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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

**RATEPAYER REPRESENTATIVES' RESPONSE TO WOWSC'S MOTION TO
ADMIT EXHIBITS PURSUANT TO THE RULE ON OPTIONAL COMPLETENESS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

THE REPRESENTATIVES OF THE RATEPAYERS OF WINDERMERE OAKS WATER SUPPLY CORPORATION ("Ratepayers") file this RESPONSE TO THE WOWSC'S MOTION TO ADMIT EXHIBITS PURSUANT TO THE RULE OF OPTIONAL COMPLETENESS and would show as follows.

Timeliness of Filing

Ratepayers received Windermere's Motion on April 6, 2023. The deadline for response is 5 business days following the date of receipt.¹ April 7, 2023, was not a business day. Accordingly, this Response is timely filed.

Grounds for Denial of Motion

As discussed extensively during the hearing, the Rule 107, T.R.E.,² commonly referred to as the "Rule of Optional Completeness," creates a very limited opportunity for an adverse party to introduce *otherwise inadmissible evidence* on the same subject that is necessary to fully and fairly explain properly admitted evidence. When a party opens the door by introducing only a part of a conversation, writing, act or declaration, the Rule permits the adverse party

¹ 16 Tex. Admin. Code §§ 22.77 & 22.78.

² Pursuant to 16 Tex. Admin. Code § 22.221(a), the Texas Rules of Evidence shall be followed in all contested cases.

to introduce otherwise inadmissible evidence when necessary to prevent the fact finder from being confused or misled.³ The burden is on the proponent of the evidence to show it is truly necessary to explain properly admitted evidence.⁴ If the proponent fails to show that the admitted evidence creates a false or misleading impression, then the proponent's "completeness" evidence is not admissible under Rule 107.⁵

Neither Rule 106 nor Rule 107 authorized the admission of evidence following the completion of the hearing. Rule 106 requires that if the so-called "completeness" evidence is the remainder of a writing or a related writing, then it must be offered at the same time the allegedly incomplete evidence is offered.⁶ If Windermere believed any other evidence were required to prevent the fact finder from being confused or misled, it was obliged to make its case during the hearing as to each item of evidence it wished to offer for "completeness" and to make its witnesses available for cross-examination on the evidence it wished to offer.

Windermere has made no effort to show that any of its "Optional Completeness" exhibits is admissible under this standard, and they are not. Moreover, to allow Windermere to supplement the record now with its self-serving discovery responses and related materials would deprive Ratepayers of due process, as they have no opportunity to cross-examine or to otherwise test the supplemental evidence.

With respect to each of Windermere's proposed "Optional Completeness" exhibits:

WOWSC - 35 OC: This purports to "complete" Staff HoM2 Exhibit 4, which is the WOWSC's supplemental response to Staff 1-4. That response is required to have been complete and accurate, and Windermere does not suggest it was not. Page 1 of the proposed

³ *Cerda v. State*, 557 S.W.2d 954, 957 (Tex. Crim. App. 1977).

⁴ See, e.g., *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011).

⁵ *Walters v. State*, 247 S.W.3d 204, 217-18 (Tex. Crim. App. 2007); see also *Allridge v. State*, 762 S.W.2d 146, 153 (Tex. Crim. App. 1988) (defendant's self-serving hearsay confession not admissible where the confession offered by the State did not mislead the jury or leave the jury with an incomplete version of the facts).

⁶ See Rule 106, T.R.E., which provides the remainder evidence is to be offered *at the same time*; see also *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App. – Texarkana, writ denied) ("remainder" evidence must be offered at the same time, even if it interrupts the opponent's case).

exhibit is a duplicate of the WOWSC's supplemental response to Staff 1-4; this is duplication, not optional completeness. The remaining pages are Windermere's self-serving responses to Ratepayers' discovery requests on a different topic; they are not necessary to explain Windermere's supplemental response to Staff 1-4. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 36 OC: This purports to “complete” Staff HoM2 Exhibit 14, which is the WOWSC's response to Staff 6-7. That response is required to have been complete and accurate, and Windermere does not suggest it was not. Page 1 of the proposed exhibit is a duplicate of the WOWSC's response to Staff 6-7; this is duplication, not optional completeness. The remaining page is Windermere's self-serving response to Ratepayers' discovery request on a different topic; it is not necessary to explain Windermere's response to Staff 6-7. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 37 OC: This purports to “complete” Staff HoM2 Exhibit 37, which is the WOWSC's response to Staff 5-14. That response is required to have been complete and accurate, and Windermere does not suggest it was not. Page 1 of the proposed exhibit is a duplicate of the WOWSC's response to Staff 5-14; this is duplication, not optional completeness. The remaining page is the same as Staff HoM2 Exhibit 45; this is duplication, not optional completeness.

WOWSC – 38 OC: This purports to “complete” Ratepayers Exhibit HoM2 121, which is the WOWSC's general ledger for 2022, which speaks for itself and does not require further explanation. Page 1 of the proposed exhibit is Windermere's self-serving and inaccurate response to Ratepayers' 8-24. The remaining pages appear to be the entirety of Windermere's Supplemental Attachment Ratepayers 8-24, which includes 300 pages of miscellaneous banking records for the years 2019 – 2023. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 39 OC: This purports to “complete” Ratepayers' Exhibits HoM2 128 (a single May 2019 email exchange between Grant Rabon and Joe Gimenez, which is a complete exchange and does not require further explanation), 135 (August 2020 emails that comprise the complete exchange and do not require further explanation), 143 (a February 2020 email exchange that is the complete exchange and does not require further explanation), 152 (a January 6, 2020 email exchange that is the complete exchange and does not require further explanation) and 155 (an October 21, 2020 email exchange that is the complete exchange and does not require further explanation). The proposed exhibit appears to be the entirety of Windermere's Attachment Ratepayers 7-9, which consists of 590 pages and encompasses any number of subjects. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility

of such evidence tested, and to have its witnesses available for cross examination. The only pages that arguably concern even the same topics as the referenced Ratepayers' Exhibits are these: Bates pages 231-236; 238-240; 251-255; 262-263; and 378-379. Those pages are not "optional completeness"; they would constitute a supplementation of the record with other evidence. However, Ratepayers would not object to Windermere's supplementing the record with these pages.

WOWSC – 40 OC: This purports to "complete" Ratepayers' Exhibits HoM2 129 (a December 3, 2020 email and rate study proposal that is complete and does not require further explanation), 130 (a June 19, 2020 memo that is complete and does not require further explanation), 132 (an August 4 email exchange that is complete and does not require further explanation), 133 (Windermere's 2019 year-end financials, which are complete and do convey a false impression, not because of the evidentiary offer but because Windermere's board omitted a \$121,000 liability in the form of legal debt), and 134 (the CoBank Credit Agreement provided to Grant Rabon, which is complete and does not require further explanation). The proposed exhibit appears to be the entirety of Windermere's Attachment Ratepayers 8-27D, which consists of 2072 pages and encompasses a wide variety of subjects. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination. The only pages that arguably concern even the same topics as the referenced Ratepayers' Exhibits are these: Bates pages 533 – 534; 551; 567; 579-581; 670-680; 1260-1279; 1511; 1520; 1547-8; 1553; 1605-6; 1612; 1650; 1705; 1752; 1797; 1844; 1891-2; 1941-2; 1990; 2037; 2053-2072; 2095; 2167-8; 2244-5; 2389-2408; 2546-7. Those pages are not "optional completeness;" they would constitute a supplementation of the record with other evidence. However, Ratepayers would not object to Windermere's supplementing the record with these pages.

WOWSC – 41 OC: This purports to "complete" Ratepayers' Exhibit HoM2 136, which is a January 22, 2021 memo prepared by Grant Rabon regarding the financial policies he recommended to Windermere's board; it is complete and even Rabon himself could not provide any further explanation. The proposed exhibit appears to be a set of board meeting minutes portraying a board discussion of these financial policies. The board's discussion, even if accurately portrayed by the hearsay minutes, is not necessary to explain Rabon's recommendations. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 42 OC: This purports to "complete" Ratepayers' Exhibit HoM2 140, which is comprised of Windermere's responses to Staff 4-2 (with attachments) and Staff 4-3 (with attachments). These responses were required to be complete and accurate, and Windermere does not suggest they were not. To the extent this exhibit conveys a false impression, that is because Windermere's response conveys a false impression and not because of the evidentiary offer. The proposed exhibit includes Windermere's responses and supplemental responses to several of Ratepayers' discovery requests on other subjects. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence

during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 43 OC: This purports to “complete” Ratepayers’ Exhibit HoM2 145, which is Windermere’s response to Staff 2-6. This response was required to be complete and accurate, and Windermere does not suggest it was not. To the extent this exhibit conveys a false impression, that is because Windermere’s response conveys a false impression. The proposed exhibit includes Windermere’s self-serving supplemental response to this request. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

WOWSC – 44 OC: This purports to “complete” Ratepayers’ Exhibit HoM2 150, which is comprised of a number of Windermere’s responses to Ratepayers’ discovery. These responses were required to be complete and accurate, and Windermere does not suggest they were not. To the extent any part of this exhibit conveys a false impression, that is because Windermere’s response conveys a false impression and not because of the evidentiary offer. The proposed exhibit appears to include Windermere’s response to Ratepayers’ 8-7 as well as 3454 pages of Windermere’s Attachment Ratepayers 8-7, which (if responsive) includes all communications between Windermere and CoBank on any topic. To the extent Windermere wanted evidence of these matters in the record, it was required to introduce such evidence during the hearing, to have the admissibility of such evidence tested, and to have its witnesses available for cross examination.

None of Windermere’s proposed “Optional Completeness” exhibits meet the requirements for admission as such. The objective of the rule of optional completeness is to promote fairness. The granting of Windermere’s motion would do just the opposite.

Windermere’s motion is a thinly veiled effort to supplement the record with its own self-serving discovery materials while preventing any cross-examination or rebuttal concerning the matters in those materials. Given Windermere’s recent changes of position concerning the design and calculation of the appealed rates, as well as its refusal to respond to discovery concerning its new theories, to allow such supplementation after the close of the evidence would be particularly prejudicial.

WHEREFORE, premises considered, Ratepayers respectfully request that Windermere’s motion be denied, that any supplementation be limited to the pages identified

above, and that they receive 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 14, 2023.

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