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

**INITIAL BRIEF
OF WINDERMERE OAKS
WATER SUPPLY CORPORATION**

APRIL 11, 2023

**INITIAL BRIEF
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SUPPLY CORPORATION**

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**WINDERMERE OAKS WATER SUPPLY CORPORATION’S
INITIAL BRIEF**

TO THE HONORABLE CHRISTIAAN SIANO AND DANIEL WISEMAN, ADMINISTRATIVE LAW JUDGES (ALJs), STATE OFFICE OF ADMINISTRATIVE HEARINGS (SOAH):

COMES NOW, Windermere Oaks Water Supply Corporation (WOWSC or the Corporation), and files this Initial Brief in the above-styled and numbered docket. Pursuant to SOAH Order No. 31, this brief is timely filed.¹ In support thereof, WOWSC shows the following:

I. INTRODUCTION

On remand, this case again focuses on a single issue: whether outside legal expenses may be included in a water supply corporation’s water and wastewater rates. The Public Utility Commission of Texas’s (Commission) Order on Remand instructed the ALJs to address all elements of Tex. Water Code § 13.043(j), including whether WOWSC’s rates effective in March 2020 are discriminatory, preferential, or prejudicial.² WOWSC addressed these elements in testimony and addresses them below.³ However, based on the evidentiary record in this second phase of the proceeding, the main issue relates to WOWSC’s annual base rates and, specifically, whether the inclusion of 2020 budgeted legal expenses that incorporated the 2019 legal fees results in just and reasonable rates.

WOWSC incurred the 2019 legal expenses defending itself in several lawsuits filed by the appellant ratepayers (Ratepayers) and responding to an excessive number of Ratepayers’ Public Information Act (PIA) requests.⁴ WOWSC accurately budgeted 2020 legal expenses based on the

¹ SOAH Order No. 31 – Post-Hearing Briefing Schedule; Guidelines (Apr. 4, 2023).

² *Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates*, Docket No. 50788, Order Remanding Proceeding at 7-8 (Jun. 30, 2022) (Remand Order).

³ See WOWSC Ex. 24, Supplemental Direct Testimony of Grant Rabon.

⁴ WOWSC Ex. 3, Rebuttal Testimony of Joe Gimenez, III at Bates 9:6-10:7; WOWSC Ex. 26, Supplemental

2019 legal expenses and the likelihood of continued litigation.⁵ It now defends itself in this rate appeal that, again, Ratepayers initiated. As such, the Corporation continues to incur outside legal costs solely on account of the same group of members that, ironically, now asserts WOWSC's legal expenses were unreasonable and unnecessary. Commission Staff disregards Ratepayers' litigious nature and WOWSC's duty to defend itself and similarly asserts that, because the Corporation's outside paid and budgeted legal expenses were unnecessary, the Commission should exclude the expenses from WOWSC's annual base rates.⁶

The record is clear: WOWSC's legal expenses paid in 2019 and budgeted in 2020 were just and reasonable. As discussed below, recent developments in the underlying lawsuits further validate the legal expenses.⁷ In contrast, Ratepayers' frivolous legal attacks and Commission Staff's post-hoc judgments related to prior WOWSC litigation are both reckless and misguided.⁸ Most importantly, Commission Staff's proposed revenue requirement arbitrarily excludes WOWSC's legal expenses and would financially destroy the Corporation within a single year.⁹

The Commission shall conduct a de novo review of an appeal brought under the Texas Water Code (TWC).¹⁰ Further, the Commission may consider only the information available to the governing body at the time it established rates and evidence of reasonable expenses incurred in the appeal proceedings.¹¹ More specifically, the Remand Order instructed the ALJs to determine whether the appealed rates meet "all of the standards prescribed under TWC § 13.043(j)."¹² As such, the ALJs must determine whether the appealed rates are "just and reasonable" and "not [] unreasonably preferential, prejudicial, or discriminatory but... sufficient, equitable, and consistent

Rebuttal Testimony of Joe Gimenez, III at Bates 7:10-8:2; Bates 3-19; Bates 10:12-15.

⁵ See also Windermere Oaks Water Supply Corporation's (WOWSC) Initial Brief at 6 (Dec. 30, 2021).

⁶ Staff HoM2 Ex. 2, Supplemental Direct Testimony of Anna Givens at 6:20-23 (Bates 8:20-23); Staff Ex. 4, Direct Testimony of Maxine Gilford at 6:20-7:2; see also Prehearing Conference Transcript (Tr.) at 21:16-17 (ALJ Siano) (Mar. 21, 2023) (granting Commission Staff's motion to adopt Maxine Gilford's testimony).

⁷ WOWSC Ex. 26 at Bates 8:3-13:19.

⁸ See *Id.* at Bates 8:3-11:15.

⁹ WOWSC Ex. 27, Supplemental Rebuttal Testimony of Mike Nelson at Bates 8:5-9:8.

¹⁰ Tex. Water Code Ann. §§ 13.043(a) and (e) (TWC); see also 16 Tex. Admin. Code § 24.101(e) (TAC).

¹¹ *Id.*

¹² Remand Order at 7.

in application to each class of consumers.”¹³ If WOWSC’s rates fail to meet these standards, the Commission must set new rates.¹⁴ Importantly, however, the Commission must “use a methodology that preserves the financial integrity of the retail public utility.”¹⁵

At the prehearing conference held on March 21, 2023, the ALJs narrowed the scope of briefing to three issues: (1) WOWSC’s customer characteristics and whether the appealed rates have a discriminatory affect; (2) evidence related to Commission Staff’s recommended revenue requirement and rates; and (3) WOWSC’s rate case expense recovery.¹⁶ For the reasons set forth below, WOWSC’s customers demonstrate similar characteristics and, therefore, the appealed rates of general applicability are nondiscriminatory and equitable. Further, because the record clearly shows that the legal expenses at issue were both reasonable and necessary, WOWSC’s inclusion of the expenses in its annual base rates resulted in just and reasonable rates. Moreover, the evidence shows that if the Commission adopts Commission Staff’s proposed rates, the utility will be unable to provide safe and adequate water and wastewater services to its members. Finally, WOWSC’s rate case expenses are reasonable and, as such, should be recovered in full. The Commission should therefore deny Ratepayers’ appeal and allow WOWSC to continue charging the appealed rates. In the alternative, the Commission should allow WOWSC to recover the \$171,337 of outside legal fees through a surcharge in accordance with Commission Staff’s recommendation.¹⁷

To the extent necessary to determine the above-listed issues, WOWSC incorporates all of the evidence and briefing submitted on December 30, 2021, and January 25, 2022, in this docket.

II. CUSTOMER CHARACTERISTICS AND DISCRIMINATORY RATES (ISSUE 1)

A uniform rate charged equally to all customers is not, on its own, equitable and consistent in application.¹⁸ Rather, to demonstrate that a uniform rate is nondiscriminatory, the utility must

¹³ TWC § 13.043(j).

¹⁴ Remand Order at 8.

¹⁵ TWC § 13.043(j).

¹⁶ Prehearing Conference Tr. at 12:21-13:7 (ALJ Siano) (Mar. 21, 2023).

¹⁷ Tr. at 857:12-19 (Givens Cross) (Mar. 22, 2023); WOWSC Ex. 27, Attachment MN-8, (Commission Staff witness Anna Givens adopting Commission Staff witness Maxine Gilford’s testimony that WOWSC could recover rate case expenses through a surcharge).

¹⁸ Remand Order at 6.

also show that its customers' characteristics do not differ in a meaningful manner.¹⁹ Because WOWSC's customers reside in the same location and receive the same services from the same facilities, the Corporation appropriately grouped all its customers in one class.²⁰ Thus, the appealed rates charged equally to all WOWSC customers are non-discriminatory.

The American Water Works Association provides that, when a utility establishes customer classes, the utility should consider the location of its customers, service characteristics, and demand patterns.²¹ Service characteristics refer to both the actual services provided, such as raw versus treated water, and the facilities that provide the service, such as transmission versus distribution systems.²² Demand patterns capture the cost to serve a particular customer by considering the customer's total demand and the difference between the customer's peak and average service uses.²³ Importantly, a utility should not establish customer classes based on a customer's identity as residential, commercial, or industrial.²⁴ Rather, customer classes should only consider factors that impact a utility's costs to provide water and wastewater services.²⁵

All of WOWSC's customers reside in the same discrete location: the Windermere Oaks subdivision.²⁶ Further, all customers receive the same potable water and wastewater service from the same facilities and water source.²⁷ And although the airport hangar accounts have a higher peak-to-average demand difference than the single-family residential (SFR) accounts, SFR accounts more consistently use WOWSC's services and, therefore, have a much higher level of demand.²⁸ For purposes of the hangar and SFR demand patterns, these variances offset each other and, as such, each customer imposes a similar cost on WOWSC's provision of service.²⁹ Moreover, WOWSC's inclining block rate design allows for additional recovery from SFR

¹⁹ *See Id.*

²⁰ WOWSC Ex. 24 at Bates 7, Bates 10.

²¹ *Id.* at Bates 5; Attachment GR-2.

²² *Id.*

²³ WOWSC Ex. 24 at Bates 4.

²⁴ *Id.* at Bates 6.

²⁵ *Id.* at Bates 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at Bates 9.

²⁹ *Id.*

accounts that consume more water, which further mitigates the need to segregate airport hangar and SFR accounts.³⁰

In sum, because WOWSC's customers reside in the same location, receive the same service, and impose similar costs on WOWSC, the customers have similar characteristics.³¹ It is therefore appropriate to group all WOWSC customers in a single class and charge the customers a single rate. Thus, in accordance with TWC § 13.043(j), the appealed rates are not unreasonably preferential, prejudicial, or discriminatory.³² Moreover, no party provided prefiled evidence contradicting these facts.

III. COMMISSION STAFF'S REVENUE REQUIREMENT AND RECOMMENDED RATES (ISSUE 2)

Commission Staff alleges that WOWSC has failed to show that its 2019 outside legal expenses were reasonable and beneficial to its ratepayers and, therefore, recommends removing \$171,337 from the Corporation's annual base rate cost recovery.³³ As such, Commission Staff recommends that the Commission order WOWSC to charge a new monthly base water rate of \$40.43 and a new monthly base wastewater rate of \$29.81 in place of the appealed rates of \$90.39 and \$66.41, respectively.³⁴ Commission Staff further suggests that the Commission order WOWSC to refund the difference between the appealed rates and Commission Staff's proposed rates for the period starting on the effective date of March 23, 2020, and first billing on or about September 1, 2023.³⁵

As discussed in more detail below, Commission Staff continues to disregard WOWSC's statutory duty to protect itself and its directors from legal threats.³⁶ It disregards recent developments in the underlying litigation that show, in contrast to Commission Staff's assertion,³⁷

³⁰ *Id.*

³¹ *Id.* at Bates 10.

³² TWC § 13.043(j).

³³ Staff Ex. 4 at 12; Tr. at 844:21-24 (Givens Cross) (Mar. 22, 2023); *see also* Prehearing Conference Tr. at 21:16-17 (ALJ Siano) (granting Commission Staff's motion to adopt Maxine Gilford's testimony).

³⁴ Staff HoM2 Ex. 1, Supplemental Direct Testimony of Stephen Mendoza at 4:12-26, 5:5-13.

³⁵ Staff HoM2 Ex. 2 at 8 (Bates 10).

³⁶ WOWSC's Reply Brief at 9-10 (Jan. 25, 2022).

³⁷ Commission Staff's Initial Brief at 3 (Dec. 30, 2021) (Staff's Initial Brief) (alleging that WOWSC's rate-making policy allows "Windermere's board of directors *carte balance*...for legal expenses").

WOWSC has acted reasonably and limited legal fees to the benefit of its ratepayers.³⁸ And perhaps most importantly, it chooses to ignore the detrimental impact Commission Staff's rates and proposed refund would have on the Corporation's financial integrity.³⁹ Commission Staff's proposed rates and refund should therefore be rejected, and the Commission should allow WOWSC to continue charging the appealed rates instead.

In the alternative, Commission Staff recommends that WOWSC, if it exhausts all available revenue streams, recover its legal expenses through a surcharge.⁴⁰ WOWSC will soon adopt a resolution to amend its tariff to allow for a surcharge to recover its legal expenses.⁴¹ Importantly, including these legal fees in a surcharge would enable WOWSC to continue operations.⁴² As such, if the Commission does ultimately adopt Staff's proposed rates, it should allow WOWSC to recover the underlying legal fees through a surcharge.

A. Just and Reasonable Outside Legal Expenses

Just and reasonable rates provide a utility with the amount necessary to maintain an adequate debt service, obtain funding for future infrastructure, and pay operating and maintenance expenses associated with the provision of adequate water and wastewater services.⁴³ The National Association of Regulatory Utility Commissioners' (NARUC) definition of "operation and maintenance" *includes legal fees* and books these fees under "Account 631."⁴⁴ Importantly, the Commission operates under the NARUC chart of accounts and, therefore, classifies legal fees as expenses associated with the operation and maintenance of a utility.⁴⁵ Thus, a utility may recover through its base rates reasonable and necessary legal fees as a cost of service.⁴⁶

³⁸ WOWSC Ex. 26 at Bates 8:3-13:19.

³⁹ WOWSC Ex. 27 at Bates 8:5-11:2.

⁴⁰ Tr. at 857:12-19 (Givens Cross) (Mar. 22, 2023); *see also* WOWSC Ex. 27, Attachment MN-8, (Commission Staff witness Anna Givens adopting Commission Staff witness Maxine Gilford's testimony that WOWSC could recover legal expenses through a surcharge).

⁴¹ WOWSC Ex. 26 at Bates 14:4-15.

⁴² WOWSC Ex. 27 at Bates 5:8-16.

⁴³ *See* Staff Ex. 4 at 8:1-20; 16 TAC § 24.41(b)(1)(A).

⁴⁴ Tr. 845:6-17 (Givens Cross) (Mar. 22, 2023). WOWSC similarly categorizes its legal expenses under Account 631. Tr. at 847:10-20 (Givens Cross) (Mar. 22, 2023); *see also* WOWSC Ex. 17, WOWSC's Response to Ratepayers RFI 1-12 at Bates 7.

⁴⁵ *See* Tr. at 846:8-15 (Givens Cross) (Mar. 22, 2023).

⁴⁶ *See* 16 TAC § 24.41(b)(1)(A).

The record is clear: the legal fees at issue were necessary. The Corporation incurred the fees defending itself against a handful of WOWSC members who, after exhausting all other remedies through litigation and the election process, attempt to use this rate appeal as a forum to resolve local disputes.⁴⁷ In fact, Ratepayers initiated all underlying lawsuits other than the *Paxton* Lawsuit, which WOWSC filed in response to Ratepayers' PIA requests to preserve confidential information.⁴⁸

Commission Staff has suggested that WOWSC acted imprudently by defending its former directors.⁴⁹ But as WOWSC has repeatedly stated, Chapter 8 of the Texas Business Organizations Code authorizes—and in conjunction with WOWSC's Bylaws arguably requires—that WOWSC advance defense costs to WOWSC's current and former directors.⁵⁰ Staff witness Maxine Gilford recognized this legal duty but, nevertheless, Commission Staff continues to ignore it.⁵¹ Legal duties aside, because WOWSC is composed of volunteer directors, it must encourage volunteer community members to serve on its Board. If the Corporation suddenly refused to indemnify its directors, no community member would volunteer. Rather, in such a litigious community, volunteering without protection from personal liability would no doubt chill board participation. Finally, through mediation and community meetings, WOWSC did everything in its power to minimize legal fees.⁵² Unfortunately, after extensive effort, resolution was unsuccessful due to the plaintiffs' litigious nature.⁵³ Thus, Commission Staff's assertions that WOWSC failed to demonstrate that its legal fees were reasonable and necessary are completely without basis. They should therefore be denied.

Moreover, recent developments further vindicate WOWSC's legal decisions and, specifically, demonstrate that the Corporation limited its legal expenses to the benefit of its ratepayers. In the *Double F Hanger* lawsuit, the jury found that Dana Martin, in her capacity as

⁴⁷ WOWSC Ex. 2, Direct Testimony of Joe Gimenez, III at 21:10-22:11 (Bates 22:10-23:11); WOWSC Ex. 26 at Bates 7:10-11:15.

⁴⁸ WOWSC Ex. 3 at Bates 9:6-14; WOWSC Ex. 26 at Bates 7:10-8:2, Bates 8:3-19, Bates 10:12-15.

⁴⁹ Staff's Initial Brief at 3-4.

⁵⁰ WOWSC Ex. 26 at Bates 11:1-4; WOWSC's Reply Brief at 9 (Jan. 25, 2022).

⁵¹ Staff Ex. 4 at 13:14-15 (stating "I understand that Windermere could not just ignore the TOMA and Ultra Vires suits").

⁵² WOWSC Ex. 3 at Bates 18:5-19:16.

⁵³ WOWSC's Initial Brief at 12 (Dec. 30, 2021).

WOWSC director, breached her fiduciary duty to WOWSC by engaging in a land transaction with the Corporation.⁵⁴ Previously, the plaintiffs in that lawsuit—including Ratepayers—demanded that WOWSC initiate a lawsuit against Ms. Martin and the other previous WOWSC Directors to break the land sale contract at issue and, therefore, subject itself to legal liability and countersuits.⁵⁵ WOWSC concluded that the claims offered limited upside and, as such, refrained from pursuing plaintiff’s claims and incurring additional legal costs.⁵⁶ The court first granted summary judgment and dismissed plaintiffs’ claims against seven of the current and former WOWSC directors.⁵⁷ And several years later, after plaintiffs spent over \$400,000 in legal fees,⁵⁸ the jury returned a verdict against the remaining WOWSC director, Dana Martin, for a mere \$70,000.⁵⁹ Thus, if WOWSC committed to plaintiffs’ claims, it would have incurred far more outside legal expenses to recover through rates rather than recoup any lost profit to put towards its existing unpaid legal fees.

The United States District Court of the Western District of Texas also recently ruled in favor of WOWSC and held that Allied World Insurance (Allied) owes the Corporation for defense costs related to the *Double F Hangar* Lawsuit.⁶⁰ Again, this demonstrates that the Corporation’s legal decisions and related expenses were reasonable and, most importantly, stand to benefit WOWSC’s ratepayers. But because Allied appealed the district court’s ruling, it is unclear exactly when WOWSC will recover the 2019 insurance settlement proceeds.⁶¹ It is therefore reasonable and necessary for WOWSC to recover the 2019 legal expenses through rates. Importantly, WOWSC has provided that after it pays its legal debt in full, it will immediately reduce its base rates.⁶²

⁵⁴ WOWSC Ex. 26 at Bates 9:7-13, Attachment JG-43.

⁵⁵ WOWSC Ex. 3 at Bates 12:1-17.

⁵⁶ *Id.*

⁵⁷ WOWSC Ex. 3 at Bates 10:8-17, 19:6-14.

⁵⁸ WOWSC Ex. 26, Attachment JG-44 at p. 3 of 98 (Bates 40).

⁵⁹ *Id.* at Bates 9:7-19, Attachment JG-43.

⁶⁰ *Id.* at Bates 12:10-20; Attachment JG-48.

⁶¹ *Id.* at Bates 13:1-4.

⁶² *Id.* at Bates 13:20-14:3; *see also* WOWSC Ex. 3, Attachment JG-39 at p. 4 of 6 (Bates 396).

B. Proposed Rates Destroy WOWSC's Financial Integrity

The Commission must set rates that preserve the utility's financial integrity.⁶³ Although there is no definition or standard of "financial integrity," the Supreme Court of Texas has found that an investor owned utility (IOU) must be allowed to recover its operating expenses together with a reasonable return on invested capital.⁶⁴ Importantly, that requirement is "only met if the return is sufficient to ensure confidence in the financial integrity of the enterprise, *so as to maintain its credit and to attract capital.*"⁶⁵

In contrast to an IOU, however, WOWSC is a nonprofit water supply corporation that does not have any shareholders and, therefore, may only realistically pay its legal expenses and maintain its credit through rates.⁶⁶ WOWSC may eventually recover Dana Martin's defense costs, Allied's insurance settlement, and damages from the *Double F Hanger* lawsuit, and would use this recovery to pay its legal debt.⁶⁷ But the recovery is still uncertain and subject to the judicial process.⁶⁸ WOWSC's financial integrity, therefore, depends on recovery of the appealed rates. Commission Staff witnesses recognized the Commission's duty to consider WOWSC's financial integrity and, specifically, recommended that the Commission consider evidence demonstrating that the recovery of WOWSC's outside legal expenses is necessary to preserve the Corporation's financial integrity.⁶⁹

Commission Staff, however, wholly failed to satisfy this duty. Commission Staff's recommendation to remove the underlying legal expenses will bankrupt the utility. It then goes so far to suggest that WOWSC, in order to "pay [its] legal bills," could sell its land or "sell itself to another functioning utility."⁷⁰ It is hard to fathom how Commission Staff could consider WOWSC's financial integrity and simultaneously suggest that WOWSC sell valuable land or even itself to another entity. In fact, Commission Staff witness failed to identify another instance where,

⁶³ TWC § 13.043(j).

⁶⁴ *Suburban Util. Corp. v. Public Util. Comm'n of Texas*, 652 S.W.2d 358, 362 (Tex. 1983).

⁶⁵ *Id.*

⁶⁶ WOWSC Ex. 27 at Bates 11:5-13.

⁶⁷ WOWSC Ex. 26 at Bates 11:16-12:9, Bates 13:1-19

⁶⁸ *Id.*

⁶⁹ Staff Ex. 4 at 16:3-7; Tr. at 877:14-17 (Givens Recross) (Mar. 22, 2023).

⁷⁰ WOWSC Ex. 27, Attachment MN-10.

in a rate appeal, the Commission suggested that a utility sell land—or even itself—to pay its cost of service.⁷¹ This would establish dangerous precedent that contradicts Texas law and policy. It therefore must be dismissed.

Further, despite WOWSC’s additional loan requirements, customer growth, and required infrastructure improvements, Commission Staff inexplicably recommends rates that are lower than the rates effective *before* WOWSC’s March 2020 rate change.⁷² As such, Commission Staff apparently disregards that, to fund necessary capital expenditures, the Corporation entered into a credit agreement with CoBank in September 2020 that requires WOWSC to maintain a Debt Service Coverage Ratio (DSCR) of 1.25 to 1.00.⁷³ It disregards that the WOWSC subdivision currently adds roughly six houses each year, and has 130 vacant lots and forty additional hangars that could soon be developed.⁷⁴ Finally, it ignores that WOWSC must expand its Sewer Plant, soon replace its raw water pumps, and soon replace its clarifier system.⁷⁵ Legal expenses aside, it is unclear how Commission Staff expects WOWSC to maintain its credit and fund necessary expansion and issue refunds with rates *lower* than the rates effective prior to the appealed rates.

Nevertheless, Commission Staff’s proposed rates applied to WOWSC’s FY2022 billing data, which incorporates the Corporation’s necessary legal payments,⁷⁶ has the following financial impact: (1) after 11 months, WOWSC would have no funds to meet its loan covenant reserves; (2) after 12 months, WOWSC would exhaust its checking and money market account balances and, therefore be incapable of paying its bills; and (3) after 12 months, WOWSC would not meet its loan covenant’s DSCR.⁷⁷ Commission Staff’s proposed rates *and* recommended refund would have the following impacts: (1) after six months, WOWSC would have no funds to meet its loan covenant reserves; (2) after seven months, WOWSC would exhaust its checking and money market account balances; and (3) after 12 months, WOWSC would not meet its loan covenants’ DSCR.⁷⁸

⁷¹ Tr. at 866:7-24 (Givens Cross) (Mar. 22, 2023).

⁷² Staff HoM2 Ex. 1 at 4:14-26, 5:10-13.

⁷³ WOWSC Ex. 26 at Bates 5:3-9; WOWSC Ex. 27, Attachment MN-13 at p. 11 of 19 (Bates 118), p. 18 of 19 (Bates 125).

⁷⁴ WOWSC Ex. 26 at Bates 6:11-14.

⁷⁵ *Id.* at Bates 6:15-7:3.

⁷⁶ WOWSC Ex. 27, Attachment MN-12 at p. 5 of 91 (Bates 21).

⁷⁷ *Id.* at Bates 8:5-14; Attachment MN-11.

⁷⁸ *Id.* at Bates 9:9-18, Attachment MN-14.

In short, Commission Staff’s proposals would result in financial collapse within a year. Moreover, these analyses assume that WOWSC receives all standby and late fees in the first month of the year, WOWSC has no capital expenditures throughout the year, and WOWSC has complete access to its account balance and standby and late fees.⁷⁹ As such, the analyses represent ideal outcomes and, under realistic conditions, WOWSC’s default timeline would accelerate.⁸⁰

The record is clear: Commission Staff’s proposals would financially destroy WOWSC. Within a year, WOWSC’s loans would become immediately payable, likely leading to a quick sale of WOWSC property vital to the Corporation’s operations.⁸¹ WOWSC would violate its CoBank DSCR and, therefore, fail to secure new loans for capital improvements.⁸² And it would default on its legal bills, subjecting itself to increased legal liability.⁸³ In sum, Commission Staff’s proposals would inevitably lead WOWSC to bankruptcy or receivership and, ultimately, impact WOWSC customers’ ability to receive water and wastewater services. Therefore, Commission Staff’s proposed rates and refund must be denied.

Important, however, is Commission Staff’s alternate recommendation to recover the underlying legal fees in a surcharge and move them out of base rates.⁸⁴ If the Commission adopts Commission Staff’s recommended rates and moves the underlying legal fees into a surcharge, the utility could maintain its financial integrity and continue to provide continuous and adequate service.⁸⁵ Thus, this recommendation appropriately considers WOWSC’s financial integrity in accordance with TWC § 13.043(j). As such, WOWSC requests that, if the Commission ultimately adopts Commission Staff’s rates, the Commission also authorize a surcharge for the Corporation to recover its underlying legal fees.

⁷⁹ *Id.* at Bates 8:15-9:3, Bates 9:18-10:2.

⁸⁰ *Id.*

⁸¹ *Id.* at Bates 10:16-20.

⁸² *Id.* at Bates 10:20-21.

⁸³ *Id.* at Bates 10:3-10.

⁸⁴ WOWSC Ex. 27, Attachment MN-10 (Commission Staff suggesting that WOWSC could pay its legal bills through a surcharge); *see also* Tr. at 860:6-19 (Givens Cross) (Mar. 22, 2023) (providing that, if WOWSC exhausts its revenue stream, “Windermere has other options for paying th[e] legal expenses and one of those includes the special assessment”).

⁸⁵ WOWSC Ex. 27 at Bates 5:8-16.

C. Commission Staff's Recommended Rate Design

Commission Staff also suggests a different rate design that lowers WOWSC's base rates and raises WOWSC's volumetric rates.⁸⁶ This rate design is unsuitable for WOWSC's service area due to the nature of the Corporation's members. Specifically, many WOWSC connections are with second home and hangar owners and, as such, a significant number of customers use minimal water.⁸⁷ These customers therefore pay minimal volumetric rates.⁸⁸ Accordingly, under Staff's proposed rate design, permanent residences effectively subsidize temporary residents with higher volumetric rates.⁸⁹

The WOWSC Board found that higher base rates establish a more equitable rate design that ensures all residents, whether permanent or temporary, fund the system that stands ready to serve them. This is a policy decision that is best left to the locally elected WOWSC Board of Directors. If community members prefer higher volumetric rates and lower base rates, they will vote in the next WOWSC Board election accordingly. It is inappropriate for the Commission to substitute its judgment for the policy preferences of WOWSC members. The Commission should therefore reject Commission Staff's proposed rate design and allow the Corporation to continue collecting rates in accordance with the rate design effective March 2020.

V. RATE CASE EXPENSE RECOVERY (ISSUE 3)

Under TWC § 13.043(e), the Commission may allow recovery of reasonable expenses incurred by WOWSC in the appeal proceedings. Title 16 TAC § 24.44 provides guidelines for reviewing the rate case expenses in this proceeding.⁹⁰ Under this rule, WOWSC has the burden to prove the reasonableness of the expenses which show a number of requirements, including the nature and extent of the work done by the attorney, time and labor expended by the attorney, and fees paid to the attorney, among others.⁹¹

⁸⁶ Staff HoM2 Ex. 1 at 4:13-26; WOWSC Ex. 26 at Bates 15:5-15.

⁸⁷ WOWSC Ex. 26 at Bates 15:16-20.

⁸⁸ *Id.*

⁸⁹ *Id.* at Bates 15:21-22.

⁹⁰ WOWSC Ex. 4, Direct Testimony of Jamie Mauldin at Bates 5:6-13; *see also* Staff Ex. 4 at 4:32-5:20.

⁹¹ 16 TAC § 24.44.

Reimbursable expenses for this case began on May 1, 2020, and continued through the pendency of the proceeding.⁹² This rate appeal has not been a simple task, but rather a mountain of complex and novel legal issues which required counsel's time and attention, including the consultation of an expert.⁹³ Accordingly, the Proposal for Decision (PFD) issued on March 31, 2022, recommended that WOWSC recover its rate case expenses as of December 15, 2021, which totaled \$345,227.03.⁹⁴ It also recommended recovery of trailing rate case expenses incurred between the date of the PFD filing and when the Commission's decision became final.⁹⁵

Since the Commission remanded this proceeding back to the State Office of Administrative Hearings (SOAH), WOWSC has had to incur significant additional rate case expenses. As such, WOWSC requests that the Commission allow the Corporation to recover \$478,184.04 in reasonable and necessary legal and consultant rate case expenses.⁹⁶ This total includes \$85,662 of legal expenses incurred from May 23, 2022, through January 31, 2023.⁹⁷ Moreover, in accordance with Commission Staff's recommendation, WOWSC requests that the Commission allow the Corporation to update its rate case expenses after the close of the record and request a recovery of trailing expenses in a compliance proceeding where its residual rate case expenses can be reviewed.⁹⁸ Finally, to alleviate the burden on WOWSC members, the Corporation requests a surcharge over a 42 month period to recover the \$478,184.04 of rate case expenses.⁹⁹ The amount requested is reasonable given the complexity of this case and comparable to the rate case expenses awarded in other rate appeals.¹⁰⁰

⁹² WOWSC Ex. 4 at Bates 7:21-24, Bates 8:1-24 and Bates 9:1-20.

⁹³ *Id.* at Bates 10:1-14.

⁹⁴ Proposal for Decision at 12 (Mar. 31, 2022) (PFD).

⁹⁵ *Id.*

⁹⁶ WOWSC Ex. 28, Fifth Supplemental Direct Testimony of Jamie L. Mauldin at Bates 4:21-5:1. At hearing, Staff Witness Anna Givens stated that Commission Staff recommends that the Commission allow WOWSC \$379,000 in rate case expenses. Tr. at 864:10-18 (Givens Cross) (Mar. 22, 2023).

⁹⁷ WOWSC Ex. 28 at Bates 6:18-19.

⁹⁸ Staff Ex. 4 at 7:21-24, 8:1-24, 9:1-20; *see also* Prehearing Conference Tr. at 21:16-17 (ALJ Siano).

⁹⁹ PFD at 13 (recommending that WOWSC recover rate case expenses through a surcharge over a 42-month period); *see also* Tr. at 857:12-19 (Givens Cross) (Mar. 22, 2023); WOWSC Ex. 27, Attachment MN-8, (Commission Staff witness Anna Givens adopting Commission Staff witness Maxine Gilford's testimony that WOWSC could recover rate case expenses through a surcharge); WOWSC Ex. 26 at Bates 14:4-15 (providing that WOWSC will soon amend its tariff to allow for a surcharge).

¹⁰⁰ *Ratepayers Appeal of the Decision by Bear Creek Special Utility District to Change Rates*, Docket

VI. CONCLUSION

For the foregoing reasons, WOWSC respectfully requests that the Commission deny Ratepayers’ appeal, maintain the rates approved effective March 23, 2020, and grant WOWSC such other relief to which it may be entitled. In the alternative, WOWSC respectfully requests that the Commission allow WOWSC to recover the \$171,337 of outside legal expenses through a surcharge.

Respectfully submitted,

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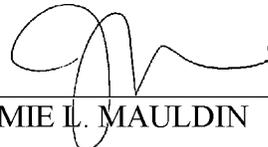
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CERTIFICATE OF SERVICE

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 April 11, 2023, in accordance with the Order Suspending Rules, issued in Project No. 50664.



JAMIE L. MAULDIN

No. 49351, Order on Rehearing at 3, Findings of Fact No. 56 (Nov. 19, 2021) awarding \$409k in rate case expenses.