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RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

RATEPAYERS EXCEPTIONS TO THE PROPOSAL FOR DECISION

August 3, 2023

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RATEPAYERS' EXCEPTIONS TO PROPOSAL FOR DECISION

The Ratepayer Representatives ("Ratepayers") of Windermere Oaks Water Supply Corporation ("Windermere") file these exceptions to the Proposal for Decision issued on June 29, 2023 ("PFD") in the above-styled and numbered docket. In support thereof, Ratepayers show as follows:

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

In connection with the hearing held in December 2021, Windermere presented no evidence that it complied with §24.101's mandate to give notice of the appeal hearing to its customers.[1] No evidence of compliance was presented in connection with the March 22, 2023 hearing. Windermere presented no evidence that it complied with §24.101 as to the March 22, 2023 hearing. Ratepayers take exception to any implied determination that Windermere complied with §24.101.

Ratepayers continue to take exception to the characterization of Windermere's legal expenses for this proceeding as "rate case expenses." This is not a rate case. If Windermere had been required to file a rate case, the appealed rates would never have been implemented. If this had been a rate case, Windermere would not have been allowed to delay until the eve of a remand

[1] Statements of counsel are not evidence under the Commission's Rules governing evidence in contested cases. Counsel's statements were neither offered nor received as evidence. Counsel was not under oath or affirmation, as required by Rule §22.223. Counsel was not presented for cross-examination.

hearing before disclosing to PUC Staff and Ratepayers (i) that the TRWA revenue requirement Windermere had embraced for years, including through a 3-day evidentiary hearing, was not Windermere's revenue requirement and did not include all of the costs to be recovered through rates, and (ii) that the appealed rates were set (a) without any revenue requirement, using an ad hoc calculation of the increase per customer required to generate a desired amount of additional monthly cash flow indefinitely, (b) using "budget data" that Windermere did not (and could not) prove was a reasonable approximation of its actual, reasonable or necessary costs of providing service to customers,[2] or (c) using some unspecified combination of information and a calculation that Windermere has been unable to reproduce in this proceeding. If this had been a rate case, Windermere could not have collected revenue with rates that are not just and reasonable for more than three years.

Ratepayers continue to take exception to the ALJs erroneous post-hearing admission of WOWSC exhibits 35-39, 42 and 44 "under the rule of optional completeness." As Ratepayers briefed extensively when these materials were belatedly offered, they fall far short of the requirements for admission under the rule of optional completeness. Further, they are largely self-serving and their admission after the hearing, when there was no opportunity for cross-examination or rebuttal, denied Ratepayers of their basic right to due process.

II. SCOPE OF REVIEW

Ratepayers except to the PFD's assertion that the Commission may consider information after the rate decision "to the extent it sheds light on what conditions existed at the time of the

[2] To the contrary, for virtually the entire appeal proceeding Windermere vigorously opposed even discovery of expense information for the years 2020 and later. PUC Staff witness Anna Givens acknowledged on cross examination that she had never been furnished with any data that would enable her to evaluate the budget data that was ultimately disclosed. Hearing Testimony of Anna Givens, Transcript at p. 840 lines 5-13.

decision,"[3] as this is an incorrect statement and application of the law. The Commission has determined[4] that in an appeal brought under TWC § 13.043(b) it may consider, *inter alia,* the information that was available to the governing body of the utility at the time the governing body set the rates appealed and any information that *shows, or tends to show, the information that was available* to the governing body at the time it set the rates appealed.[5] That which "sheds light" on "what conditions existed" is not the standard.

III. DISCUSSION

Ratepayers except to the PFD's characterization of the primary issue in this appeal as "whether Windermere's rates should include certain outside legal expenses relating to three lawsuits stemming from a 2015-2016 sale of corporate land to a then-board member, Dana Martin."[6] Instead, pursuant to the Preliminary Order,[7] the primary issue in this appeal as it relates to legal costs is whether Windermere's outside legal expenses related to defending civil suits were included in the rates appealed and, if so, what amount was included in the rates appealed. The evidence indicates that some amount of such outside legal expenses were included in the appealed rates, but does not show any specific amount.

Ratepayers take exception to the PFD's implicit assertion that "necessary and justified" is tantamount to "just and reasonable,"[8] as this is an incorrect statement of the law.

Ratepayers take exception to the ALJs' determination to summarily, and silently, dismiss a variety of relevant evidence by choosing not to "address" it. The ALJs' election not to "address" this evidence does not extinguish it from the record or make it any less relevant or probative as to

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[3] PFD at pp. 3-4.

[4] E.g., *Ratepayers Appeal of the Decision by Bear Creek Special Utility District to Change Rates,* Docket No. 49351, Order on Rehearing, Conclusion of Law 7A (Nov. 19, 2021).

[5] Emphasis is added by the author.

[6] PFD at p. 5.

[7] Preliminary Order, p. 5, paragraph 8.

[8] PFD at p. 5.

the matters at issue. As and to the extent the ALJs contend any of Ratepayers' evidence may properly be disregarded under applicable substantive law and/or procedural rule, it is incumbent upon them to identify each item of such evidence and to state the basis upon which they contend they are entitled to disregard it.

BACKGROUND

1. The Corporation

Ratepayers take exception to the PFD's failure to acknowledge the unique characteristics of the legal relationship between Windermere and its members-customers, as well as its failure to apprehend their impact in this proceeding. The evidence here establishes that Windermere was organized and is required to operate in compliance with a set of articles of incorporation and bylaws, the essential terms of which are statutorily prescribed.[9] As Ratepayers have briefed extensively in the past,[10] Windermere's articles and bylaws constitute a contract that governs the legal relationship between the utility and its members-customers.[11]

The record[12] establishes that Windermere is a special kind of nonprofit corporation with express limitations on its power and authority. It was organized and is operated for the sole purpose of providing its members-customers with water and sewer service. Its governing documents authorize Windermere to operate the facilities beneficially owned by its members-customers exclusively for that purpose and to collect from them only the amount required to pay the costs of service. Windermere has authority to disburse revenues exclusively for the purposes of paying the costs to provide services and establishing a "sinking fund." The governing

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[9] Ratepayers Exhibit 27.
[10] Ratepayers Representatives' Initial Brief (Remand Issues) pg.5-7. Pg. 8 par. 1
[11] *Id* and pg.5-7. Pg. 9 par. 1-2
[12] Ratepayers Exhibit 27.

documents prohibit Windermere from accumulating more revenue than is required to pay the costs of providing services. Excess revenue belongs to the members-customers and is required to be returned to them each year, in proportion their patronage.[13] The governing documents make clear that Windermere has neither the power nor the authority to use revenues (or other assets) for any purposes other than to pay the costs to provide the services that generate that revenue.[14] Windermere is subject to the provisions of the Texas Business Organizations Code, but only to the extent those provisions are not inconsistent with its governing documents.

The evidence here conclusively establishes that Windermere's outside legal costs related to defense of civil suits at issue here are not costs of service. They have nothing at all to do with providing water and sewer services.[15] Further, as discussed below, these corporate expenditures were neither necessary nor reasonable given the company's position in the lawsuits. At best, these expenditures provided only marginal benefit to the corporation; the beneficiaries of such expenditures were the handful of members-customers whose legal costs were paid and the one member-customer who has been allowed to retain the corporation's misappropriated land.

While other types of nonprofits might have discretion as to whether to collect and use corporate resources to pay such costs, Windermere does not. Its governing documents prohibit the corporation from collecting or using its revenues for that purpose.

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[13] Ratepayers Exhibit 27, Bylaws §5, No. 2 Transfers of Assets Upon Dissolution - "Upon discontinuance of the Corporation by dissolution or otherwise, all residual assets of the Corporation remaining after payment of the lawful indebtedness of the Corporation or return of excess profits to members shall be distributed among the members and former members in direct proportion to the amount of their patronage with the Corporation insofar as practical."

[14] Ratepayers Exhibit 27 §5, Restrictions and Requirements No. 3 – Limitations on Activities "The Corporation shall have no power to engage in activities or use 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)." Ratepayers Reply Br. p 14, par 1-2, Ratepayers Initial Brief (Remand Issues) pg.5, par 2 – pg. -7. pg. 8 par 1.

[15] See, e.g., Testimony of George Burris, Transcript (Day 1), December 1, 2021, at pp. 71-2.

Further, Windermere is subject to the terms of a tariff that govern its operations. Windermere's tariff prescribes the exclusive mechanism by which the corporation must recover the cost for services provided at the member's request but outside the scope of normal utility operations.[16] Likewise, the tariff prescribes the exclusive mechanism by which Windermere is allowed to recoup operating shortfalls from its members.[17] According to PUC Staff witness Anna Givens, these requirements are mandatory, not discretionary.[18] They cannot be circumvented because they are inconvenient.

Windermere's governing documents and tariff constitute a contract between the utility and its members-customers that governs the parties' legal relationship.[19] The Commission may not abrogate or modify the terms prescribed by this contract unless it first determines the contract adversely affects the public interest.[20] The PFD contains no such determination, and there is no evidence to support such a conclusion.

Ratepayers further except to the PFD to the extent it suggests there is only one meter-sharing arrangement within Windermere's service area or that this arrangement does not uniquely burden the system, as there is no evidence to support that. Ratepayers further except to the extent the PFD suggests that Windermere properly overlooked this violation of its tariff or that the acknowledged sharing of services through a single meter[21] by the respective owners of units within a multihangar building is somehow legal, proper or acceptable.[22]

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[16] Tariff, Section G, paragraph 27.
[17] Tariff, Section G, paragraph 11.
[18] Testimony of Anna Givens, Transcript (March 23, 2023) at pp. 859-60.
[19] Ratepayers Reply Br. p 14, par 1-2, Ratepayers Initial Brief (Remand Issues) pg.5, par 2 – pg. -7. pg. 8 par 1.
[20] *Texas Water Com'n v. City of Ft. Worth*, 875 S.W.2d 332, 338 (Tex. App. – Austin 1994, writ denied).
[21] Windermere acknowledges this sharing in Staff Exhibit HOM2 – 17, which is referenced in the PFD.
[22] PFD at p. 7.

Windermere's tariff expressly prohibits the sharing of services through a single meter.[23] With limited exception not applicable here, the tariff requires that each user who receives services from the corporation shall become a member and shall pay the membership fee and other required fees, as well as the rates in effect for the services.[24] Windermere has not only the authority, but the duty, to police these requirements and to investigate whenever meter-sharing is suspected.[25] By allowing the acknowledged sharing of services through a single meter in even one instance, Windermere has violated its tariff and created a situation in which its rates are not equitable or consistent in application.

Ratepayers except to the PFD's assertion that Windermere's system has experienced, and expects, significant customer growth.[26] There is no evidence that any such information (whether accurate or not) was available to the board at the time of the rate increase or that the board considered anticipated growth when it approved the appealed rates.

Windermere's 2020 budget does not reflect that the board anticipated there would be any increase in membership fees, equity buy-in fees or the like. The page of Joe Gimenez's direct testimony cited in the PFD (without pinpoint citation) does not provide such proof. The page of Joe Gimenez's supplemental rebuttal testimony cited in the PFD (again without pinpoint citation) includes only his speculation concerning the number of vacant buildable lots he believed in 2022 were within the community at that time and that some of those lots *could* be developed at some point in the future. The cited page of testimony asserts that Windermere will need to make certain capital improvements if it has 375 connections, but acknowledges the utility is nowhere near that

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[23] WOWSC Exhibit 12, Att. Section I p. 82, TCEQ Regulatory Guidance One Meter per Residence Requirements

[24] WOWSC Exhibit 12, Att. Section E p. 18, #10 - Membership.

[25] WOWSC Exhibit 12, Att. Section E p. 29 & 30, #25 -Prohibition of Multiple Connections to A Single Tap

[26] PFD at p. 7.

number. Mr. Gimenez does not profess to have personal knowledge as to the rate of new home construction in the community. Neither Windermere's customer records nor any other evidence supports Mr. Gimenez's speculation that 50 new homes were built in the service area during 2018 – 2021.

2. The Land Sale

Ratepayers except generally to the PFD's discussion of the land sale on the grounds that the ALJs misguided evidentiary rulings deprived the record of substantial credible, objective evidence of the matters discussed in this section. During both hearings, Ratepayers offered considerable credible, objective evidence of what actually occurred, the fiduciary misconduct involved and how that was addressed – by both Windermere's board and its members-customers. Upon Windermere's objection, virtually all of that evidence was excluded as irrelevant.[27] Ratepayers were precluded from eliciting any "detail" concerning these matters, on the grounds that no detail was necessary.[28] Ironically, the ALJs sustained Windermere's relevancy objections and excluded materials Windermere itself had put into the record as part of its case in chief.[29]

Considerable detail concerning these matters is in evidence through the direct testimony of Kathryn E. Allen[30] and/or a handful of pleadings that made it into the record.[31] Allen's testimony is largely unrebutted. The pleadings constitute the best and most reliable evidence of the claims and requested relief. Inexplicably, such evidence has been largely disregarded.

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[27] See, e.g., objections sustained concerning transaction and lawsuits at Transcript (Day 1), Dec. 1, 2021, at pp. 141-168.

[28] See, e.g., Transcript (Day 1) at pp. 134-6 & 162-6.

[29] See, e.g., exclusion of original petition in Double F lawsuit (RP Ex. 19), the petition in intervention that asserted claims involving Windermere and 5 former directors (RP Ex. 20), the amended petition in the Double F lawsuit (RP Ex.22) asserting claims involving 3 current directors who approved additional land transfer, the January 2019 demand letter prepared by Windermere's general counsel (RP Ex. 25).

[30] Ratepayers Exhibit 05.

[31] E.g., WOWSC Exhibit 6, JG-25.

Accordingly, the only "detail" now available is that which Windermere chose to provide, through witnesses who have no firsthand knowledge, do not know enough about the testimony they have sponsored to be meaningfully cross-examined and are not qualified to present opinion testimony.

Ratepayers except to the PFD's[32] effort to minimize the wrongful acts and omissions associated with the Martin land transaction. It is certainly true that the board failed to comply with its statutory obligation to give proper notice prior to its December 19, 2015 meeting of its plan to consider and to vote on a sale of valuable airport land to a sitting director.[33] However, as a jury recently determined,[34] the betrayal by Windermere's fiduciaries was far more extensive than that.

Further, there is evidence that the board which approved the engagement of counsel for individual defendants at corporate expense and directed counsel to vigorously oppose any award that might benefit the company, approved the unlimited legal spending, and approved the rate increase to pay for it was well-aware of the wrongdoing at the time. The evidence shows that the board had at least two written analyses prepared by two different general counsels that detailed the fiduciary wrongdoing and its significant consequences for the corporation and its members-customers.[35]

There is a December 2016 memorandum prepared by Mark Zeppa on the eve of a hearing to remove Dana Martin in which Zeppa advised that the transaction constituted grounds for removing Martin from office and warned that the sale could be set aside if challenged.[36] There is Setting aside for the moment the fact that the outside legal costs are not costs of service, the

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[32] PFD at p. 7

[33] Ratepayers Exhibit 04, Direct Test. K. Allen p. 15, Order Granting Petitioners' Motion For Summary Judgment & Denying Respondent's Motion To Dismiss, Windermere's board later coined the term "clerical error" for this significant statutory violation.

[34] WOWC Exhibit 26 Attachment JG-43 p. 1-15

[35] WOWSC Exhibit 03 Attachment JG-25

[36] Ratepayers Exhibit 06 Zeppa Letter

evidence detailed above cannot be disregarded in connection with any inquiry whether the board's legal spending was prudent, reasonable and necessary.[37]

3. The Lawsuits

Ratepayers carry forward their exception set forth above concerning the exclusion of credible, relevant evidence concerning the lawsuits.

Ratepayers take exception to virtually all of the assertions set forth in this Section of the PFD, and they are inaccurate and either unsupported by any credible evidence or conclusively disproved by the evidence. These are the more glaring illustrations.

- Patti Flunker was a not a party to the TOMA Integrity litigation and there is no evidence to suggest she was.
- The evidence establishes that the trial court ruled the board violated the Texas Open Meetings Act in connection with its approval of the land sale, exactly as 2 separate general counsels had previously advised, and that Windermere did not contest this determination.
- There is no evidence of any judgment to the effect that "the land sale was no longer voidable" in the TOMA Integrity lawsuit or any other proceeding. In the TOMA Integrity case, the courts ruled that a declaration setting aside the land sale was not a remedy available under the Act.
- The evidence conclusively establishes that the only member-customer who was a plaintiff in both the TOMA Integrity lawsuit and the Double F Lawsuit was Dick Dial.
- The evidence conclusively disproves the assertion that "the plaintiffs [in the Double F lawsuit] sought to compel Windermere to initiate a lawsuit against Ms. Martin to break

[37] The PFD mistakenly focuses on whether the *legal strategies* that were pursued with corporate funds were ultimately successful. The proper focus is whether a rational and properly-motivated board would have authorized the corporation's *legal spending* as and for the purposes seen here.

the land sale contract." The amended petition in the Double F lawsuit (JG-25) reflects that the lawsuit was brought by members-customers using their own resources to obtain injunctive relief for the benefit of the company restoring title to the land on the grounds that the land sale was illegal and fraudulent. See, e.g., pp. 2 & 8, and paragraphs 3.14, 7.04, 7.07, 7.10, and 7.29.

- There is no evidence suggesting that a judgment setting aside the land sale on the grounds that it was illegal and fraudulent would have "subjected Windermere to legal liability and countersuits." Mr. Gimenez testified on cross-examination that the statement to this effect in his prefiled testimony related to a letter the company had received from Martin's title company long before Windermere was made a party in the Double F lawsuit (as a nominal party only) and long before Martin and Friendship fully and finally released Windermere from any potential exposure in September 2019.[38] When pressed about any potential exposure Windermere may have had, Mr. Gimenez candidly admitted he had no legal knowledge, he didn't really understand the legal implications and he had no first hand knowledge.[39]

- In any event, there is no evidence that Windermere was relying on its directors to understand and evaluate its legal position or its potential exposure. There is substantial evidence that Windermere was paying the lawyers at Lloyd Gosselink handsomely to understand and evaluate its legal position and potential exposure. There is no evidence that Windermere's legal advisors ever concluded or advised the board that a judgment setting aside the land sale on the grounds that it was illegal and fraudulent would have "subjected Windermere to legal liability and countersuits."

[38] Gimenez testimony, Transcript (Day 2), pp. 285-6.
[39] Id. at pp. 286-8.

- The Double F amended petition speaks for itself and conclusively establishes that Windermere was in the lawsuit as a nominal party only, solely for the purpose of having all parties to the land contract before the court so that complete relief could be granted.
- The Double F amended petition conclusively establishes that the plaintiffs never pursued, and expressly disclaimed any intention to pursue, any recovery vis-à-vis the corporation.
- The evidence conclusively established that any potential exposure Windermere might have had vis-à-vis Martin or Friendship for "breaking a land deal" was fully and finally released and extinguished by October 2019 at the latest.[40]
- The Double F amended petition shows that the plaintiffs named additional directors as defendants and first asserted damages claims only after Windermere sought to have the lawsuit for injunctive relief dismissed on jurisdictional grounds.[41]
- There is no evidence that Windermere's board ever authorized the corporation to file suit against Martin or Friendship to recover the land, therefore it is a reasonable inference that at some point the board decided against it.[42] The minutes for the January 19, 2019 meeting include statements by the board as to its intention to address a "disparity too significant to ignore" by all available avenues. There is, however, no evidence (meeting notices, meeting minutes, etc.) of any formal vote at an open meeting on whether to file suit and no evidence as to what the board's rationale may have been.

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[40] Gimenez testimony, Transcript (March 23, 2023) at p. 758; see also October 2019 settlement agreement.
[41] See, e.g., para. 4.07 at p. 14 – addressing Windermere's attempt to foreclose owners from relief to which they are entitled; and para. 7.02 – addressing Windermere's attempt to ratify the transaction.
[42] The ALJs precluded Ratepayers from admitting evidence on this matter. See, e.g., Transcript (Day 1) at pp. 160-5.

- The evidence conclusively establishes that the TOMA Integrity plaintiff and the Double F plaintiffs invested their own personal resources and filed suit in their own names to seek recovery of the land or its value from individual defendants for the benefit of the corporation.
- There is no evidence that Windermere contributed any corporate resources to fund the TOMA Integrity lawsuit or the Double F lawsuit.
- The evidence conclusively establishes that Windermere itself had no exposure or potential downside associated with the Double F plaintiffs' pursuit of their claims. The evidence further establishes that Windermere's board was aware at the time of the rate increase that the plaintiffs expressly disclaimed any intention to recover against the corporation and that Martin and Friendship had given Windermere a full and final release.
- The evidence conclusively establishes that Windermere's board believed at the time that none of the civil lawsuits posed any "threat" to Windermere itself. In connection with the CoBank loan entered into in mid-2020 (having been in negotiation for the better part of a year), Windermere warranted and represented to CoBank that even if decided adversely to the corporation, none of the civil suits (including this rate appeal) could have a material adverse effect on the company, its operations or its financial condition.[43] Windermere's general counsel made exactly the same representation and warranty in an opinion letter furnished to

[43] See CoBank Credit agreement, para. ____; see also Testimony of Joe Gimenez, Transcript (March 23, 2023) at pp. 752-7.

CoBank prior to the loan closing[44] and again in March 2021.[45] There is no evidence that Windermere or its counsel ever advised CoBank any differently.

- The evidence conclusively negates any suggestion that Windermere had a "duty" to defend or to pay legal costs for the individual director defendants. There is no such provision in Windermere's governing documents. The Business Organizations Code does not create any such duty. The director defendants themselves acknowledged in pleadings that the board (including four directors who received a direct financial benefit) made a discretionary decision to obligate the corporation to pay their legal costs.[46]
- There is no evidence Windermere's board was under any sort of legal or financial compulsion or obligation to pay the legal costs of the individual defendants. To the contrary, Windermere's governing documents expressly prohibit Windermere from using corporate funds for any purpose other than to provide water and wastewater services to its members-customers. The evidence cited above conclusively establishes that Windermere's outside legal costs do not provide water and wastewater services to its members-customers.
- There is no evidence of any benefit to Windermere or any of its members-customers (other than those having their legal costs paid) in connection with Windermere's expenditures for outside legal services in connection with civil lawsuits.
- The evidence conclusively establishes that Windermere's board authorized the unlimited expenditure of corporate funds and credit for legal services to prevent the

[44]Ratepayers Exh. HOM2-____ (Troupe Brewer letter).
[45] Ratepayers Exh. HOM2 151.
[46]See Motion for Summary Judgment at pp. 5-6.

TOMA Integrity plaintiff and the Double F plaintiffs from recovering a judgment for the benefit of the corporation.[47]

- The evidence shows that some of the PIA requests made in 2019 were made by a Double F plaintiff, some were made by Dana Martin and many more were made by nonparties. There is no evidence showing how much time and legal expense was associated with any of these requests.

4. Legal Expense

Ratepayers take exception to the PFD's effort to allocate outside legal costs to particular lawsuits or matters. Windermere itself has acknowledged that no such allocation is possible. The evidence conclusively establishes that Lloyd Gosselink never even opened separate files to keep track of fees and expenses for the Double F lawsuit or the Paxton lawsuit, and it cannot now be determined through which file number those costs were billed. Nor is there any evidence that separate files opened to keep track of costs related to PIA requests, director elections, recall efforts or online postings by members-customers. Windermere's year end financials for 2019 negate the assertion in the PFD that any particular amount was spent or incurred in connection with any given matter. Contrary to the PFD, those financials report that Windermere's "lawsuit" expense was $159,173, while the total amount of other legal costs was just over $7,400.00.

There is no evidence that depositions were taken in the Double F lawsuit in September or October of 2019. The legal invoices show that the 2019 outside legal costs incurred prior to November were almost exclusively related to the negotiation of the Martin settlement.

[47] Testimony of Joe Gimenez, Transcript (Day 2) at pp. 291 & 297-8.

It is undisputed that the Double F plaintiffs were not notified of the mediation with Martin, nor were they invited to participate. It is also undisputed that as part of a settlement with Martin the 2019 board approved the transfer of even more land to Martin for little or no consideration. One of the Double F plaintiffs' primary complaints was that Martin had abused her position as a fiduciary to secretly obtain prime airport property for far less than Windermere's appraisal expert concluded it was worth. There is no evidence to suggest that any rational, properly-motivated board could reasonably expect a secret mediation through which Martin gained more corporate property for little or nothing would prompt the Double F plaintiffs to drop their suit.

Ratepayers except to the assertion in the PFD that Windermere received "an extra $20,000 from Ms. Martin through mediation." There is no evidence that Windermere received any consideration from Martin. The plain language of the settlement agreement negates that assertion that Windermere received $20,000.00. The $20,000 payment was contingent upon Windermere's getting the Double F lawsuit dismissed within a year. Although it appears that upwards of $200,000 in corporate funds and credit were spent in 2020 (and far more since then) in connection with Windermere's effort to obtain the $20,000 payment, that effort was unsuccessful. This action was taken by the same board that decided the corporation could not afford to spend any resources trying to recover 4.3 acres of prime airport property misappropriated by its unfaithful fiduciary.

5. Allied World

Ratepayers take exception to the assertion that Windermere set up a payment agreement with Lloyd Gosselink and Enoch Kever to pay each firm $10,000 or that this was the basis for the inclusion of $250,000 for legal costs in the 2020 budget.

There is no evidence that the board ever approved any such payment plan. The law firms' engagement agreements provide just the opposite. Lloyd Gosselink's modification of its original engagement agreement, done well after the rate increase, incorporates and carries forward the requirement that invoiced amounts be paid in full within 30 days. There are no meeting notices, meeting minutes, resolutions or other contemporaneous writings that reflect any such agreement. No payment agreement was mentioned in connection with any board consideration or approval of the 2020 budget.

Ratepayers further except to the suggestion that Windermere expected to pay "the entirety of its legal bills" as they came due even with a rate increase. Windermere admits it had no idea at all what costs it would incur for legal services rendered in 2020 or any other year. According to Mr. Nelson, the plan was to make a "minimum payment" that would satisfy the law firms, while carrying the unpaid balance as a corporate obligation. The evidence shows that Windermere became heavily indebted to the law firms as a result of this arrangement and remains in debt today.

6. The Board's Decision

Ratepayers except to the assertion that Windermere first consulted TRWA about a rate increase in early 2020 as a result of the legal costs. Windermere's general manager George Burris testified that the consultation with TRWA began more than a year earlier and was not related to legal costs.

Ratepayers except to the assertion that "$171,337 [of the TRWA revenue requirement] was listed for legal fees identified in the 2020 budget." There is no evidence that TRWA was even provided with the 2020 budget, much less that the revenue requirement was based on budget data. There is no evidence that $171,337 was a

reasonable approximation of the reasonable and necessary cost for legal services to be provided in 2020. To the contrary, the evidence showed that Windermere had no approximation and no ability to formulate one. That is certainly what Mr. Gimenez told consultant Grant Rabon. The evidence also shows that Windermere incurred far more in legal cost for services in 2020 than $171,337, and far more than the $250,000 in the 2020 budget.

Further, Windermere failed to produce evidence to prove that its 2020 budget was a reasonable approximation of the reasonable and necessary costs of service. PUC Staff witness Anna Givens testified that Windermere failed to provide adequate information.

There is no evidence that the TRWA analysis resulted in any "base rate." Based on Mr. Nelson's testimony concerning the calculation of the appealed rates, it appears Windermere's board treated the TRWA's calculated rate of approximately $116 for recovery of fixed costs as a "base rate." In any event, as Mr. Nelson explained in his most recent testimony the $116 figure is the rate that was used for purposes of the calculation that was presented to the ratepayers prior to the rate increase.[48] That same figure appears to have been used for purposes of the calculation by which the appealed rates appear to have been determined, which Mr. Nelson confirmed was different from the calculation presented to the ratepayers.[49] In testimony given during the December 2021 hearing, Mr. Nelson testified as to a third, and completely different calculation that appears to have had nothing to do with the TRWA rate study.[50] To the extent the ALJs have

[48] HoM Tr. Day 1 pg 204 lines 8-9 (Nelson) (Dec. 1, 2021)
[49] HoM Tr. Day 1 pg 204 lines 23-25 and pg. 205 line 1 (Nelson) (Dec. 1, 2021)
[50] HoM Tr. Day 1 pg 205 lines 5-19 (Nelson) (Dec. 1, 2021)

now concluded that Windermere's revenue requirement was determined on the basis of 2020 budget data, that would be yet a fourth version of the origin of the appealed rates.

Likewise, there is no evidence of any board decision concerning depreciation rates at the time of the rate increase. There is no evidence that depreciation rates impacted the calculation of the appealed rates in any way.

Windermere's own evidence, to say nothing of its more recent discovery responses, is wildly inconsistent with regard to the methodology and data used to set the appealed rates. Ratepayers except to the PFD to the extent it asserts that a preponderance of the evidence supports any particular version.

B. System Customer Characteristics (PO Issue 1)

Ratepayers except to the PFD's conclusion that the appealed rates are sufficient, equitable and consistent in application on the grounds that Windermere failed to bring forth evidence regarding the characteristics of its customers to demonstrate that the single rates it charges customers are just and reasonable. The PFD concludes that there is no evidence of meaningful differences among Windermere's customers, no evidence of different meter sizes, no evidence of differences in demands on the system, etc.

A determination that there is no evidence is dramatically different from a determination that Windermere has met it burden to bring forth evidence regarding the characteristics of its customers to demonstrate that the single rates it charges customers are just and reasonable.

In fact, however, the record does contain evidence of differences. For example, there is evidence that Windermere has meter sizes other than ¾" and 5/8."[51] There is evidence that Windermere has some customers with dramatically different levels of consumption, and therefore demand on the system, as compared to the others.[52] There is evidence that there are at least two properties where multiple users receive service through a single meter.[53] One of these properties, Bus Hangars, allows the public to dispose of RV wastewater into Windermere's system. Windermere appears to have chosen not to look into any of these situations and not to make efforts to identify any other, similar situations within its service area.[54] Windermere should not reap benefits from its lack of diligence to collect or regularly analyze data regarding the characteristics of its customers.

C. Information Available After Windermere's Rate Decision

Ratepayers carry forward their earlier exception to the PFD's characterization of the post-decision information that may be considered.

1. Paxton Lawsuit

Ratepayers except to the assertion that Windermere released the allegedly privileged materials in an effort to reduce legal expenses, as there is no evidence of that in this record. The evidence shows that Windermere had its lawyers assert a privilege and refuse to release the

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[51] WOWSC Exhibit-02, Att. JG-2 pg. 2, #2 "Van Eman's airport construction", Att. JG-4, pg.5 #4 "Van Eman Project" and WOWSC-44 OC to Ratepayers HOM2 Exhibit 150, p. 31, 8-25A, bates 439 Water Management, Inc. Invoice dated July 31, 2021, "Removed 2" meter at Van Eman project" and Att. Ratepayers 8-27D, p. 765-766, bates 1261, "Account 645 "2" Construction Meter per George Burriss"

[52]. WOWSC Exhibit-02, Att. JG-30,

[53] Ratepayers Exhibit 30, WOWSC Response to Ratepayer 1-23, "The WOWSC Board disallowed the practice of allowing multiple properties to connect to one meter and/or grinder pump in 2015. The Board grandfathered existing properties with multiples connections to one meter and/or grinder pump, but does not maintain a list of these properties", Ratepayers Exhibit 142, Staff 6-10

[54] *Id*

requested invoices based on the claim that discovery of the invoices might prejudice the defendants in the Double F litigation. As discussed above, there was no possibility of prejudice to Windermere, as it was no more than a nominal party with no exposure. The evidence shows that the only parties with personal exposure were the individual defendants.[55]

Nevertheless, an undetermined amount of Windermere's corporate resources was spent (i) to respond to the request, (ii) to request an attorney general opinion and brief the issues, (iii) to respond to the attorney general's determination that the documents must be released, (iv) on efforts to persuade the attorney general to change its determination, (v) on negotiations with the attorney general concerning a settlement (in which the requestor was not invited to participate), and (vi) to finalize a settlement with the attorney general and present it to the court for approval. The last step in this lengthy and costly process was to notify the requestor and secure court approval.

The requestor (Danny Flunker, who was not a Double F plaintiff) intervened, but did not oppose the settlement. There is certainly no evidence in this record that he did, nor is there any other evidence to suggest that there might be significant additional legal cost for Windermere.

After all this time and expense, all of which inured exclusively to the benefit of the individual defendants and claiming that Windermere had "prevailed" in the Paxton lawsuit, Windermere's board unilaterally decided to post the legal invoices on the company's website. It is reasonable to infer that the board felt pressure from the membership, whose resources were being used to pay those bills, to disclose the information. The conclusion that Windermere was trying to reduce legal costs is not supported by the evidence and makes no sense.

2. Double F Hangar Lawsuit

[55] WOWSC Exhibit-02, Att. JG-21

Ratepayers carry forward their prior exceptions as to matters restated in this section.

Ratepayers except to the assertion that the jury found Martin had acquired the property for $70,000 less than fair market value. It is true that the jury should have been asked to find the difference between the amount Martin paid and the fair market value at the time of the transaction, but they were not. This is conclusively established by the jury's written verdict.

Ratepayers except to the assertion that Windermere intends to collect any amount from Martin under any circumstances. There is no such evidence in the record.

3. Allied World Lawsuit

Ratepayers carry forward their prior exceptions as to matters restated in this section.

Ratepayers except to the PFD on the grounds that Ratepayers have moved to complete the administrative record with information about the amount of the cash settlement payment that Allied has now made to Windermere.

4. Other Activities

There is no evidence in the record to support the stated assertion.

Even if there were, the PFD articulates no basis on which it would be relevant to any matter in this appeal.

5. Legal Expenses

Ratepayers carry forward their prior exceptions as to matters restated in this section.

Ratepayers except to the assertion that Windermere has continued to pay Lloyd Gosselink and Enoch Kever $10,000 per month for legal expenses in accordance with the 2020 budget on the grounds that there is no evidence any payments to the law firms are related to the 2020 budget.

Ratepayers further except on the grounds that Windermere has failed to meet its burden of proof concerning the use of budget data for rate setting.

Ratepayers further except to the extent the PFD suggests that "the legal expenses" were incurred to defend civil litigation, as there is no evidence as to what "the legal expenses" are or what services, if any, they procured. Indeed, this is the most problematic aspect of the appealed rates. Windermere has been allowed to accumulate and to dispose of rate revenue without any oversight or regulation.

D. Revenue Requirement. (PO Issue 7)

Ratepayers carry forward their prior exceptions as to matters restated in this section.

Ratepayers further except to the assertion that Windermere used the cash needs method to set the appealed rates or that its revenue requirement, if any, included the items listed. There is no evidence to show either matter.

Ratepayers further except to the assertion that only the inclusion of outside legal expenses is at issue, as this conflicts with the Commission's order of remand.

E. Methodology for Calculation Rates

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, rules and postulates employed by a discipline; a particular procedure or set of procedures" that are applied evenly to all cases.[56]

The record clearly shows that Windermere's board has mismanaged the rate increase. Windermere communicated with TRWA after the rate appeal was filed, and the 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.[57] 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.[58]"

Ratepayers except to the assertion in the PFD that Windermere has any acceptable and logical methodology applied to determine the ad hoc rates.

F. Other Revenue Sources

G. Rate Case Expenses

Ratepayers carry forward previous briefed positions on Rate Case Expenses

Rate Case Expenses should not be recovered. 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 remand hearing on the merits, Jamie Mauldin was

[56] 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
[57] Ratepayers' Exhibit HoM2 155 at Ratepayers pp. 1 and 2
[58] Id. at Ratepayers p. 3.

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.

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.

The appealed rates calculations still remain a mystery or what cost data (if any) Windermere relied on. Windemere no longer sponsors it's original revenue requirement reflected in the TRWA rate design and Windermere no longer relies on the only cost date it has ever furnished and to date there has not been any revised cost data submitted to Staff to analyze[59]. This lack of transparency and clarity surrounding the rates calculations, along with the absence of disclosed cost data on which Windermere relied, is concerning. Moreover, Windermere's decision to no longer sponsor its original revenue requirement reflected in the TRWA rate design, coupled with their reliance on a singular cost dataset, has further complicated the situation and rewarding such behavior would not align with sound public policy principles, setting an unfavorable precedent. It is crucial to address these issues to ensure fair and accountable decision-making in this case.

IV. Conclusion

The ratepayers vehemently contest the ALJ's PFD and assert that the presented evidence unequivocally demonstrates the unjust and unreasonable nature of the current rates imposed by

[59] Testimony of Anna Givens, Transcript at 885-6.

Windermere. The presence of discrepancies, lack of transparency, and questionable practices throughout this case has evoked serious concerns among the ratepayers. We implore the Commission to meticulously review and consider Staff's recommended rates and refunds, as it holds the key to rectifying this situation and achieving a fair and just resolution for all ratepayers.

It is imperative that the Commission, as a guardian of the public's best interests, embraces transparency and accountability within the regulatory process. By wholeheartedly adopting the Staff's recommendations, the Commission would demonstrate its unwavering commitment to these principles. The ratepayers earnestly appeal to the Commission to take bold and decisive action, offering much-needed relief through the establishment of fair rates and equitable refunds. Such measures will underscore the Commission's integrity and dedication to safeguarding the rights of all stakeholders involved.

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 August 3, 2023.

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