



## **Filing Receipt**

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<b>RATEPAYERS APPEAL OF THE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>DECISION BY WINDERMERE OAKS</b>	<b>§</b>	
<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' REPLY BRIEF**

Ratepayers' Representatives ("Ratepayers") files its Reply Brief in accordance with SOAH Order # 32 and would show that this filing is timely filed.

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 May 2, 2023.

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## **I. Introduction**

Windermere Oaks Water Supply Corporation (Windemere) is organized as a non-profit, member-owned and member-controlled water supply and sewer service corporation that was incorporated in 1996 under the provisions of Texas Water Code Chapter 67 and the Texas Nonprofit Business Corporation Act. According to Windermere's governing documents their sole purpose is to provide water and or sewer service to towns, cities, private corporations, individuals and military camps and bases, and for the purpose of providing a flood control and drainage system for towns, cities, counties, other political subdivisions, private corporations, individuals, and other persons. Windermere's Bylaws, Article 5, item 3 Limitations of Activities, prohibit the corporation from engaging in activities or using its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue Code 501(c)(12)(A)<sup>1</sup>.

The 2020 rate increase was not an unintentional overcharge by people who thought they were doing the right thing. The 2020 rate increase was designed and implemented by fiduciaries - including directors and attorneys -- who sought to thwart efforts by their principals to hold them accountable at the expense of those very principals. To that end, the fiduciaries implemented a rate increase to pass on the "minimum portion" of the expense. They have caused the WOWSC to accrue debt for the larger and ever-increasing remainder, and now insist that this debt has been passed on to the ratepayers as well. These fiduciaries have not been honest or transparent with the

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<sup>1</sup> See Ratepayers HOM2 Exhibit 48 Articles of Incorporation Article 4 and 5 and Tr. Cross Exam Gimenez, pg. lines 4-22

customers or the Commission about what they did or what has happened as a result. The level of their deception transcends the bounds of zealous advocacy.

The Commission has discretion to require the customers to pay the costs incurred by the utility in an appeal proceeding. The Commission should not exercise its discretion so as to punish the WOWSC customers for pursuing the only regulatory remedy they have in these circumstances.

## **II. Ratepayers Reply Issue One – Characteristics**

### **Windermere Customer Characteristics and Discriminatory Rates (Issue 1)**

Windermere maintains all customers takes service in a similar manner and reside in the same location and receive the same services hence all customers are in one class, therefore.

Prove up that their rates are not discriminatory. Contrary to Windermere's argument and that all customers have the same meters size, Windemere's Account #645 was supplied a 2" construction meter<sup>2</sup>, however Windermere has sustained all along all ratepayers take service the same way. Additionally, Windemere does not dispute there are ratepayers sharing water service and in their response to Staff's 6-10 admits they know of one ratepayer that has multiple connections to one meter, Windermere Hangars, Account 59 which shares with three other entities.<sup>3</sup> In the table below Example 4 would show what Account 59 would pay for a base rate divided by the four entities.

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<sup>2</sup> WOWSC-40 OC Attachment Ratepayers 8-25A, page 31 of 48 bates 439 Water Management, Inc. Invoice dated July 31, 2021, Removed 2" meter at Van Eman project and Attachment Ratepayers 8-27D, pgs. 765-766, bates 1261, Account 645 "2" Construction Meter per George Burriss"

<sup>3</sup> See Ratepayers HOM2 Exhibit 142

Example 1	Ratepayer with no multiple connections	\$90.39	\$66.41
Example 2	Ratepayer with multiple connections and dividing cost with 1 non-ratepayer	$\$90.39/2 = \$45.20$ each	$\$66.41/2 = \$33.21$
Example 3	Ratepayer with multiple connections and dividing cost with 2 non-ratepayer	$\$90.39/3 = \$30.13$ each	$\$66.41/3 = \$22.13$
Example 4	Ratepayer with multiple connections and dividing cost with 3 non-ratepayer	$\$90.39/4 = \$22.60$	$\$66.41/4 = \$16.60$

Windermere appealed rates are unreasonably preferential, prejudicial, or discriminatory

### III. Ratepayers Reply Issue Two – Revenue Requirement

In their Initial brief Windermere maintains they have a statutory duty to protect itself and its directors from legal threats<sup>4</sup> and therefore has limitless authority to saddle the ratepayers with legal debt to the tune of \$1,737,634.56.<sup>5</sup> The WOWSC's governing documents do not require or permit either indemnification or advancement of defense costs to current or former directors who are made parties to litigation. As a result of Windemere's insurer denying coverage and declined to defend or indemnify the corporation in the TOMA Integrity v. WOWSC case based on exclusions pertaining to illegal acts and intentional misconduct Windermere choose to pass all their outside legal defense and plaintiff cost to the ratepayers<sup>6</sup>. Distributing this cost among the 271 ratepayers' results in a \$6,411.93 bill for each individual tap. Former board

<sup>4</sup> See Windermere Initial Brief, page 5, III Commission Staff's Revenue Requirement and Recommended Rates (Issue 2)

<sup>5</sup> See Ratepayers Exhibit HOM2

<sup>6</sup> See List of Issues – Commission will only address “defendant legal cost”, Windemere was a plaintiff is Windermere v. Texas Attorney General Ken Paxton and the current Windermere v. Allied Insurance. Plaintiff expenses are not included in the July 16, 2020, Preliminary Order, Issue #8.

director Mike Nelson was unable to provide an example of how these legal expenses benefit the ratepayers or how they improve their water or wastewater service.<sup>7</sup>

If the Commission adopts Staff's recommendations to not include outside legal expenses of \$171,337 as a cost of service from the revenue requirement, Windermere intends to recover these legal expenses and additional legal expenses unrelated to providing water and wastewater service from the ratepayers in any way possible including levying a monthly surcharge<sup>8</sup> despite that Windermere has yet to provide in the record any tariff, resolution, provision in the bylaws or articles of incorporation which authorizes them to levy a surcharge.<sup>9</sup>

### **Just and Reasonable Outside Legal Expenses**

From January 2019 to date Windermere has incurred \$1,780,493.36 in legal expense, \$982,504.29 has been paid to date and \$797,989.07 remains unpaid. According to Windermere, if they are unable to pay their several law firms for not only defense representation but also for plaintiff representation the financial integrity of the utility and Windermere will not be able to survive.<sup>10</sup> Nothing can be farther from the truth. On cross examination former board member Joe Gimenez admits they have substantial amount of revenue which does not come from the rates<sup>11</sup> yet if these rates do not remain in effect Windermere will not be able to pay their law firms which results the utility having to close shop.

### **Financial Integrity**

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<sup>7</sup> Nelson HOM Transcript -

<sup>8</sup> Tr. 3/22/2023 Mauldin Cross, Pg. 856 lines 6-12 and

<sup>9</sup> See Ratepayers HOM2 Exhibit 154

<sup>10</sup> Tr. 3/22/2023 Gimenez Cross Pg 775 lines 11-15.

<sup>11</sup> Tr. 3/22/2023 Gimenez Cross Pg. 778 lines 1-11 and pg. 784 lines 10-17



The Water Code does not require the Commission to fix overall revenues at a level that will preserve the financial integrity of a utility when its fiduciaries have irresponsibly managed its finances. Windermere's priorities are to the members and ratepayers of the corporation. Providing safe drinking water at cost is the cornerstone of a water utility and is prudent management of a board of directors of water utility. However, operating in the red is an indication of trouble ahead. This is precisely what Windermere has chosen to do year after year. Windermere's own expert witness Grant Rabon agreed on cross examination that continually operating in a deficit is definitely a red flag and would be ideal for the utility to look into to evaluate the situation.<sup>12</sup> Windermere simply cannot knowingly operate in the red, spend ratepayers money on lawyers to represent the directors so much so to put the these individual director interest before the majority of ratepayers and then pull out their whip hand to avoid accountability for their mismanagement.<sup>13</sup>

#### **IV. Ratepayers Reply Issue Three – Rate Appeal Expenses**

##### **a. Windermere**

Windermere's Initial Brief requested to recover \$478,184.04 in reasonable and necessary legal and consultant rate case expenses. Additionally, Windermere goes onto assert that the "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."<sup>14</sup> Windermere's rate appeal expenses are not reasonable nor necessary as described below.

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<sup>12</sup> Tr. 3/22/2023 Rabon Cross Pg. 645 lines 3-19

<sup>13</sup> See PUC Docket 42862, Town of Woodloch, Order conclusion of Law #13, When setting rates, the Commission must use a "methodology that preserves the financial integrity of the retail public utility." Tex. Water Code § 13.043(j). Considerations of financial integrity cannot, however, 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>14</sup> Windermere's Initial Brief, V. Rate Case Expenses Recovery (Issue 3) page 13 1<sup>st</sup> paragraph

Windermere's Board representatives and their lawyers have been neither candid nor transparent in this proceeding. They have sponsored filings, sworn testimony and discovery responses that were, at best, misleading and in some instances false. They have misled witnesses and mischaracterized evidence and for the past three years Windermere has led the Ratepayers, Staff and the Tribunal to believe their revenue requirement for their rate analysis to be \$576,192. For reasons which have yet to be determined, on January 9, 2023, almost three years after the rate appeal was filed, Windemere brought to light their revenue requirement was actually \$643,565<sup>15</sup> of which included \$250,000 in legal and accounting expenses, not the originally sponsored \$171,337 in legal and accounting. These fiduciaries have not been honest or transparent with Staff, the Ratepayer Representatives, their ratepayers or the Commission about what they did or what has happened as a result. The level of their deception transcends the bounds of zealous advocacy. Had Windermere chose to be truthful at the commencement of this rate appeal it is quite possible these requested legal expense would be minimal, however Windemere chose to deceive the parties in this rate appeal and thwart their efforts of the Parties to dig deep into legitimacy of the rate increase. To reward this behavior will set a precedent and public policy that a utility along with their attorneys can run amok by intentionally misrepresenting the facts and recover rate appeal expenses just because that is the accepted standard applied in these types of cases. While the Commission has discretion to require the ratepayers to pay the costs incurred by the utility in an appeal proceeding. The Commission should not exercise its discretion so as to punish the WOWSC ratepayers for pursuing the only regulatory remedy they have in these circumstances.

b. Staff

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<sup>15</sup> Staff's HOM 2 Exhibit 41 at 2

Ratepayers agree with the majority of Staff's Initial Brief with the exception of allowances for recovery of rate case expense.

In their Initial Brief Staff effectively points out that Windermere has misrepresented its revenue requirement and that Windermere's numbers produced in this rate appeal are unreliable.<sup>16</sup> Despite Staff's discovery of the dishonesty on the part of Windermere for misleading all the parties, Staff recommends that Windermere be allowed to recover \$379,000 as they believe these are constitute reasonable and allowable expenses based on the guidance of 16 TAC § 24.44(b), 16 TAC § 24.44(c) and 16 TAC § 24.101(e)(2)<sup>17</sup> however Staff provides no sufficient detailed explanation on how any of these prerequisites apply to Windermere's rate appeal expenses.<sup>18</sup> In *Ratepayers v. North San Saba Water Supply Corporation*<sup>19</sup> the Commission found that because the rates adopted by the board were not just and reasonable the award of rate case expenses was not appropriate.<sup>20</sup>

## **V. Conclusion**

In exercising their rights to submit a petition of review of the just and reasonable rates adopted by the Windermere Directors the Ratepayers never anticipated the long and arduous process that would be before them. The Ratepayers can't imagine this was the intent of the legislators to create such high hurdles to overcome to obtain simply just and reasonable rates from the

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<sup>16</sup> Staff Initial Brief, page 1 of 12 I. Introduction

<sup>17</sup> Staff Initial Brief, page 10 of 12, V. V. Recovery of Windermere's Reasonable Appeal Expenses, A. Commission of approval of recovery.

<sup>18</sup> See *Highsaw Water Supply Corporation v. Texas Natural Resource Conservation Commission, ET AL*, Cause No. 95-14064, Travis County District Court, II Rate Case Expenses "Commission erred in finding that rate case expense in the amount of \$15,00 were reasonable and necessary without placing in the record a sufficient explanation or reason, based upon substantial evidence, by which the reasonableness of its action might be judged in light of the whole record".

<sup>19</sup> See PUC Docket 43771, Item 29, An Order Granting the Ratepayers' Appeal of The Retail Water Rates of North San Saba Water Supply Corporation SOAH Docket No. 582-09-0660 TCEQ Docket No. 2008-1481-UCR, II Findings of Fact 12, 13 and 14, Conclusions of Law, 3 and 6

<sup>20</sup> *Id*

monopolistic utility they must take service from. Because Windermere rates are not just and reasonable the rate case expenses should not be awarded. The Ratepayers further respectfully request that they be granted any other such relief which has been proven to be justly entitled.

Respectfully Submitted,

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