 4-11 (Nov. 18, 2022).

<sup>19</sup> Ratepayers’ Motion at 10.

<sup>21</sup> *See also* WOWSC’s Response to Ratepayers’ Motion to Compel (Mar. 7, 2023).

	supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.” <sup>20</sup>	information that was not timely disclosed.”
“Windermere also failed to comply with its duty to make complete responses to discovery.” <sup>22</sup>	Ratepayers asserts that because WOWSC “refused” to provide requested information, such as “detailed information” regarding its 2020 budgeted costs and “source documents” related to WOWSC’s QuickBooks data, WOWSC failed to make a complete response. <sup>23</sup>	Ratepayers made similar accusations in its Motion to Preclude Admission or Consideration of Evidence or, Alternatively, to Compel a Complete Response to Ratepayers’ Request for Information Amended 6-9. <sup>24</sup>  As described in WOWSC’s Response, Ratepayers’ discovery requests were vague and subject to multiple interpretations and, therefore, did not abide by the Texas Rules of Civil Procedure. <sup>25</sup> In an attempt to comply with these requests, WOWSC provided all the available information WOWSC had in its possession at the time Ratepayers made its requests. <sup>26</sup> Therefore, in contrast to Ratepayers’ assertion, WOWSC satisfied its burden in discovery.

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<sup>20</sup> Tex. R. Civ. Proc. Rule 193.6(a).

<sup>22</sup> Ratepayers’ Motion at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *See* Ratepayers’ Motion to Preclude Admission or Consideration of Evidence or, Alternatively, Compel a Complete Response to Ratepayers’ Request for Information (RFI) Amended 6-9 at 8 (Feb. 28, 2023) (Ratepayers’ Motion to Compel).

<sup>25</sup> Windermere Oaks Water Supply Corporation’s (WOWSC) Response to Ratepayers’ Motion to Preclude Admission or Consideration of Evidence or, Alternatively, to Compel a Complete Response to Ratepayers’ Request for Information Amended 6-9 at 3-4 (Mar. 7, 2023) (WOWSC’s Response to Ratepayers’ Motion to Compel).

<sup>26</sup> *Id.* at 4.

## 2. Ratepayers' Misstatements of Fact

Ratepayers' Assertion	Record Citation	Ratepayers' Misstatement
"Windermere did not disclose that...its board based the appealed rates on budgeted cost data for 2020 and not the 2019 data for paid costs Windermere had produced." <sup>27</sup>	Ratepayers provides no citation to the record.	In contrast to Ratepayers' assertion, Windermere has consistently represented that it used its 2020 budget, in addition to the TRWA rate study that incorporated WOWSC's 2019 financials, to establish the appealed rates.  It represented this throughout testimony, during the hearing, and throughout discovery. <sup>28</sup>
"Aside from general references to Windermere's outside legal costs and "cash capital outlays," the Nelson Testimony does not identify or provide any detail as to	Ratepayers provides no citation to Nelson's Supplemental Rebuttal or the record.	Nelson's Supplemental Rebuttal contains WOWSC's monthly Profit and Loss statements from each month of 2022. <sup>30</sup> These statements provide, in great detail, what

<sup>27</sup> Ratepayers' Motion at 6.

<sup>28</sup> See WOWSC's Amended Response to Ratepayers Eighth RFI 8-1 and 8-26 (Mar. 10, 2023) (providing that "WOWSC relied upon the TRWA model (Attachment MN-2) which computed a \$576,192 revenue requirement using 2019 actual financials to develop rates. Based on a review of the 2020 budget... WOWSC adjusted the TRWA-generated rates..."); WOWSC's Response to Ratepayers' Amended RFI 6-4(a) (Feb. 6, 2023) (providing that "WOWSC did not set its revenue requirement to recover a specific amount"); WOWSC's Response to Ratepayers' Amended RFI 6-4(b) (Feb. 6, 2023) (stating that, to determine WOWSC's appealed rates, "[i]n 2019, WOWSC budgeted \$38,000 for legal fees, which is roughly \$3,000 a month. In 2020, WOWSC required \$20,000 a month for legal fees and, therefore, implemented rates to add between \$16,000 and \$17,000 a month"); WOWSC's Response to Ratepayers RFI 4-1 (Nov. 18, 2022) (stating that "[t]he TRWA spreadsheet generated the calculated base rates at roughly \$175. The Board used the financial data and determined that, to add to the previous year's legal fee budget of roughly \$3,150 per month and to satisfy its obligations to law firms that totaled \$20,000 per month (\$250,000 in the year 2020), it required an extra \$16,000 per month. Thus, because the Board could collect \$16,000 per month with a rate lower than \$175, it reduced the base rate to reflect the amount needed for ongoing legal fees."); Tr. at 199:1-11 (Nelson Cross) (Dec. 1, 2021) (providing that "the concept was to look at 2019, right, use it in a rate study to understand how high we could increase rates and then see if we could meet the \$10,000 a month per law firm [in the 2020 budget]"); Direct Testimony of Mike Nelson at 9 (Mar. 10, 2021) (Nelson Direct) (providing that "WOWSC's 2020 budget estimated a net loss of \$174,515 primarily by estimated legal costs of \$250,000.... In order to defend itself in these various lawsuits, WOWSC needed to increase rates in order to be able to continue providing safe and adequate water and sewer service while also paying the necessary legal fees associated with ongoing litigation"); WOWSC's Response to Staff 1-20 (Nov. 9, 2020) (stating that "[t]he 2020 Budget shows that without the rate increase, WOWSC projected a \$174,515.00 loss").

<sup>30</sup> See Nelson Supplemental Rebuttal, Attachment MN-12.

what is included within ‘all its bills.’” <sup>29</sup>		financial expenses WOWSC incurs each month. <sup>31</sup>
“As to at least two of the ‘capital projects,’ both funded with assistance from the LCRA, Windermere itself has acknowledged the costs far exceed any tangible benefit to the ratepayers.” <sup>32</sup>	Ratepayers cites to WOWSC’s Response to Staff 8-9. Here, WOWSC reviewed the LCRA programs and provided that their “[m]oney saving options included conservation processes that offset initial expenses....” <sup>33</sup> The Response did not quantify the programs’ benefit to ratepayers. <sup>34</sup>	WOWSC has not once stated that the LCRA programs’ costs exceed any benefit to WOWSC’s ratepayers. In fact, WOWSC provided that the LCRA programs are estimated to save WOWSC \$8,325.90 annually. <sup>35</sup>  Because WOWSC is a non-profit corporation, these savings will pass to ratepayers and, therefore, result in tangible benefit to ratepayers. As such, Ratepayers’ assertion is a blatant misstatement that is not supported by the record.
“Ratepayers Amended 6-9 and Ratepayers’ 8-24 requested detailed information concerning Windermere’s 2020 costs and revenues, both budgeted and actual. As the ALJs may recall, Windermere’s financial reports reflect only the amounts Windermere’s board has chosen to pay during the reporting period. They do not accurately reflect the utility’s financial obligations paid or incurred for that period. As discussed	Ratepayers does not cite to the record to support its assertion.	WOWSC, pursuant to Ratepayers’ request for additional information beyond what was originally requested, provided Ratepayers the “source documents” to WOWSC’s QuickBooks data. The source documents, unless otherwise clarified by Ratepayers, is also responsive to Ratepayers’ request for additional information beyond what was originally requested, related to Ratepayers’ Amended 6-9. <sup>37</sup>

<sup>29</sup> Ratepayers’ Motion at 8.

<sup>31</sup> *Id.*

<sup>32</sup> Ratepayers’ Motion at 8.

<sup>33</sup> WOWSC’s Response to Staff’s RFI 8-9 (Jan. 9, 2023).

<sup>34</sup> *Id.*

<sup>35</sup> WOWSC’s Supplemental Response to Ratepayers’ RFI 7-28; Supplemental Attachment Ratepayers 7-28 (Feb. 24, 2023).

<sup>37</sup> *See* WOWSC’s Supplemental Response to Ratepayers’ Eighth RFI (Mar. 6, 2023); *see also* WOWSC’s



above, Windermere has yet to provide the requested information.” <sup>36</sup>		
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## **B. RESPONSE TO RATEPAYERS’ OBJECTIONS TO NELSON’S SUPPLEMENTAL REBUTTAL**

Pursuant to 16 Tex. Admin. Code § 22.221, in a contested case hearing SOAH must apply “the Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas.”<sup>38</sup> Therefore, unless statute, the Texas Rules of Civil Evidence (TRE), or the U.S. or Texas Constitution provide otherwise, SOAH must include all relevant evidence.<sup>39</sup> The TRE provides that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probably than it would be without evidence; and (b) the fact is of consequence in determining the action.”<sup>40</sup> Moreover, once a party introduces “an act, declaration, conversation, writing, or recorded statement,” the TRE broadly authorizes the adverse party to testify to *any* other part on the same subject.”<sup>41</sup> In contrast, an objection to testimony must “point out specifically the portion objected to” and identify the evidentiary “rule the court will violate if it admits the testimony.”<sup>42</sup>

Ratepayers fails to establish that any TRE Rules, statutes, or other legal authority preclude admission of Nelson’s Supplemental Rebuttal. Rather, it broadly asserts that Nelson’s Supplemental Rebuttal is inadmissible because (1) it is irrelevant “to the determination of any issue in the Preliminary Order” and “any slight probative value is outweighed by a danger of unfair prejudice, confusing the issues [sic] undue delay”; (2) Mr. Nelson is not qualified to offer opinion testimony; (3) the testimony is speculative; and (4) the testimony is admissible due to WOWSC’s alleged discovery violations.<sup>43</sup> Ratepayers’ various evidentiary objections are addressed in turn below.

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Response to Ratepayers’ Motion to Compel at 3-4.

<sup>36</sup> Ratepayers’ Motion at 10.

<sup>38</sup> 16 TAC § 22.221(a).

<sup>39</sup> *Id.*

<sup>40</sup> Tex. R. Evid. Rule 402.

<sup>41</sup> Tex. R. Evid. Rule 107 (emphasis added).

<sup>42</sup> *Speier v. Webster Coll.*, 616 S.W.2d 617, 619 (Tex. 1981); *United Cab Co. v. Mason*, 775 S.W.2d 783, 785 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1989, writ denied); *see also* Tex. R. Evid. 103(a)(1)(B).

<sup>43</sup> Ratepayers’ Motion at 2; 9-10.

**1. Ratepayers Fail to Establish that Nelson’s Supplemental Rebuttal is Irrelevant or Unduly Prejudicial**

Ratepayers objects to Nelson’s Supplemental Rebuttal as “irrelevant” and inadmissible because “any slight probative value [of Nelson’s Supplemental Rebuttal] is outweighed by a danger of unfair prejudice, confusing the issues [sic] undue delay.”<sup>44</sup> But Ratepayers fails to cite to any legal authority and, moreover, any specific portion of Nelson’s Supplemental Rebuttal.<sup>45</sup> Rather, it broadly asserts that the entirety of Nelson’s Supplemental Rebuttal is irrelevant. As discussed above, Texas law requires that an objection to testimony “point out specifically the portion objected to” and identify the evidentiary “rule the court will violate if it admits the testimony.”<sup>46</sup> Ratepayers objections related to relevance fail to identify any legal authority or any specific portion of Nelson’s Supplemental Rebuttal and, therefore, should be rejected.<sup>47</sup>

Nevertheless, WOWSC assumes that Ratepayers objects to Nelson’s Supplemental Rebuttal under TRE Rules 402 and 403. As discussed above, TRE Rule 402 provides that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without evidence; and (b) the fact is of consequence in determining the action.”<sup>48</sup> Moreover, once a party introduces “an act, declaration, conversation, writing, or recorded statement,” the TRE Rule 107 broadly authorizes the adverse party to testify to *any* other part on the same subject.<sup>49</sup> Finally, TRE 403 precludes the ALJs from admitting relevant evidence “if its probative value is *substantially* outweighed by a danger of...unfair prejudice, confusing the issues,...[or] undue delay.”<sup>50</sup> Ratepayers made no specific objections under TRE Rules 402 or 403. WOWSC therefore responds to Ratepayers’ general assertion in its entirety below.

Ratepayers generally objects to unspecified portions of Nelson’s Supplemental Rebuttal because the testimony relates to WOWSC’s ability “to pay its bills” or WOWSC’s DSCR requirements.<sup>51</sup> It quotes this language but provides no citation to Nelson’s Supplemental

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<sup>44</sup> Ratepayers’ Motion at 1-2, 8-9.

<sup>45</sup> *Id.*

<sup>46</sup> *Speier v. Webster Coll.*, 616 S.W.2d 617, 619 (Tex. 1981); *United Cab Co. v. Mason*, 775 S.W.2d 783, 785 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1989, writ denied); *see also* Tex. R. Evid. 103(a)(1)(B).

<sup>47</sup> Ratepayers’ Motion at 2, 8-9.

<sup>48</sup> Tex. R. Evid. Rule 402.

<sup>49</sup> Tex. R. Evid. Rule 107 (emphasis added).

<sup>50</sup> Tex. R. Evid. Rule 403 (emphasis added).

<sup>51</sup> Ratepayers’ Motion at 8-9.

Rebuttal.<sup>52</sup> According to Ratepayers, WOWSC’s ability to “pay its bills” or maintain its DSCR requirements is irrelevant to this rate proceeding because “[u]nder the Water Code, Windermere’s rates may not recover ‘all its bills.’”<sup>53</sup> In contrast to Ratepayers’ assertion, Tex. Water Code § 13.043(j) expressly requires the utility commission to “use a methodology that *preserves the financial integrity* of the retail public utility.”<sup>54</sup> The Texas Supreme Court has interpreted “financial integrity” as a financial state that enables the utility “to maintain its credit and to attract capital.”<sup>55</sup> If WOWSC failed to “pay its bills” or maintain its DSCR requirements, WOWSC would not be able to maintain credit. Therefore, the Texas Water Code expressly requires that the Commission review WOWSC’s ability to maintain its “checking and money market account balances [to] pay[] its bills.”<sup>56</sup> And more specifically, in the Order Remanding Proceeding, the Commission instructed SOAH to apply “all of the standards prescribed under [Tex. Water Code] § 13.043(j).”<sup>57</sup> As such, Ratepayers not only blatantly mischaracterizes the Texas Water Code, but it appears to assert that testimony directly related to the Order Remanding Proceeding’s primary inquiry is irrelevant.<sup>58</sup> This assertion is misleading and without basis and, therefore, should be rejected. Moreover, Ratepayers makes no attempt to assert that the testimony related to WOWSC’s financial state is unfairly prejudicial, confuses the issues, or would result in undue delay. As such, if it is objecting to this testimony under TRE 403, its objection should be rejected.

Ratepayers subsequently appears to assert that Nelson’s Supplemental Rebuttal related to legal expenses is irrelevant to this rate appeal.<sup>59</sup> Again, however, because Ratepayers provides no citation to Nelson’s Supplemental Rebuttal or any legal authority, it is difficult to discern what it is objecting to. Nevertheless, Nelson’s Supplemental Rebuttal related to WOWSC’s legal representation is directly responsive to Staff’s assertion that WOWSC has not shown that its legal fees were reasonable. It is therefore relevant under TRE Rules 402 and 107. Moreover, Ratepayers makes no attempt to assert that the testimony related to WOWSC’s legal representation is unfairly

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<sup>52</sup> *Id.* at 8.

<sup>53</sup> Ratepayers also provides no citations to “the Water Code.”

<sup>54</sup> Tex. Water Code § 13.043(j) (emphasis added).

<sup>55</sup> *State v. Pub. Util. Comm’n of Tex.*, 883 S.W.3d 190, 196-97 (Tex. 1994).

<sup>56</sup> Nelson Supplemental Rebuttal at 8-11.

<sup>57</sup> Order Remanding Proceeding at 7 (Jun. 30, 2022).

<sup>58</sup> Ratepayers’ Motion at 8-9.

<sup>59</sup> Ratepayers’ Motion at 9.

prejudicial, confuses the issues, or would result in undue delay. As such, Ratepayers' assertion to Nelson's Supplemental Rebuttal related to WOWSC's legal representation should be rejected.<sup>60</sup>

## **2. Ratepayers Fails to Establish that Nelson's Supplemental Rebuttal is "Inadmissible Opinion Testimony"**

Ratepayers broadly asserts that "to the extent intended as opinion testimony, [Nelson's Supplemental Rebuttal] does not meet the standards for admissibility under Rules 701 and 702 or the common law."<sup>61</sup> But it fails to connect any line, let alone page, of Nelson's Supplemental Rebuttal to this assertion and rather refers to Nelson's Supplemental Rebuttal in its entirety.<sup>62</sup> As such, Ratepayers' failed to "point out specifically the portion [of testimony] objected to."<sup>63</sup>

Eight pages later, Ratepayers asserts that because Mr. Nelson is not qualified to testify to the substance of Nelson's Supplemental Rebuttal, "[t]he Nelson Testimony does not meet the requirements for admissibility as opinion testimony."<sup>64</sup> When it makes this assertion, however, Ratepayers fails to cite to any evidentiary rule regarding the admissibility of opinion testimony and speculation.<sup>65</sup> Rather, it alleges that Mr. Nelson is unqualified to offer testimony without providing any "rule the court will violate if it admits the testimony."<sup>66</sup> Ratepayers' objections to Nelson's Supplemental Direct as "[i]nadmissible [o]pinion [t]estimony" should be rejected for these reasons alone.<sup>67</sup>

Moreover, Mr. Nelson never stated that he is an accountant.<sup>68</sup> As such, he did not represent that he has "scientific, technical, or other specialized knowledge" that qualifies him to testify in the capacity as an expert.<sup>69</sup> Rather, Mr. Nelson provided that he serves as a Board member and

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Speier*, 616 S.W.2d at 619.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.*

<sup>66</sup> *United Cab Co.*, 775 S.W.2d at 785.

<sup>67</sup> Ratepayers' Motion at 10-11.

<sup>68</sup> *See generally* Nelson Supplemental Rebuttal.

<sup>69</sup> Tex. R. Evid. Rule 702; *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851 (Tex. 2011) (providing that "when the main substance of the witness's testimony is based on application of the witness's specialized knowledge, skill, experience, training or education, ... then the testimony will generally be expert testimony within the scope of Rule 702" and "[a] witness giving [expert] testimony must be properly disclosed and designated as an expert").

the Vice-President of WOWSC.<sup>70</sup> Thus, because he testified in this capacity to related events “based on personal perception and opinions,”<sup>71</sup> TRE 702 is irrelevant and TRE 701 applies. And Ratepayers failed to cite to any “common law” regarding evidentiary objections.<sup>72</sup> “Common law” is an incredibly broad term and certainly is not narrowly tailored to provide SOAH a rule it would violate if it admitted Nelson’s Supplemental Rebuttal.<sup>73</sup> As such, Ratepayers’ “common law” assertion must be rejected.<sup>74</sup>

Nevertheless, if the ALJs find that Ratepayers clearly relied on TRE 701 to object to Nelson’s Supplemental Rebuttal as “[i]nadmissible [o]pinion [t]estimony,”<sup>75</sup> Ratepayers misapplied the rule and failed to establish that Nelson’s Supplemental Rebuttal is improper. TRE 701 provides that “[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited one that is: (a) rationally based on the witness’s perception; and (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue.”<sup>76</sup> Testimony is admissible under TRE 701 if the witness testifying has personal knowledge “of the events from which her opinion is drawn” and “the opinion drawn [is] rationally based on that knowledge.”<sup>77</sup> Importantly, “Texas courts regularly allow...company officers to testify as lay witnesses, based on knowledge derived from their positions and any other relevant experience.”<sup>78</sup>

Before Mr. Nelson became Vice-President for WOWSC, he served as WOWSC’s Secretary and Treasurer.<sup>79</sup> As Treasurer, Mr. Nelson was personally involved in establishing the rates that are currently on appeal and, moreover, developed WOWSC’s budgets. Nelson’s

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<sup>70</sup> Nelson Supplemental Rebuttal at 3.

<sup>71</sup> *Reid Rd. MUD*, 337 S.W.3d at 850-51 (providing that “[a] witness may have special knowledge, skill, experience, training, or education in a particular subject, but testify only to matters based on personal perception and opinions.... If so, the witness’s testimony is not expert testimony”).

<sup>72</sup> Ratepayers’ Motion at 2.

<sup>73</sup> *United Cab Co.*, 775 S.W.2d at 785.

<sup>74</sup> *See* Ratepayers’ Motion at 2.

<sup>75</sup> *Id.* at 10-12.

<sup>76</sup> TRE 701.

<sup>77</sup> *Merrill v. Sprint Waste Servs.*, 527 S.W.3d 663, 670 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2017, no pet.).

<sup>78</sup> *Health Care Serv. Corp. v. East Tex. Medical Center*, 495 S.W.3d 333, 338 (Tex. App.—Tyler 2006, reh’g overruled).

<sup>79</sup> *See* Nelson Direct at 3.

Supplemental Rebuttal also reviews WOWSC’s CoBank loans.<sup>80</sup> Mr. Nelson personally reviewed the CoBank credit agreement and promissory notes before WOWSC ultimately received the CoBank loans. Mr. Nelson therefore has personal knowledge of these topics. Ratepayers’ various objections related to Mr. Nelson’s qualifications to testify as a witness are addressed in the table below.

<b>Objection</b>	<b>Citation to Testimony TRE Rule</b>	<b>WOWSC’s Brief Response to Specific Objection</b>
“Mr. Nelson does not portray himself as any sort of expert in matters of rate-setting or public utility accounting, and it does not appear he has any such expertise. He is not qualified to opine as to the establishment of a revenue requirement, the recoverability of expenses, the ‘just and reasonable’ standards or any similar matter pertinent to the issues identified in the Preliminary Order.” <sup>81</sup>	Ratepayers does not cite to the Nelson’s Supplemental Rebuttal. <sup>82</sup>  Ratepayers does not cite to a TRE Rule. <sup>83</sup>	First, Ratepayers fails to support its objection with any legal authority. Moreover, it failed to object to specific portions of the testimony. As such, this does not appear to be an objection, but rather a general grievance against Mr. Nelson and his opinions. It should therefore be rejected.  Nevertheless, Mr. Nelson is not offering an expert opinion. Rather, he is offering a lay opinion based on his personal knowledge of the rates on appeal, WOWSC’s budget, and WOWSC’s operations. He has established personal knowledge of these topics by demonstrating that he was served as Treasurer and now serves as Vice-President of WOWSC.
“Mr. Nelson does not portray himself as any sort of expert in matters of contract interpretation or matters of banking or finance, and it does not appear that he has any such expertise. He is not qualified to opine as to	Ratepayers does not cite to the Supplemental Rebuttal Testimony. <sup>85</sup>  Ratepayers does not cite to a TRE Rule. <sup>86</sup>	Ratepayers does not cite to the Supplemental Rebuttal Testimony or any TRE Rule. As such, this does not appear to be an objection, but rather a general grievance against Mr. Nelson and his opinions. It should therefore be rejected.

<sup>80</sup> *Id.* at 4-6.

<sup>81</sup> Ratepayers’ Motion at 10-11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<p>matters such as the proper calculation of the DSCR requirement and other covenants of the CoBank loan documents.”<sup>84</sup></p>		<p>Nevertheless, Mr. Nelson is not offering an expert opinion. Rather, he is offering a lay opinion based on his personal knowledge of the rates on appeal, WOWSC’s budget, and the CoBank loans and credit agreement. He has established personal knowledge of these topics because he personally reviewed the documents before WOWSC ultimately received the loans.</p>
<p>“Mr. Nelson does not portray himself as any sort of expert in matters of corporate structure, and it does not appear that he has any such expertise. He is not qualified to opine as to matters such as the obligations and responsibilities of shareholders of IOU utilities or even as to the obligations and responsibilities of members of a nonprofit water supply corporation.”<sup>87</sup></p>	<p>Ratepayers does not cite to the Supplemental Rebuttal Testimony.<sup>88</sup></p> <p>Ratepayers does not cite to a TRE Rule.<sup>89</sup></p>	<p>Ratepayers does not cite to the Supplemental Rebuttal Testimony or any TRE Rule. As such, this does not appear to be an objection, but rather a general grievance against Mr. Nelson and his opinions. It should therefore be rejected for this reason alone.</p> <p>Nevertheless, Mr. Nelson is not testifying as an expert and, as discussed above, currently serves as Vice President of WOWSC, a non-profit water supply corporation. Moreover, he previously served as Treasurer of WOWSC. As such, he has personal knowledge of the general corporate structure of other water utilities and, especially, other nonprofit water supply corporations.</p>
<p>“Mr. Nelson’s testimony is also unreliable because no ‘legal payment agreements’ exist. Windermere has admitted there is no record of any board approval of the alleged ‘payment agreements’</p>	<p>Ratepayers does not cite to the Supplemental Rebuttal Testimony.<sup>91</sup></p> <p>Ratepayers does not cite to a TRE Rule.<sup>92</sup></p>	<p>Ratepayers does not cite to the Supplemental Rebuttal Testimony or any TRE Rule. As such, this does not appear to be an objection, but rather a general grievance against Mr. Nelson and his opinions. This</p>

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<sup>84</sup> *Id.* at 11.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

at a properly noticed and conducted open meeting.” <sup>90</sup>		assertion should be denied for this reason alone.  Nevertheless, because Ratepayers objects to unspecified portions of Nelson’s Supplemental Direct as “unreliable,” it appears to be an objection as unreliable expert testimony. <sup>93</sup> As discussed above, Mr. Nelson is not testifying as an expert. This assertion should therefore be rejected.
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### **3. Ratepayers Fail to Establish that Nelson’s Supplemental Rebuttal is Speculative**

Ratepayers makes various allegations throughout its objections that, because Nelson’s Supplemental Rebuttal contains “speculation,” it is invalid.<sup>94</sup> But again, when it makes these assertions, Ratepayers cites to no law regarding speculation.<sup>95</sup> In fact, it does not cite to any law at all.<sup>96</sup> Ratepayers therefore fails to identify a law or rule that the ALJs would violate if they admitted Nelson’s Supplemental Testimony.<sup>97</sup> Its objections to Nelson’s Supplemental Testimony based on “speculation” should therefore be rejected.

Nevertheless, WOWSC assumes that Ratepayers attempts to object to Nelson’s Supplemental Testimony as “speculative” under TRE 701. A witness speculates if the witness’s opinion “is not rationally based on [the] witness’s perception.”<sup>98</sup> Put differently, “‘speculate’ means ‘to take to be true on the basis of insufficient evidence.’”<sup>99</sup> As discussed above, Mr. Nelson personally reviewed the CoBank loans at issue. Moreover, Mr. Nelson was personally involved in Windermere’s payment agreements with outside legal counsel. As such, his testimony regarding

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<sup>90</sup> *Id.*

<sup>93</sup> *See Vela v. State*, 209 S.W.3d 128, 130 (Tex. Crim. App. 2006) (providing that to admit expert testimony, a judge must inquire into the testimonies “reliability”).

<sup>94</sup> Ratepayers’ Motion at 2, 11, 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See United Cab Co.*, 775 S.W.2d at 785.

<sup>98</sup> *Health Care Serv. Corp.*, 495 S.W.3d at 339.

<sup>99</sup> *Id.* (quoting *Bd. Of Trustees of Fire & Police Retiree Health Fund v. Towers, Perrin, Foster & Crosby, Inc.*, 191 S.W.3d 185, 194 (Tex. App.—San Antonio 2005, pet. denied).



these subjects is not based on “insufficient evidence” and, moreover, is “rationally based on [his] perception.”<sup>100</sup> Thus, his testimony contains no impermissible speculation and, therefore, Ratepayers’ objections related to speculation should be rejected. Ratepayers’ various objections related to speculation are addressed in the table below.

<b>Objection</b>	<b>Citation to Testimony TRE Rule</b>	<b>WOWSC’s Brief Response to Specific Objection</b>
“Further, the Nelson Testimony purporting to predict the future if CoBank were to discover that Windermere was in default on any of the loan covenants is rank speculation.” <sup>101</sup>	Nelson’s Supplemental Rebuttal at 10:11-11:2.  Ratepayers does not cite to a TRE Rule. <sup>102</sup>	First, Ratepayers fails to support its objection with any legal authority. It should therefore be rejected for this reason alone.  Nevertheless, Mr. Nelson is not “predict[ing]” the future. Ratepayers cites to Mr. Nelson’s statements regarding WOWSC’s loan covenant responsibilities. This is not a prediction, it is a recitation of Windermere and CoBank’s promissory notes <sup>103</sup> that, as discussed above, Mr. Nelson personally reviewed. It subsequently details the impact of a loan default on WOWSC’s operations. As the Vice President of WOWSC, and former Treasurer, Mr. Nelson is familiar with WOWSC’s financial obligations. Thus, these statements are not based on “insufficient evidence” and are “rationally based on [Mr. Nelson’s] perception.” The cited testimony is therefore not speculative and, as such, Ratepayers’ assertion should be rejected.
“Mr. Nelson’s proffered opinions concerning the possible impact should Windermere stop making payments to the law firms	Ratepayers does not cite to the	Ratepayers does not cite to the Supplemental Rebuttal Testimony or any evidentiary rule. As such, this does not appear to be an objection, but rather a general grievance

<sup>100</sup> *Health Care Serv. Corp.*, 495 S.W.3d at 339.

<sup>101</sup> Ratepayers’ Motion at 11.

<sup>102</sup> *Id.*

<sup>103</sup> Nelson Supplemental Rebuttal, Attachment MN-13 at 11.

are, by his own admission, speculation.” <sup>104</sup>	Supplemental Rebuttal Testimony. <sup>105</sup>  Ratepayers does not cite to a TRE Rule. <sup>106</sup>	against Mr. Nelson and his opinions. It should therefore be rejected.  Nevertheless, Mr. Nelson was personally involved in WOWSC’s payment agreements with outside legal counsel. Moreover, based on a general understanding of business transactions, it is rational to state that if WOWSC did not perform under the payment agreements, there would be repercussions. As such, Mr. Nelson based his opinion on personal experience and, moreover, his related testimony is “rationally related to his personal perception.” <sup>107</sup> Therefore, this testimony is not speculation. Ratepayers’ objection should therefore be denied.
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#### **4. Ratepayers Fail to Establish that Nelson’s Supplemental Rebuttal is Inadmissible due to Alleged Discovery Violations**

Finally, Ratepayers accuses WOWSC of various discovery violations and asserts that, under Texas Rules of Civil Procedure Rule 193.6, “Windermere’s failure to make complete and timely responses to Ratepayers’ discovery requests on the exact subject matter of the Nelson Testimony triggers mandatory exclusion of such Testimony.”<sup>108</sup> Specifically, Ratepayers broadly objects to portions of Nelson’s Supplemental Testimony that relate to the “exact subject matter” of Ratepayers’ 8-2, Ratepayers Amended 6-9, and Ratepayers’ 8-24.<sup>109</sup> But Ratepayers provides no citations to a specific portion of Nelson’s Supplemental Testimony that contains the “exact subject matter” to the information WOWSC allegedly withheld. As such, Ratepayers failed to

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<sup>104</sup> Ratepayers’ Motion at 11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Health Care Serv. Corp.*, 495 S.W.3d at 339.

<sup>108</sup> Ratepayers’ Motion at 10.

<sup>109</sup> *Id.* at 9-10.

“point out specifically the portion [of testimony] objected to.”<sup>110</sup> For this reason alone, Ratepayers’ objections related to WOWSC’s alleged discovery violations should be rejected.

Nevertheless, Ratepayers’ assertions regarding Rule 193.6 are troubling for several reasons. First, Ratepayers’ Motion appears to automatically assume that WOWSC violated discovery procedures. As discussed above, WOWSC maintains that it satisfied its burden during discovery.<sup>111</sup> And WOWSC has since supplemented several of the RFI responses currently at issue.<sup>112</sup> Ratepayers’ allegations are currently in a discovery dispute and should be considered in that context only; therefore, WOWSC will not address the merits of Ratepayers’ allegations in this Response.

Moreover, Ratepayers greatly expands the applicability of Rule 193.6. Rule 193.6(a) provides that:

“[a] party who fails to make, amend, or supplement a discovery response, including a required disclosure, in a timely manner may not introduce in evidence *the material or information that was not timely disclosed*, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.”<sup>113</sup>

Therefore, Rule 193.6(a) does not broadly exclude information related to the “subject matter” of information that was improperly withheld. Rather, it narrowly excludes the same “material or information” that was unlawfully withheld. Further, Rule 193.6(a) does not result in “mandatory exclusion” as Ratepayers asserts. Rather, it is in the court’s discretion as to whether the rule applies.

Nelson’s Supplemental Rebuttal does not review or rely on any information that Ratepayers alleges WOWSC unlawfully withheld. Ratepayers asserts that (1) WOWSC did not provide “underlying documentation” related to its 2020 budget and (2) “a complete duplicate” of

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<sup>110</sup> *Speier*, 616 S.W.2d at 619.

<sup>111</sup> See WOWSC’s Response to Ratepayers’ Motion to Compel.

<sup>112</sup> Supplemental Response to Ratepayers’ Eighth RFI (Mar. 6, 2023); WOWSC’s Supplemental Response to Ratepayers’ Seventh RFI (Feb. 24, 2023); WOWSC’s Supplemental Response to Ratepayers’ Amended Sixth RFI (Feb. 23, 2023).

<sup>113</sup> Tex. R. Civ. Proc. Rule 193.6(a)

WOWSC's QuickBooks data that includes source documents and other unspecified records.<sup>114</sup> Irrespective of the merits of Ratepayers' discovery allegations, Nelson's Supplemental Rebuttal does not discuss or cite to underlying documentation related to WOWSC's 2020 budget or WOWSC's QuickBooks data.

Again, because Ratepayers does not cite to the information it seeks to withhold pursuant to Rule 193.6(a), it is difficult to determine what Ratepayers is objecting to. However, it is likely objecting to Nelson's Supplemental Rebuttal related to WOWSC's ability to pay its bills and meet its credit agreement's DSCR, which relies on Attachment MN-11 to the Supplemental Rebuttal Testimony of Mike Nelson.<sup>115</sup> But as detailed in Nelson's Supplemental Rebuttal, his calculations are based on WOWSC's FY2022 monthly financial reports which WOWSC provided as Attachment MN-12 to the Supplemental Rebuttal Testimony of Mike Nelson.<sup>116</sup> Therefore, this information is wholly unrelated to the information Ratepayers now asserts WOWSC unlawfully withheld. WOWSC does not plan on introducing the information at issue in Ratepayers' discovery disputes at trial. Thus, WOWSC is not attempting to "introduce in evidence the material or information that was [allegedly] not timely disclosed."<sup>117</sup> As such, Ratepayers' objections related to WOWSC's alleged discovery violation should be rejected.<sup>118</sup>

#### **IV. CONCLUSION**

WOWSC respectfully requests that the ALJs overrule the objections of the Ratepayers and grant further relief to which WOWSC shows itself justly entitled.

Respectfully submitted,

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<sup>114</sup> See Request for Relief in Connection with Windermere's Failure to Comply with Discovery Concerning its Rate Methodology, Revenue Requirement, Rate Calculation and Cost Data at 13-14 (Mar. 7, 2023); Ratepayers' Motion to Compel at 4.

<sup>115</sup> Nelson Supplemental Rebuttal at 8:5-10:2.

<sup>116</sup> Nelson Supplemental Rebuttal at 8, Attachment MN-11; Rebuttal Testimony of Joe Gimenez III, Attachment JG-19 (Jun. 7, 2021).

<sup>117</sup> Tex. R. Civ. Proc. Rule 193.6(a).

<sup>118</sup> Ratepayers' Motion at 9-10.

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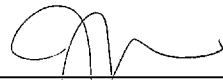
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**CERTIFICATE OF SERVICE**

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 March 10, 2023, in accordance with the Order Suspending Rules, issued in Project No. 50664.



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JAMIE L. MAULDIN