



## Filing Receipt

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**SOAH DOCKET NO. 473-20-4071.WS  
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<b>RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**RATEPAYER REPRESENTATIVES' INITIAL BRIEF**

(Remand Issues)

**TABLE OF CONTENTS**

I.	Timing of Filing .....	3
II.	Issues on Remand .....	3
III.	Overview (All Issues) – The Significance of Windermere’s Organizational Structure.....	4
IV.	Windermere Has Chosen Not to Inform Itself (or This Tribunal) Concerning the Characteristics of Its Customers .....	10
V.	PUC Staff’s Recommended Rates Should Be Approved .....	13
	A. Windermere’s Outside Legal Costs are Properly Disallowed from the Revenue Requirement.....	13
	1. Not costs of service.....	13
	2. Not reasonable and necessary; not beneficial for the ratepayers .....	13
	3. Not Actually Realized or Anticipated With Reasonable Certainty .....	19
	B. Staff’s Recommended Rates Are Just and Reasonable.....	20
	C. Any Jeopardy to Windermere's Financial Integrity is the Result of Board Mismanagement, not Staff recommended rates.	22
	D. A Surcharge is Not Permitted Here	26
VI.	WINDERMERE SHOULD NOT RECOVER ANY CASE EXPENSES FOR THIS APPEAL .....	26
	A. Anna Givens Undisclosed Testimony Should be Stricken	26

B.	Jaime Maudlin Testimony Should be Stricken	28
C.	An Award to Windermere is Unjust	28
VII.	CONCLUSION.....	28

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<b>WATER SUPPLY CORPORATION TO</b>	<b>§</b>	<b>OF</b>
<b>CHANGE WATER AND SEWER</b>	<b>§</b>	
<b>RATES</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**RATEPAYER REPRESENTATIVES' INITIAL BRIEF**  
(Remand Issues)

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

THE REPRESENTATIVES OF THE RATEPAYERS OF WINDERMERE OAKS WATER SUPPLY CORPORATION ("Ratepayers") file this their INITIAL BRIEF relating to the issues addressed in the March 22, 2023 hearing on remand and would show as follows.

I. Timeliness of Filing

Pursuant to SOAH Order No. 31, this Initial Brief is due by April 11, 2023. Accordingly, this Initial Brief is timely filed.

II. Issues on Remand

Pursuant to the ALJs' determination during the prehearing conference on March 21, 2023, the issues to be addressed on remand are: (i) Windermere's customers' characteristics and whether the appealed rates impact different customers or types of customers differently, (ii) PUC Staff's evidence concerning its recommended revenue requirement and recommended rates, as reflected in its prefiled testimony, and (iii) whether and to what extent Windermere should recover appeal case expenses from its ratepayers. Accordingly, this Initial Brief focuses on those issues. To the extent appropriate, Ratepayers carry forward and incorporate by this reference the contents of their prior briefing in this appeal.

### III. Overview (All Issues) – The Significance of Windermere’s Organizational Structure

The Legislature has determined that a retail public utility may be organized as a private nonprofit corporation whose members are its customers.<sup>1</sup> Windermere is such a retail public utility. The Legislature has determined that a private nonprofit corporation whose members are its customers may be granted monopolistic power within its certificated area.<sup>2</sup> When the Commission issued CCNs to Windermere, it placed Windermere in just such a monopolistic position.<sup>3</sup> For those who are in Windermere’s service area and desire to have running water and sewer service, membership in the corporation is not a matter of choice.<sup>4</sup>

As a matter of express legislative policy and purpose and statutory mandate, all rates<sup>5</sup> charged by retail public utilities must be just and reasonable.<sup>6</sup> The controlling standards are not new.<sup>7</sup> They are the same for all retail public utilities, regardless how the utility is organized or the method by which the utility sets its rates.<sup>8</sup>

Windermere has suggested the Commission must create an exception for the rates of a retail public utility organized as a nonprofit corporation with members. For example, Windermere claims that all expenditures its board chooses to authorize are necessarily “just and reasonable”,

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<sup>1</sup> TWC § 13.002(24).

<sup>2</sup> TWC §§ 13.241 et seq.

<sup>3</sup> Tariff - Windermere Exhibit WOWSC-02 Attachment JG-1, Section D, pg 13 and 14 of 111.

<sup>4</sup> TWC §§ 13.002(11) and (24). See also Windermere Exhibit WOWSC-02 Attachment JG-1, pg. 10 of 111 Section C, Member definition, Section B pg 6, No. 1-4.

<sup>5</sup> “Rate” means every compensation, tariff, charge, fare, toll, rental, and classification or any of those items demanded, observed, charged, or collected whether directly or indirectly by any retail public utility for any service, product, or commodity described in Subdivision (24) of this section and any rules, regulations, practices, or contracts affecting that compensation, tariff, charge, fare, toll, rental, or classification. TWC § 13.002(17).

<sup>6</sup> TWC § 13.001 and 13.043(e) and (j).

<sup>7</sup> To prove its rates are just and reasonable, Windermere must show that its rates provide revenue equal to its cost of service and recover costs from ratepayers equitably, recover only its reasonable and necessary expenses, do not recover expenses that bear no relationship to its provision of utility service and collect only expenses actually realized or which can be anticipated with reasonable certainty. 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.

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

even those that have nothing to do with providing service. Windermere urges the Commission to arbitrarily single out the ratepayers of a nonprofit corporation retail public utility for different, and (according to Windermere) less favorable, treatment regarding rates than the similarly situated customers of other types of retail public utilities. That would be illegal.<sup>9</sup>

At the same time, there is one respect in which Windermere's organizational structure requires that it be distinguished from other types of retail public utilities. That distinction is outcome determinative of this appeal.

To operate as a retail public utility, Windermere is required to have adopted and to be operating in accordance with bylaws or articles of incorporation which ensure that it is member-owned and member-controlled.<sup>10</sup> Windermere's bylaws constitute a binding contract with its members (who are also its ratepayers) concerning how the corporation is required to operate.<sup>11</sup> This contract determines the amount of revenue Windermere is authorized to collect from its ratepayers and the purposes for which such revenue may be disbursed. The appealed rates alter the economic bargain set forth in the contract between Windermere and its ratepayers. Accordingly, they cannot be sustained.

The "member-owned" and "member controlled" requirements set forth in TWC § 13.002(24) are principles of cooperative operation derived from the law applicable to nonprofit

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<sup>9</sup> See, e.g., *Santos v. City of Houston, Tex.*, 852 F. Supp. 601, 607-8 (S.D. Tex. 1994) and cases cited therein.

<sup>10</sup> TWC 13.002(24) defines "water supply or sewer service corporation" as a nonprofit corporation organized and operating under Chapter 67 that provides potable water service or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold.

<sup>11</sup> See, e.g., *High Rd. on Dawson v. Benevolent & Protective Ord. of Elks of the United States of Am., Inc.*, 608 S.W.3d 869, 880 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2020, pet. denied) and cases collected therein. See also TWC §§ 13.002(24), 67.003 and 67.004, and Tex. Bus. Org. Code §§ 2.005, 22.001(2) and 22.102(a) – (b).

water and sewer service providers under IRC Section 501(c)(12)(A).<sup>12</sup> An I.R.C. 501(c)(12) organization exists for the sole purpose of providing services to its members at the lowest possible cost.<sup>13</sup> The organization is authorized to collect revenue only to the extent required to pay the expenses to provide the services being purchased, plus a reasonable maintenance reserve.<sup>14</sup> Revenues in excess of costs of service belong to the members/ratepayers who paid them in (ergo “member-owned”) and must be returned to them in proportion to their level of patronage.<sup>15</sup> Gain from the sale of an appreciated asset also belongs to the ratepayers based on their level of patronage (again, ergo “member-owned”).<sup>16</sup> A 501(c)(12) organization is not authorized to accumulate revenue beyond the reasonable needs of its business of providing the services it exists to provide.<sup>17</sup>

An I.R.C. 501(c)(12)(A) organization must be democratically controlled by its members.<sup>18</sup> Each member is entitled to one vote on matters put before the membership at an annual or special members meeting, regardless of the number of membership he/she holds.<sup>19</sup> Day-to-day operations are managed by an elected board of directors who must also be members.<sup>20</sup> To avoid any conflict between the interests of the directors and the interests of the remainder of the membership, the organization has no authority to distribute income to directors or to confer other benefits upon them.<sup>21</sup> Accordingly, at least in theory all board decisions should likewise be “member-controlled.”

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<sup>12</sup> Providing water and sewer services are “like activities” within the meaning of Section 501(c)(12). Rev. Rul. 67-265.

<sup>13</sup> *Puget Sound Plywood v. Commissioner*, 44 T.C. 305, 307 – 8 (1965); see also TWC § 67.002.

<sup>14</sup> *Id.*; see also TWC § 67.008.

<sup>15</sup> *Id.*; see also Rev. Rul. 72-36.

<sup>16</sup> Rev. Rul. 72-36.

<sup>17</sup> *Id.*; see also TWC § 67.014, which imposes strict requirements concerning how the corporation can hold and/or invest funds allocated to a sinking fund that are not required to be spent in that year.

<sup>18</sup> *Puget Sound*, 44 T.C. at 308. See also TWC §§ 67.0054, 67.007

<sup>19</sup> TWC § 13.002(11).

<sup>20</sup> *Id.*; see also TWC § 67.0051.

<sup>21</sup> TBOC § 22.053.

Windermere's contract with its ratepayers includes provisions intended to implement these principles:

- Windermere's sole purpose is to provide water supply and sewer service to its members.<sup>22</sup>
- Windermere possesses no corporate power that is inconsistent with Internal Revenue Code Section 501(c)(12)(A) and related federal regulations, rulings and procedures.<sup>23</sup>
- Windermere is prohibited from engaging in activities or using its assets for any purpose other than to provide its ratepayers with water and wastewater services.<sup>24</sup>
- Windermere is required to return excess revenues to its ratepayers in direct proportion to the amount of business each transacted.<sup>25</sup>
- Every member is entitled to one vote on each matter submitted to a vote at a members meeting.<sup>26</sup>
- Every member is entitled to vote in every election.<sup>27</sup>
- To be eligible for election or appointment as director, a person must be a member of the corporation.<sup>28</sup>
- Windermere is prohibited from distributing income to members, directors, or officers in these roles.<sup>29</sup>
- Windermere's board is required to adopt and maintain a conflict-of-interest policy designed to promote the business of the Corporation and serve the interests of the membership.<sup>30</sup>

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<sup>22</sup> Bylaws [Ratepayers' Exhibit 27], art. 3, bates FHH 0342.

<sup>23</sup> Bylaws [Ratepayers' Exhibit 27], art. 4, bates FHH 0342.

<sup>24</sup> Bylaws, art. 5 § 3 [Ratepayers' Exhibit 27] at bates FHH 0343 (emphasis added).

<sup>25</sup> *Id.*, emphasis added. This is also required by TWC § 67.008.

<sup>26</sup> Bylaws, art. 7 § 4 at bates FHH 0345.

<sup>27</sup> Bylaws, art. 8 § 6 at bates FHH 0349.

<sup>28</sup> Bylaws, art. 8 § 3 at bates FHH 0347.

<sup>29</sup> Bylaws, art. 5 § 1 [Ratepayers' Exhibit 27] at bates FHH 0343.

<sup>30</sup> Bylaws, art. 8 § 18 at bates FHH 0353.



- Windermere’s directors are prohibited from voting on any matter in which they have a pecuniary interest.<sup>31</sup>
- Windermere’s board is required to present at each annual meeting of members a full and clear statement of the business and condition of the corporation.<sup>32</sup>

Windermere’s bylaws “talk the talk,” but its 2020 rate increase reflects a total disregard for the corporation’s contractual obligations to its ratepayers. Windermere’s appealed rates were intended to and do collect revenues to pay outside legal costs that are not costs to provide water or sewer services or a reasonable reserve for systems maintenance or replacements.<sup>33</sup> The additional revenue generated by the appealed rates has not paid costs of service but has been used to make payments towards the corporation’s undisclosed but ever-increasing legal debt. Neither Windermere’s legal expenditures nor the rate increase implemented to fund them was approved by Windermere’s board as the contract requires

To make matters worse, Windermere now claims it intends to levy some sort of additional charge on its ratepayers to recover outside legal costs, including the costs related to this appeal proceeding. Windermere’s tariff contains an excerpt from the “Assessments” provision in the TRWA’s sample tariff, which appears to allow for the recovery of a shortfall from water and wastewater operations.<sup>34</sup> The TRWA’s sample tariff refers parenthetically to authority conferred

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<sup>31</sup> Bylaws, art. 8 §18 [Ratepayers’ Exhibit 27] at bates FHH0353.

<sup>32</sup> Bylaws, art.12 § 6 at bates FHH 0362

<sup>33</sup> To the contrary, according to Windermere’s board representatives the corporation’s legal expenditures reflect the philosophy of the directors who authorized (and benefitted from) them that volunteer directors should not have personal exposure for actions taken in their capacities as directors or the rank speculation that positions on Windermere’s board would be less attractive if the directors were required to pay their own legal costs. Windermere’s directors are not forbidden from espousing lofty views about how they think the world, or the law, should be changed. Windermere’s contract with its ratepayers, however, forbids the corporation from promoting the directors’ personal world views with corporate resources.

<sup>34</sup> Tariff, Windermere Exhibit WOWSC-02 Attachment JG-1, Section G, Item 11, pg 43 and 44 of 111; see also October 6, 2021 email exchange between Joe Gimenez and Trent Hightower, Ratepayers’ Exhibit HoM2 153, bates 375-376 of 590.

by “Article XVIII of USDA Model Bylaws, Section 1 Rev. 12-2011 or your Corporation’s bylaws or other governing documents.”<sup>35</sup> As Windermere itself has admitted, however, the corporation’s bylaws have no assessment provision and do not empower or authorize the corporation to levy any other sort of surcharge.<sup>36</sup> As discussed fully above, Windermere’s contract with its ratepayers prohibits the corporation from charging its ratepayers, in any form, to recover a cost that is not a cost of service.

The Commission cannot abrogate or impair the contract between Windermere and its ratepayers in this appeal.<sup>37</sup> No one has suggested that the continuance of the contract would adversely affect the public interest. Under the circumstances, that would be a difficult argument to sustain.

Windermere’s ratepayers did not make a voluntary decision to entrust a private nonprofit corporation with authority to operate facilities purchased with their resources or to manage the revenues their facilities generate. The Legislature and the Commission made that choice for them. At the same time, the Legislature established a “comprehensive regulatory system” to ensure that Windermere’s rates, operations and services are just and reasonable.<sup>38</sup> Windermere’s contract with its ratepayers arises from and is an integral part of that “comprehensive regulatory system.” The contract has all the “right” provisions; Windermere simply has not observed them.

The appealed rates are a graphic example. They were approved by vote of a board with a clear and substantial pecuniary interest and have conferred on those directors and a few other members the exclusive benefit of more than a million dollars in legal services at corporate expense.

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<sup>35</sup> October 6, 2021 email exchange between Joe Gimenez and Trent Hightower, Ratepayers’ Exhibit HoM2 153, bates 375-376 of 590.

<sup>36</sup> Ratepayers’ Exhibit HoM2 154, bates 174 and 177.

<sup>37</sup> *Texas Water Comm’n v. City of Ft. Worth*, 875 S.W.2d 332, 335-6 (Tex. App. – Austin 1994, writ denied).

<sup>38</sup> TWC §§ 13.001 et seq.

They recover revenue Windermere is not authorized to collect from its ratepayers in the first instance and may not accumulate under any circumstances. The additional revenue the appealed rates generate funds activities that have nothing to do with the legitimate business of a water supply or sewer service cooperative recognized by 1434a and I.R.C. 501(c)(12)(A), which are activities in which Windermere is expressly prohibited from engaging.

Any assessment, surcharge or other additional charge levied by Windermere or by the Commission to recover Windermere's outside legal costs would be noncompliant for the same reasons.

As discussed more fully below, the board's expenditure of hundreds of thousands in corporate resources to "defend" rates that are blatantly inconsistent with Windermere's contractual obligations to its ratepayers also compels the conclusion that Windermere cannot recover appeal case expenses from its ratepayers.

#### IV. Windermere Has Chosen Not to Inform Itself (or This Tribunal) Concerning the Characteristics of Its Customers

Windermere charges the same single base rate for water and sewer service to all the ratepayers. Windermere acknowledges that they do not gather data from customers to identify what type of customer characteristics defines the potential or existing ratepayer<sup>39</sup>. Board President Joe Gimenez, asserts that "WOWSC's tariff does not request members to clarify whether its members are residential or non-residential"<sup>40</sup>, however Section G of the tariff under Standard Service, plainly states that Standard Service shall;

include Tap fee, all current labor and materials necessary to provide individual metered water or wastewater service, engineering fee, legal fee, customer service inspection fee,

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<sup>39</sup> HOM2- PUC STAFF NO. 19, Page 14

<sup>40</sup> *Id*

and administrative costs and any additional site-specific equipment or appurtenances necessary to provide individual metered water or wastewater<sup>41</sup>

Windermere's tariff stipulates that they shall conduct a service investigation for each service application submitted to the Corporation<sup>42</sup> at which a determination shall be made as to whether the service is a Standard or Non-Standard Service request. Does Windermere charge for services such as a customer service inspection and administrative services without ever assigning the type of customer for the corporation records with unique characteristics?

Section E of the Windermere tariff defines single family and commercial members<sup>43</sup> which delimitates differences between the two types of ratepayers. Windermere's Non-Standard Application requires structures defined as "commercial" to take service as a non-standard<sup>44</sup> customer whereas the tariff's Standard Application requires that the customer agree that it is their responsibility to install, maintain and efficiently operate all components from a point of generation, i.e. house, *emphasis added*, to the collection main of the Corporation. Windermere supports the opinion that the tariff does not require applicants to disclose on any application for service identification as to what type of customer defines their classification such as single-family residence, commercial, industrial or irrigation even though their tariff states otherwise. Whether Windermere gathers this data clearly a variety of characteristics among ratepayers do exist. For example Windermere is aware of a hangar in the Spicewood Airport Area which is a commercial hangar, and which has multiple connections to one meter.<sup>45</sup>

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<sup>41</sup> See Tariff WOWSC Exhibit 02, Section G, #4 Installation Fee, Page 41

<sup>42</sup> See Tariff WOWSC Exhibit 02, Section G page 41 1. Service Investigation Fee.

<sup>43</sup> WOWSC Exhibit 02 JM-2 Section E, Page 30

<sup>44</sup> See Tariff WOWSC Exhibit 02 Section I – Nonstandard Application page 65

<sup>45</sup> Staff - HOM2- PUC STAFF NO. 19, Page 14

Windermere's Expert Witness, Mr. Grant Rabon's argues that Windermere does not have any unique "classes" of customers, that they are all in one class. However, he overlooks characteristics of the purported one class of customers such as the commercial customers, residential customers, irrigation customers and customers who share service. He states that all Windermere customers are in the same subdivisions, have similar water uses, are all non-commercial domestic use customers and are all members of the water supply corporation<sup>46</sup>. Mr. Rabon clearly is unaware that Windermere encompasses several subdivisions which all have unique characteristics identified as commercial ratepayers, residential ratepayers, irrigation properties, and multiple users to one tap.

Windermere President, Joe Gimenez on cross examination at the Hearing on the Merits testified that Windermere does not know who is sharing water service and wastewater service.

Page 345

- 1 Q And it let's us know that although the board no  
2 longer approves this practice, there are Ratepayers on  
3 the system with multiple connections to one meter,  
4 excuse me, or one grinder pump. Correct?  
5 A Well, let me -- let me read that response --  
6 Q Sure, absolutely.

Page 346

- 1 Q (BY MS. ALLEN) The response is that the  
2 Company does not maintain a list of these properties. I  
3 hear that. How many of these properties are there where  
4 there is a single meter and multiple users?  
5 A I can't tell you. I don't know that.  
6 Q Does the Company know that?  
7 A I would -- I would have to check with our  
8 manager to see if he has those records.  
9 Q And these companies with multiple connects to  
10 one meter or one grinder pump that are described in this  
11 response, that's a situation where there is -- the  
12 Company is collecting a single charge for a meter or a  
13 grinder pump for multiple users. Correct?  
14 A Ma'am, I do not know the mechanics of how that

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<sup>46</sup> Rabon Supplemental Testimony lines 8-11 Page 7 (Bates 007)

15... works.<sup>47</sup>

Clearly Windermere is aware that ratepayers are sharing utility service in violation of the tariff<sup>48</sup>. Not knowing the type of customers and their diversity which identifies their unique characteristic raising a concern Windermere is ill-informed of the very customers they serve.

V. PUC Staff's Recommended Rates Should Be Approved.

A. Windermere's Outside Legal Costs are Properly Disallowed from the Revenue Requirement.

1. Not costs of service.

Windermere has the burden to prove that the appealed rates recover only costs that are reasonable and necessary to provide service to its customers.<sup>49</sup> Not even Windermere's representatives have suggested that Windermere's outside legal costs have anything to do with providing water or wastewater service. To the contrary, at the time of the rate increase Windermere's board drew a clear distinction between the costs necessary to continue to provide clean drinking water and to effectively treat effluent, on the one hand, and the outside legal costs, on the other hand.<sup>50</sup> The board took care to emphasize even then that the outside legal costs were distinct from and far greater than the costs of service.

2. Not reasonable and necessary; not beneficial for the ratepayers.

Windermere has the burden to prove that the appealed rates recover only its reasonable and necessary expenses.<sup>51</sup> Even if Windermere were able to articulate some theory by which its outside

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<sup>47</sup> HOM Cross Examination Gimenez, Day 2 12/2/2021, Page 345 lines 1-6, Page 346 lines 1-15

<sup>48</sup> See Tariff WOWSC Exhibit 02, Section I, Notice Of Prohibition of Multiple Connections to a Single Tap, Page 81-82

<sup>49</sup> 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.

<sup>50</sup> Ratepayers' Exhibit 18 bates 005.

<sup>51</sup> 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.

legal costs could be considered costs of service (which it has not), they were neither reasonable nor necessary.

In the more than 3 years since Windermere's board approved the appealed rates, Windermere has advanced several different explanations as to how the board calculated those rates. Each version is both internally inconsistent and inconsistent with every other version. The common thread from one version to the next, however, is the intention to recover Windermere's costs for outside legal services in lawsuits and other matters arising from the 2016 land sale to then director Dana Martin. For years, Windermere's nonlawyer hearing representatives suggested that the corporation had substantial exposure in connection with these matters. They hinted that the corporation's very existence might be at stake. They claimed the board was justified in spending hundreds of thousands of dollars in corporate funds and credit in connection with these matters.

Even the meager evidence the ALJs allowed into the record at the December 2020 hearing belied that claim. The evidence showed that no one had ever sought any recovery against the corporation in any of the lawsuits. To the contrary, both the TOMA Integrity plaintiff and the Double F plaintiffs sought to require Martin, an unfaithful corporate fiduciary, to return to the corporation the property she had misappropriated. In addition, the Double F plaintiffs sued a small group of current and former directors to recover damages for the benefit of the corporation. Neither Martin nor her entity Friendship Homes ever asserted a claim against the corporation. Well before the rate increase, both of them gave Windermere a full and final release extinguishing any potential exposure the company might have had.

After the December 2021 hearing, Ratepayers received documents making it apparent that both Windermere's board and its general counsel Lloyd Gosselink were aware the corporation had no exposure in connection with these proceedings. The evidence at the March 22, 2023 hearing

showed that shortly after the rate increase Windermere's board president Joe Gimenez warranted and represented to CoBank on behalf of the company that there was *no pending proceeding* to which the company was a party which, even if adversely determined, *might have a material adverse effect* on the financial condition, operations, properties, profits or business of the company, and no such proceedings were threatened or contemplated.<sup>52</sup> Windermere made that same warranty and representation in connection with each of CoBank's 3 extensions of credit.<sup>53</sup>

Shortly after the July 2020 Credit Agreement, Windermere's general counsel likewise warranted and represented to CoBank that the company was involved in the Double F lawsuit, a lawsuit against the Texas Attorney General and this rate appeal and that *none of these proceedings, even if adversely decided, could have a material adverse effect on the company's condition, financial or otherwise, existing operations, properties or business, or on its ability to perform its obligations under the loan documents.*<sup>54</sup>

By opinion letter dated March 24, 2021, furnished in connection with CoBank's third extension of credit, Windermere's general counsel warranted and represented that the company was involved in the Double F lawsuit and the rate appeal and that *neither of those proceedings, even if adversely decided, could have a material adverse effect on the company's condition, financial or otherwise, existing operations, properties or business, or on its ability to perform its obligations under the loan documents.*<sup>55</sup>

It has now been conclusively established that the member lawsuits and PIA requests posed no risk to the company (financial or otherwise) or its operations, and that Windermere's board

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<sup>52</sup> Ratepayers' Exhibit HoM2 134, p. 4, paragraph 4.2, at bates 2521; Testimony of Joe Gimenez, Transcript at p. 757, line 14 – p. 758, line 1.

<sup>53</sup> Ratepayers' Exhibit HoM2 134, p. 4, article 4, at bates 2521 (emphasis added); Testimony of Joe Gimenez, Transcript at p. 753, line 17 – p. 754, line 21.

<sup>54</sup> Ratepayers' Exhibit HoM2 147 at bates 5-6 (emphasis added).

<sup>55</sup> Ratepayers' Exhibit HoM2 151, pp. 2-3 (emphasis added); Testimony of Joe Gimenez, Transcript at p. 753, line 3 – p. 756, line 3.



never believed they did. Windermere’s consultant Grant Rabon demonstrated through a financial analysis in late 2020 – many months after the rate increase -- that the board’s management of legal costs for the TOMA Integrity litigation, the Double F litigation and the rate appeal had placed “significant financial strain” on the utility’s financial condition.<sup>56</sup> Mr. Rabon opined before the board approved the CoBank loans that as a result of these decisions, Windermere did not have the wherewithal to comply with CoBank’s DSCR loan covenant.<sup>57</sup> Mr. Rabon also concluded that Windermere’s “Days Cash On Hand” or DCOH had been declining significantly as a result of the board’s legal spending.<sup>58</sup> Mr. Rabon projected further financial deterioration despite the rate increase if the board’s legal spending continued.<sup>59</sup>

Mr. Rabon was not aware when he performed his financial analysis of just how financially devastating the board’s legal spending had actually been. He did not know that Windermere carried forward from 2019 more than \$121,000 in legal debt it did not have the resources to pay. Windermere’s board president told him it was a “timing difference,” i.e., that the debt was paid in 2020.<sup>60</sup> It was not. None of Windermere’s financial reports disclosed that liability.<sup>61</sup> Mr. Rabon’s proposed 2020 budget for “Legal” of \$245,000 did not include the company’s existing legal debt.<sup>62</sup> Accordingly, the board’s reckless legal spending had placed Windermere in a much worse financial position than even Mr. Rabon’s analysis reflected.

No reasonable, prudent and properly motivated board would have authorized the expenditure of unlimited corporate funds and credit for legal costs in these circumstances. That likely would not have been a prudent strategy if these lawsuit and PIA requests had threatened the

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<sup>56</sup> Ratepayers’ Exhibit HoM2 135 at bates 2425.

<sup>57</sup> Id. at bates 2437.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Transcript at p. 630, line 13 – p. 631, line 13; Ratepayers’ Exhibit HoM2 135 at bates \_\_\_\_.

<sup>61</sup> Transcript at p. 637, line 17 – p. 640, line 1.

<sup>62</sup> Ratepayers’ Exhibit HoM2 135 at bates \_\_\_\_.

company's very existence; it certainly was not a prudent strategy where, as here, the company had no risk at all. Further, these proceedings sought to recover land and damages from individual fiduciaries and to hand them over to the company, free of charge. A reasonable, prudent and properly motivated board might well have directed its lawyers that the company would take a neutral stance.<sup>63</sup> Such a board would not have emptied the company's coffers and plunged it into undisclosed legal debt greater than its institutional debt.

Such a board would not have obligated the company to expend unlimited funds and credit to furnish legal services for the only parties who needed them: the individual directors who were accused of misconduct and had personal exposure for a potentially large amount of money. The company had no obligation to furnish these individuals with legal services.<sup>64</sup> A majority of the board that decided it were motivated by self-interest; they were prohibited by Windermere's bylaws from even casting a vote. As Mr. Rabon's analysis made clear, the company did not have the resources to fund such a commitment. There was no source from which the company would be able to obtain reimbursement.<sup>65</sup> An ad hoc, ill-considered rate increase would be just asking for costly trouble, and of course that is just what happened.

It is inconceivable that a reasonable, prudent and properly motivated board would have appropriated unlimited corporate resources for outside legal service in these circumstances. This record is devoid of evidence suggesting otherwise.

The company did not need to spend a single corporate dime in connection with any of these matters and the enormous expenditures it made only decreased the likelihood that there would be

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<sup>63</sup> Testimony of Joe Gimenez, Dec. 2, 2021 Transcript at pp. 298-9.

<sup>64</sup> As discussed above, the advancement of legal costs in these circumstances was arguably prohibited by Windermere's bylaws.

<sup>65</sup> The company could not recover its legal costs from the plaintiffs in the lawsuits and knew it would not be reimbursed by Windermere's insurer without a costly legal fight.

a recovery for the corporation to enjoy. Every dollar the company has spent has been devoted to preventing the company's recovery of its land from those who misappropriated it and to preventing the corporation's recovery of compensation from the individuals who precipitated the loss.<sup>66</sup> There is no evidence that either the company or its 263 other ratepayers got any benefit from that.

The beneficiaries were the eight individual who were being sued personally and the individual who was at risk of losing the land if the plaintiffs prevailed.<sup>67</sup> Four of them were sitting directors who voted to require the company to pay all of the legal costs its cash flow would cover and to be obligated to the law firms for the unpaid balance.<sup>68</sup> Three of the parties with exposure later voted as directors to recover the company's outside legal costs from the ratepayers through a rate increase.<sup>69</sup> Windermere's bylaws prohibited these directors from voting on matters in which they had a pecuniary interest, but they did it anyway.<sup>70</sup>

As a result of those votes, the parties with personal exposure did not have to engage counsel or pay out of pocket. They enjoyed the benefit of more than a million dollars' worth of legal services to prevent themselves from being held personally accountable to the corporation and its other members.<sup>71</sup> There is no evidence to suggest the company's enormous legal expenditures conferred any benefit on Windermere's 263 other members.

### 3. Not Actually Realized or Anticipated With Reasonable Certainty.

Windermere must show the appealed rates collect only expenses actually realized or which can be anticipated with reasonable certainty.<sup>72</sup> Windermere has admitted its outside legal costs

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<sup>66</sup> Testimony of Joe Gimenez, Transcript (Dec. 2, 2021), p. 297, lines 17-23.

<sup>67</sup> Testimony of Joe Gimenez, Transcript at p. 758, line 2 – p. 759, line 3.

<sup>68</sup> Testimony of Joe Gimenez, Transcript at p. 760, lines 3-11.

<sup>69</sup> Testimony of Joe Gimenez, Transcript at p. 760, lines 12-18.

<sup>70</sup> Bylaws, art. 8 § 18 at p. 12 [Ratepayers' Exhibit 27 at bates FHH0353].

<sup>71</sup> Testimony of Joe Gimenez, Transcript at p. 760, line 19 – p. 761, line 7.

<sup>72</sup> 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.

could not be anticipated with reasonable certainty.<sup>73</sup> Windermere advised its financial consultant in 2020 that it had no projections for future legal costs.<sup>74</sup>

Windermere's claim that it had some "minimum payment plan" with the law firms that allowed it to quantify its obligation finds no evidentiary support in this record. Windermere admits there are no minutes reflecting board approval of any such arrangement.<sup>75</sup> Windermere's written engagements with its attorneys negate the existence of any such arrangement.<sup>76</sup> Windermere never told CoBank about any alleged "minimum payment" arrangement. Windermere's board president misled the CoBank representative in May 2020 about the amount of Windermere's legal debt<sup>77</sup> and advised that he "hope(s) to pay \$15-20,000 per month . . . to get out of debt."<sup>78</sup> He allowed CoBank's representative to assume that "the rate increase is covering much of what's been invoiced,"<sup>79</sup> which was completely false. In fact, Windermere's legal debt was increasing on a monthly basis.<sup>80</sup> The unpaid legal debt for 2020 alone was \$264,592.72, which exceeded the amount the company paid to the law firms that year by almost \$30,000.<sup>81</sup> As noted above, Windermere's board never advised its financial consultant of any "minimum payment" arrangement.

Even if there were such a "minimum payment" arrangement, it would not quantify the amount for which Windermere's board obligated the company for outside legal services. The

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<sup>73</sup> Ratepayers' Exhibit HoM2 132 at Ratepayers Page 3.

<sup>74</sup> Transcript at p. 632, lines 2-10; Ratepayers' Exhibit HoM2 132 at Bates Ratepayers Page 3.

<sup>75</sup> Ratepayers' Exhibit HoM2 150 at Bates Ratepayers Page 1.

<sup>76</sup> The engagement letters are collected in Ratepayers' Exhibit HoM2 149. The supplemental engagement letter dated May 26, 2020 (Bates Ratepayers Page 2-4) does not mention any "minimum payment" arrangement. To the contrary, it carries forward the obligations from the original engagement, including the obligation to pay each invoice in full upon receipt. See Bates Ratepayers Page 6.

<sup>77</sup> He did not mention the \$121,000 still unpaid for 2019.

<sup>78</sup> May 12, 2020 email Gimenez to DeLuca, Ratepayers' Exhibit HoM2 150 at Bates Ratepayers Pages 31-2.

<sup>79</sup> May 13, 2020 email DeLuca to Gimenez, Ratepayers' Exhibit HoM2 150 at Bates Ratepayers Page 32.

<sup>80</sup> See Ratepayers' Exhibit HoM2 144A.

<sup>81</sup> Id.

amounts paid (and reported on Windermere's financials) were consistently far less than the amounts for which the company was obligated.<sup>82</sup>

B. Staff's Recommended Rates Are Just and Reasonable.

Staff's recommended rates are calculated based on a revenue requirement that does not include the outside legal costs. For the reasons set forth above, this is appropriate.

Staff adjusted Windermere's proposed revenue requirement to remove the disallowed legal costs and to account for actual "other revenue." Otherwise, however, Staff relied on the costs reflected in the TRWA rate sheet Windermere furnished as Attachment Staff 1-1. Until 60 days or so ago, Windermere consistently portrayed these costs as the components of the revenue requirement used to calculate the appealed rates.<sup>83</sup> Windermere embraced the TRWA's allocation of fixed and variable costs.<sup>84</sup> PUC Staff witness Anna Givens confirmed that assuming Windermere provided accurate and reliable information about its proposed revenue requirement, then recalculated rates based on an adjusted revenue requirement that removes disallowed expenses should not impair the company's financial integrity.<sup>85</sup>

Quite recently, Windermere has sponsored other, conflicting versions of its rate calculation. Windermere now sometimes claims that the "absolute minimum" amount that had to be recovered through the appealed rates for 2020 was not \$576,192, but \$674,905.75.<sup>86</sup> No one knows the components of that "absolute minimum" amount because Windermere never furnished

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<sup>82</sup> Compare Ratepayers' Exhibit HoM2 144A with Ratepayers' Exhibit HoM2 127 at pp. 34 of 227 – 36 of 227 (Bates Ratepayers Pages 34-6), Ratepayers' Exhibit HoM2 81 (Bates Ratepayers 178-9), Ratepayers' Exhibit HoM2 119 at pp. 128 of 227 – 129 of 227 (Bates Ratepayers Pages 38-9) and Ratepayers' Exhibit HoM2 121 at pp. 211 of 227 – 213 of 227 (Bates Ratepayers Pages 73-5).

<sup>83</sup> See, e.g., Ratepayers' Exhibit HoM2 139 at bates 003-4 and 007; Ratepayers' Exhibit HoM2 140, Bates Ratepayers Page 1.

<sup>84</sup> Ratepayers' Exhibit HoM2 140 at Bates Ratepayers Page 8-9.

<sup>85</sup> Testimony of Anna Givens, Transcript at p. 880, line 11 – page 881, line 6.

<sup>86</sup> Ratepayers' Exhibit HoM2 138.

any information regarding them.<sup>87</sup> Windermere certainly has not proven that its revenue requirement should be \$674,905.

Windermere now sometimes claims its board did not use any revenue requirement to calculate the appealed rates, but just bumped up the base rates enough to generate approximately \$18,000 in additional monthly cash flow indefinitely.<sup>88</sup> The accepted application of the cash needs rate method, however, requires development of a revenue requirement.<sup>89</sup> PUC Staff's recommended rates do not apply Windermere's "back of the envelope" rate design, nor should they.

Windermere now sometimes claims its board designed the appealed rates to recover a budgeted "shortfall" based on the 2020 budget.<sup>90</sup> Budget data can be used to establish cost of service for rate-setting purposes. However, the utility must prove the data is a reasonable approximation of the actual costs of providing services and that the budgeted costs are reasonable and necessary to provide service to customers.<sup>91</sup> To meet this burden of proof, the utility must provide specific evidence of cost increases that it will encounter in the future for specific items.<sup>92</sup> Speculation that the future will look like the past and inflation will occur is not evidence of a known and measurable change.<sup>93</sup>

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<sup>87</sup> Testimony of Anna Givens, Transcript at p. 884, line 21 – p. 886, line 25.

<sup>88</sup> Testimony of Anna Givens, Transcript at p. 881, lines 7-23, discussing WOWSC response to Ratepayers Amended 6-4.

<sup>89</sup> Testimony of Grant Rabon, Transcript at p. 613, line 21 – p. 615, line 1.

<sup>90</sup> Testimony of Joe Gimenez, Transcript at p. 780, lines 7-11.

<sup>91</sup> 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.

<sup>92</sup> Proposal for Decision, Application of Deer Creek Ranch Water Co., LLC, to Change its Water Rates and Tariff under Certificate of Convenience and Necessity No. 11241 in Travis and Hays County, TCEQ Docket No. 2009-0929-UCR, 2010 WL 2690171 at \*5.

<sup>93</sup> *Id.*

With regard to legal costs, Windermere acknowledges its board could not predict with any certainty at all what amount the company might incur for 2020 and beyond.<sup>94</sup> Windermere's board president admitted on cross-examination that there was no evidence in the record from which to conclude that the budgeted costs for other categories reflected adjustments for known and measurable changes.<sup>95</sup>

After disallowance of the cost component for "Legal," the TRWA revenue requirement comprised of cost components pulled from Windermere's 2019-year end financials is the only cost data for which there is any evidence as to the "just and reasonable" standards. Windermere has acknowledged that if its outside legal costs are not included in the TRWA revenue requirement, then its 2020 rates would be lower than the rates in effect before the 2020 rate increase.<sup>96</sup> Staff's recommended rates are consistent with this analysis.

C. Any Jeopardy to Windermere's Financial Integrity is the Result of Board Mismanagement, not Staff's recommended rates.

In a rate case involving a public utility, the Commission is required to "fix its overall revenues at a level that will: . . . preserve the financial integrity of the utility."<sup>97</sup> As Windermere has often reminded, it is not a public utility and the requirements of Section 13.183 do not apply.

When the Commission sets rates under 13.043, it must use a "*methodology* that preserves the financial integrity of the retail public utility." Tex. Water Code § 13.043(j) (emphasis added). A methodology is not something that is unique to an individual case. Rather, it is a "body of methods,

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<sup>94</sup> E.g., Testimony of Mike Nelson, Transcript at p. 728, lines 6-22.

<sup>95</sup> Testimony of Joe Gimenez, Transcript at p. 780, line 7 – p. 784, line 5.

<sup>96</sup> Ratepayers' Exhibit HoM2 143, page 199 of 590 (Bates Ratepayers Page 4); Rebuttal Testimony of Joe Gimenez, WOWSC Exhibit 3, Attachment JG-39, page 2 of 6; Testimony of Mike Nelson, Transcript at p. 709, line 15 – p. 710, line 9.

<sup>97</sup> TWC § 13.183(a)(2).

rules and postulates employed by a discipline; a particular procedure or set of procedures” that are applied evenly to all cases.<sup>98</sup>

In the exercise of its appellate jurisdiction, the Commission is not required to fix a utility’s overall revenues at a level that will preserve the financial integrity of a utility.<sup>99</sup> Considerations of financial integrity cannot be treated as a trump card that overrides the utility’s obligation to comply with the standard requirements for proving its water and sewer rates.<sup>100</sup> A CCN is not a guarantee that “every inefficient or imprudent expenditure will be passed on to the consuming public.”<sup>101</sup>

Mr. Rabon’s financial analysis shows that Windermere’s financial woes are the direct result of its board’s authorization for unlimited corporate legal spending.<sup>102</sup> Without the unlimited legal spending, Windermere’s rates could have been lowered in 2020. CoBank’s second and third extensions of credit (and their associated debt service, reserve and DSCR requirements) might not have been needed. Mr. Rabon was well-qualified to advise Windermere’s board of directors on steps to mitigate the consequences of the board’s legal spending, but none of Windermere’s directors asked for any guidance.<sup>103</sup>

As a result of the board’s mismanagement, Windermere had more than \$121,000 in legal debt for 2019 that was not reported anywhere on its financials or tax filings and was not included in its 2020 budget.<sup>104</sup> The legal debt increased over the course of 2020 by \$264,592, for a total

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<sup>98</sup> Proposal for Decision, Appeal of Water and Sewer Rates Charged By the Town of Woodloch CCN Nos. 12312 and 20141, Docket No. 42862, 2015 WL 7273159, at \*13.

<sup>99</sup> Compare Section 13.043(j) with Section 13.183(a)(2).

<sup>100</sup> *Id.*

<sup>101</sup> Pub. Util. Comm’n of Texas v. Texas Indus. Energy Consumers, 620 S.W.3d 418, 424 (Tex. 2021).

<sup>102</sup> Testimony of Grant Rabon, Transcript at p. 683, line 24 – p. 684, line 13.

<sup>103</sup> Testimony of Grant Rabon, Transcript at p. 689, lines 4-10.

<sup>104</sup> Testimony of Grant Rabon, Transcript at p. 626, line 5 – p. 627, line 25; page 638, line 7 – page 639, line 3; page 680, line 7 – page 681, line 5. See also Ratepayers’ Exhibit HoM2 144A (Summaries) at page 1; HoM2 125 (2019 financials), HoM2 118 (2020 financials), HoM2 123 (2020 tax filing), HoM2 124 (2021 financials), and HoM2 120 (2022 financials).



legal debt at year-end of \$386,211. Windermere paid less than half the costs it incurred for legal services rendered in 2020.

Windermere was insolvent at the end of 2019 but no one other than the board knew it. PUC Staff's recommended rates had nothing to do with it. None of this was reported in Windermere's financial reports or tax filings. As a result, Windermere's financial records and tax filings failed to accurately reflect Windermere's results of operations.<sup>105</sup> This violated the loan covenants of the CoBank Credit Agreement.<sup>106</sup> PUC Staff's recommended rates had nothing to do with this.

The evidence also reflects that Windermere made substantial withdrawals from its "MM" account to pay legal costs.<sup>107</sup> The proceeds from 2 CoBank extensions of credit were wired into Windermere's operating account. The first (\$150,000) was transferred almost immediately to the "MM" account and comingled with those funds. Thereafter, numerous transfers from the "MM" account were made to facilitate the payment of legal costs. The second (\$300,000) was left in Windermere's operating account for months. During that time, numerous payments for legal costs were made. In January 2022, Windermere transferred only \$259,000 of the \$300,000 to the "MM" account. Since that time, there have been numerous transfers from the "MM" account back into the operating account and numerous legal payments. PUC Staff's recommended rates did not cause this.

It is undisputed that CoBank has prohibited Windermere from using loan proceeds to pay legal costs. It appears Windermere has done just that. PUC Staff's recommended rates had nothing to do with this.

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<sup>105</sup> Id.

<sup>106</sup> Testimony of Grant Rabon, Transcript at p. 658, line 12 – p. 664, line 4; Ratepayers' Exhibit HoM2 134 at pp. 3-9.

<sup>107</sup> These are reflected on the General Ledger and bank records contained within Attachment Ratepayers 8-24, which were admitted into evidence separately by year. For the ALJs convenience, highlighted copies of the referenced pages are attached hereto.

These loans were made to fund capital improvements, but there is scant evidence that Windermere disbursed these loan proceeds to pay costs for capital improvements. To the contrary, the evidence shows that Windermere has used these funds to pay legal costs and operating expenses. According to Mr. Rabon, a utility's inability to pay what the board considers to be current operating expenses from current income would be a big red flag.<sup>108</sup> A prudent board would have a plan to address it.<sup>109</sup> Windermere's board did not; its plan was to obligate the company for ever-increasing and unreported legal debt far beyond the company's ability to pay. PUC Staff's recommended rates had nothing to do with this.

Based on Windermere's recent supplements and amendments to discovery, it appears Windermere's board also mismanaged the rate increase. In communications with TRWA after the rate appeal was filed, Windermere's board claimed it had not understood at the time of the rate increase the methodology TRWA used to establish the water and sewer revenue requirement.<sup>110</sup> TRWA advised in October 2020 that the TRWA rate sheet focuses on the cash need of the system by looking "at the systems audit and gallons of water sold to the members for the year." TRWA also advised that its rate sheet "lets [sic] you look or ad [sic] any known adjustments, system upgrades, legal, tank repairs, treatment plant upgrades, etc."<sup>111</sup>

Windermere's board knew it did not have a systems audit at the time of the rate increase and did not look at gallons of water sold.<sup>112</sup> The board knew it did not add any "known adjustments" to the revenue requirement. Windermere's hearing representative testified the board didn't know at the time whether its "back of the envelope" calculation would even work.<sup>113</sup> Based

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<sup>108</sup> Testimony of Grant Rabon, Transcript at p. 644, lines 11-18.

<sup>109</sup> Id.

<sup>110</sup> Ratepayers' Exhibit HoM2 155 at Ratepayers page 1.

<sup>111</sup> Id. at Ratepayers page 3.

<sup>112</sup> The board had not gathered or reviewed any data on gallonage usage and revenues for purposes of calculating the rates. The bookkeeper gathered it in 2020 in order for Windermere to respond to Staff's discovery requests.

<sup>113</sup> Testimony of Mike Nelson, Transcript at 733, lines 1-21.

on its recent discovery updates, Windermere's board claims it also knew there was no way to keep the company afloat with the appealed rates.<sup>114</sup>

On December 3, 2020, Grant Rabon made a proposal to Windermere's board to perform a comprehensive cost of service study, to develop a revenue requirement and to design "fully vetted" rates that would "ensure the financial sustainability of the utility."<sup>115</sup> Rabon committed to perform the engagement for a "not-to-exceed price of \$22,500."

The board did not accept Rabon's proposal. Instead, it spent over \$500,000 of company resources trying to "defend" rates that recover a revenue requirement Windermere claims is not even close.

D. A Surcharge is Not Permitted Here.

Windermere admits its governing documents do not authorize it to levy a surcharge on its customers and do not authorize it to collect – in any form – for costs that are not just and reasonable.<sup>116</sup>

The only authority for the Commission to impose a surcharge is found in 13.043(e). It authorizes a surcharge if needed to recover "lost revenues." Anna Givens testified there are no "lost revenues" in this case that could be recovered through a surcharge.<sup>117</sup>

VI. Windermere Should Not Recover Any Case Expenses for This Appeal.

A. Anna Given's Undisclosed Testimony Should Be Stricken.

The testimony given by Anna Givens during Ms. Mauldin's examination suggesting that Windermere should recover some \$370,000 or so in case expenses should be stricken. That testimony was not disclosed in prefiled testimony and was a complete surprise to

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<sup>114</sup> E.g., Ratepayers' Exhibit HoM2 138.

<sup>115</sup> Ratepayers' Exhibit H0M2 129.

<sup>116</sup> Ratepayers Exhibit HoM2 154.

<sup>117</sup> Transcript at 877-8.

Ratepayers. Had Ratepayers had any inkling that Ms. Givens intended to opine about an award of case expenses, they would have allocated their time during the very short one-day hearing in a very different manner. To allow the surprise testimony under these circumstances deprived Ratepayers of an opportunity to properly prepare for the hearing and to allocate their time appropriately.

Further, Ms. Givens' testimony establishes that she does not have the experience to testify regarding expenses in a rate appeal under Section 13.043. She could not identify a single water supply corporation she has ever worked with. She thought Bear Creek SUD was a water supply corporation. She wrongly believes that TWC § 13.183, which requires the Commission to set overall revenues to preserve the utility's financial integrity, applies to water supply corporation. She has not reviewed Windermere's governing documents and did not know that a water supply corporation is governed by bylaws that determine what the corporation can and cannot do.<sup>118</sup> Beyond a general reference to Rule § 24.44, she did not identify any criteria she considered applicable to her analysis. She did not identify any criteria set forth in Rule § 24.44 that she claims to have applied.

Ms. Givens' testimony established that she has not given enough attention to the filings or testimony in this case to render an opinion concerning case expenses. She was completely unaware of Windermere's recent supplements and amendments proposing an entirely new revenue requirement, a budgeted cost revenue requirement or no revenue requirement at all, depending on who is asked. She was completely unaware that Windermere's ratepayers could have had a professional cost of service study and fully-vetted rates in December 2020 for a "not to exceed" price of \$22,500.

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<sup>118</sup> Transcript at p. 870, line 3 – p. 871, line 25.

B. Jamie Mauldin's Testimony Should be Stricken.

While everyone acknowledges that Rule § 24.44 does not apply to this rate appeal, PUC Staff insists on using it for “guidance” in this case. Section (b) identifies the information the utility must provide in connection with any request for an award of expenses. Section (c) sets forth certain factors the Commission *must* determine before making any award. Of all of the witnesses who testified at the hearing, Jamie Mauldin was probably the only one with the credentials and personal knowledge required to testify about those items.

However, Ratepayers were not allowed to cross-examine Ms. Mauldin concerning the items listed in Section (b) or the factors listed in Section (c). Accordingly, all of her testimony should be stricken.

C. An Award to Windermere is Unjust.

As discussed in prior briefing and throughout this initial brief, for the better part of 3 years, Windermere portrayed that TRWA calculated the appealed rates using its cash needs rate sheet and the cost data from Windermere's 2019 year end financials. That is simply not true, but it took years of an appeal and hours of work to discover it.

Even now, no one knows how Windermere's board calculated the appealed rates or what cost data (if any) it relied upon. Windermere no longer sponsors the only calculation it has ever furnished. Windermere's hearing representative was unable to provide any other calculation. Windermere no longer sponsors the only revenue requirement it has ever furnished. It can tell us what its revenue requirement is not, but not what its revenue requirement should be.<sup>119</sup> Windermere no longer relies on the only cost data it has ever furnished, yet it has not furnished any other cost data for staff to analyze.<sup>120</sup>

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<sup>119</sup> Ratepayers' Exhibit H0M2 138.

<sup>120</sup> Testimony of Anna Givens, Transcript at 885-6.

Even Staff Witness Anna Givens admitted that it is not good public policy or in the public interest to award case expenses in these circumstances. There is no evidence suggesting otherwise.

At best, Windermere sponsored for years proposals that had no reasonable basis in law, policy or fact and were not warranted by an reasonable argument for the extension, modification, or reversal of commission precedent. The expenses associated with those efforts were excessive and unwarranted.

## VII. Conclusion

WHEREFORE, premises considered, Ratepayers respectfully request that this proceeding move forward to conclusion as aforesaid, and that Ratepayers be awarded such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

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**Certificate of Service**

I hereby certify that, unless otherwise ordered by the Presiding Officer, notice of this filing was provided to all parties of record via electronic mail on April 11, 2023.

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